

MEMORANDUM

State of Alaska
Department of Law

TO: Jonathan W. Scribner
Regional Director
Department of Transportation
and Public Facilities

DATE: March 8, 1996

FILE NO.: 663-96-0312

TELEPHONE NO.: 465-3600

SUBJECT: Placement of Newsracks in
Highway Rights-of-Way

FROM: Craig Wm. Black
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Transportation Section

According to two letters received by our office, a dispute presently exists regarding the placement of newspaper vending machines ("newsracks") along a highway. After a thorough review of case law, it appears that publishers have a constitutional right to distribute their publications via newsracks. However, government entities retain significant authority to regulate the publishers' exercise of this right.

As we understand it, the Juneau Empire recently placed several newsracks alongside bus shelters in the Mendenhall Valley. The newsracks stand within the Department of Transportation and Public Facilities' ("department's") highway rights-of way. The Empire and its attorney have both written letters in which they insist on the right to maintain those newsracks.

Alaska Statute 19.25.200(a) only allows encroachments to be placed along a highway if done in a manner consistent with department regulations. The term "encroachment" is defined to include "a structure or object of any kind which is or has been placed in, on, under or over a portion of a highway or road." AS 19.45.001(6). "Highway" includes a highway right-of-way. AS 19.45.001(9). From these definitions, it appears that a newsrack placed within a highway right-of-way is an encroachment that must comply with AS 19.25.200(a).

The department's regulations do not address this sort of encroachment. The regulations are limited to encroachments by a utility or railroad and do not address newsracks. 17 AAC 15. Since AS 19.25.200(a) only allows those encroachments that comply with department regulations, but the department's regulations do not provide for newsracks as encroachments, the net effect is that newspaper publishers cannot place their newsracks along a highway.

The question then becomes whether this de facto prohibition is constitutional. The First Amendment to the U.S. Constitution protects not only freedom of speech, but also the freedom to disseminate speech. *Talley v. California*, 362 U.S. 60, 63 (1960). The Supreme

Court has ruled that the First Amendment provides a publisher with the right to distribute newspapers via newsracks placed on public property. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759-62 (1988). Courts have overwhelmingly found that blanket prohibitions on newsracks along public streets and sidewalks are unconstitutional. *Providence Journal v. City of Newport*, 665 F.Supp. 107, 117-18 (D. R.I. 1987); *Miller Newspapers, Inc. v. City of Keene*, 546 F. Supp. 831, 834 (D. N.H. 1982); *Philadelphia Newspapers v. Borough Council*, 381 F. Supp 228, 241 (E.D. Pa. 1974); *Remer v. City of El Cajon*, 125 Cal. Rptr. 116, 117 (Cal. Ct. App. 1975); *California Newspaper Publishers Ass'n v. City of Burbank*, 123 Cal.Rptr. 880, 882 (Cal. Ct. App. 1975); *Passaic Daily News v. City of Clifton*, 491 A.2d 808, 811-12 (N.J. Super. Ct. Law Div. 1985). Given this line of authority, the department's current lack of regulations allowing for newsrack encroachments probably would be found an unconstitutional infringement on a publisher's freedom of speech.

Although a total newsrack ban is unconstitutional, the government does retain a certain level of authority to regulate the design, placement, and use of newsracks along public highways. *Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336, 1343-44 (11th Cir. 1994) ("A newspaper publisher does not have complete freedom in setting up a newsrack distribution scheme.") Perhaps because the First Amendment is litigated so frequently, there are numerous tests designed to address the validity of restrictions on speech. Two tests merit particular attention.

One test relates to the place, or "forum," in which the speech activity is to occur. If the forum is considered a traditional public forum, the government's ability to regulate expression in the forum is rather limited. Streets have long been used for the purpose of assembly, communication, and debate. Therefore, the courts have concluded that public rights-of-way are public forums for First Amendment purposes. *Id.* at 1344.

A government restriction on First Amendment activity in a public forum, such as the placement of a newsrack along a public street, must meet what is known as the "time, manner, and place" test. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535(1980). For a public forum newsrack restriction to pass this test, the restriction first must be content neutral, meaning that it cannot be imposed based on the content of the affected speech. Second, the restriction must be narrowly tailored to serve a significant state interest, meaning that the regulation must not be broader than necessary to serve a legitimate state goal. Third, the restriction must leave open ample alternative channels of communication. *Gannett Satellite Info. Network., Inc. v. Township of Pennsauken*, 709 F. Supp. 530, 536 (D. N.J. 1989).

The current effective prohibition on highway newsracks probably meets the first and third elements of the time, manner, and place test. The prohibition is absolute and not based on the content of the speech in the suppressed newsracks, so it satisfies the content neutral

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element. Also, since a newsrack ban would still leave newspapers available by alternative methods of distribution such as home delivery, mail delivery, newsracks on private property, and store sales, the alternative channels test is probably met. *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139, 1147 (6th Cir. 1986), *aff'd on other grounds*, 486 U.S. 1310 (1988).

The narrowly tailored element, however, is probably not met. Since neither the legislature nor the department has taken a formal position in statute or regulation against the newsracks, it is difficult to assert that this de facto prohibition is "designed" to meet a significant state interest. The ban has apparently occurred by happenstance, not by design.

Furthermore, courts have found that a publisher's need to distribute its newspapers outweighs the government's reasons for imposing a newsrack ban. The typical state interests said to justify newsrack bans are safety and aesthetics. The courts have largely found these interests to be sufficient to justify limitations on newsrack size, weight, color, and lettering. These interests can also justify requirements for newsrack insurance and limitations on the placement of newsracks near curbs, crosswalks, and other heavily trafficked areas. *Gold Coast*, 42 F.3d at 1345-48; *Jacobsen v. Harris*, 869 F.2d 1172, 1174 (8th Cir. 1989); *Gannett Satellite*, 709 F.Supp. at 536-41; *Kash Enter. v. City of Los Angeles*, 138 Cal.Rptr. 53, 59-60 (Cal. 1977); *Duffy v. City of Arcadia*, 243 Cal.Rptr. 87, 88-89 (Cal. App. 1987).

But these interests are not sufficient to justify an outright ban. Courts find safety and aesthetic concerns significant, but not so weighty to justify the burden on free speech occasioned by an outright ban. Therefore, the goal must be to adopt measures that serve legitimate safety and aesthetic concerns without resulting in a complete ban on newsracks. To accomplish this goal, the department should consider adopting new regulations that specifically address newsracks.

In sum, it appears that the present de facto ban on newsracks within public rights-of-way is too restrictive to survive a First Amendment challenge. The department should consider adopting additional regulations under AS 19.25.200(a) to address newsracks as encroachments. Since many of the cases cited above discuss acceptable regulations passed in other jurisdictions, the cases can provide some initial material for consideration. I would be pleased to assist the department in preparing some regulations tailored to the department's needs. Please feel free to contact me at your convenience.

CWB:bap