



TOWN OF BLACK MOUNTAIN
160 Midland Avenue ♦ Black Mountain ♦ N.C. ♦ 28711
Phone: (828) 419-9300 ♦ Fax: (828) 669-2030

MEMORANDUM

To: Town of Black Mountain Historic Preservation Commission
From: Jennifer Tipton, Zoning Administrator
Re: Agenda Packet for March 21, 2018
Date: March 12, 2018

The **Town of Black Mountain Historic Preservation Commission** will meet on **Wednesday, March 21, 2018 at 5:30 p.m.** in Town Hall at 160 Midland Avenue.

Please find the following items for your information and use at the meeting:

1. The proposed agenda;
2. Draft minutes from January 24, 2018 and
3. Discussion of sandwich board signs and Beautification signs downtown; and
4. Appoint new Minor Works Committee.

Please let Jennifer Tipton know if you are **unable** to attend this meeting.
jennifer.tipton@townofblackmountain.org or (828) 419-9373.

The Town of Black Mountain is committed to providing accessible facilities, programs and services for all people in compliance with the American with Disabilities Act. Should you need assistance or a particular accommodation for this meeting, please inform Jennifer Tipton at (828) 419-9373 or by email at jennifer.tipton@townofblackmountain.org.

CC: Jessica Trotman, Planning Director
Ron Sneed, Town Attorney



PUBLIC NOTICE

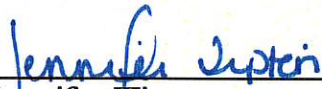
BLACK MOUNTAIN HISTORIC PRESERVATION COMMISSION

REGULAR MEETING

Wednesday, March 21, 2018 at 5:30 p.m.

The Black Mountain Historic Preservation Commission will meet for their monthly meeting on **Wednesday, March 21, 2018 at 5:30 p.m.** at Town Hall, 160 Midland Avenue, Black Mountain, NC.

The meeting is open to the public.



Jennifer Tipton
Zoning Administrator

The Town of Black Mountain is committed to providing accessible facilities, programs and services for all people in compliance with the Americans with Disabilities Act (ADA). Should you need assistance or a particular accommodation for this meeting please contact, Jennifer Tipton, Zoning Administrator at (828) 669-2030 or by email at Jennifer.tipton@townofblackmountain.org

Posted to the Town Bulletin Board 03/02/18

www.townofblackmountain.org



Historic Preservation Commission Regular Meeting

PROPOSED AGENDA

- I. CALL TO ORDER**
 - Welcome
 - Declare Quorum
- II. ADOPTION OF AGENDA**
 - **Motion:** To adopt the agenda as presented [or as amended]
- III. ADOPTION OF MINUTES**
 - **Motion:** To adopt the minutes of January 24, 2018 as presented [or as amended]
- IV. OLD BUSINESS**
 - None
- V. NEW BUSINESS**
 - Introduction of new members
 - Discussion of sandwich board signs and Beautification signs downtown
 - Appoint new Minor Works Committee
- VI. COMMUNICATION FROM HISTORIC PRESERVATION COMMISSION**
- VII. COMMUNICATION FROM STAFF**
- VIII. ADJOURNMENT**













NEWS RACKS & NEWSPAPER STREET SALES

By *David L. Hudson Jr.*, First Amendment Scholar

Updated February 2012

The regulation of news racks presents an intriguing clash between newspaper publishers' First Amendment rights and cities' interests in aesthetics and safety.

Publishers argue that news racks are an essential method of conveying important information to the public. Many people buy their newspapers through news racks.

Cities counter that the regulation of news racks combats visual clutter. They add that news racks can reduce pedestrian safety. Some cities have sought to prohibit individual, free-standing news racks and replace them with multi-rack units. Many times the disputes end up in federal court.

Newspaper publishers contend that news-rack regulations affect both noncommercial and commercial speech. Because noncommercial speech, such as political speech, receives greater protection under the First Amendment than commercial speech, publishers often argue that city regulations should be treated as restricting noncommercial speech. But some courts have determined that the regulation of news racks more directly involves commercial speech.

Suffice it to say, news-rack disputes implicate many strands of First Amendment jurisprudence. Many times it becomes important to determine on what type of property a disputed news rack is located. For instance, publishers and city officials will often clash over news racks not only on sidewalks or along public streets but also on various other kinds of city-owned property that are not public forums.

In First Amendment law, the public-forum doctrine provides different levels of protection against restrictions of expression on public property, depending on the nature of the property. If someone engages in free expression — say, by erecting a sign, giving a speech or installing a news rack — at a location considered to be a traditional or limited public forum, a judge or court will closely scrutinize any effort to restrict that expression. If the location is a non-public forum, then the judicial review is less stringent. For non-public forums, the restrictions on speech must be reasonable and not discriminate on the basis of viewpoint.

Supreme Court decisions involving news racks

Whatever standard of review is applied, the courts must balance competing concerns. The U.S. Supreme Court has twice decided cases involving news racks. In its 1988 decision *City of Lakewood v. Plain Dealer Publishing Co.*, the high court invalidated a city ordinance that gave the mayor unbridled discretion to determine whether publishers could place news racks in various locations.

The city ordinance provided that the mayor could deny a news-rack permit and require publishers to abide by "such other terms and conditions deemed necessary and reasonable by the Mayor."

This provision, the Court said, gave the mayor "unfettered discretion" to issue permits to certain newspapers and to deny permits to others. To the Court, this was unacceptable under the First Amendment.

The Court next addressed the subject of news racks in its 1993 decision *City of Cincinnati v. Discovery Network, Inc.* The city revoked the news-rack permits of those publications that it called "commercial handbills." Thus, the city allowed traditional newspapers to remain in news racks but required the removal of other publications that were devoted primarily to advertising.

The city justified its ordinance on its legitimate interests in safety and aesthetics. The city argued that it was only revoking the permits for papers of lesser value. The Supreme Court responded: "In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech."

The Court also noted the difficulty in defining commercial speech: "This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."

The city may have an interest in aesthetics, the Court noted, but the news racks of the challenging parties "are no greater an eyesore than the news racks permitted to remain on Cincinnati's sidewalks. Each news rack, whether containing 'newspapers' or 'commercial handbills,' is equally unattractive."

The city also argued that if it had the power to ban news racks, then it surely could limit the number of news racks. The Court disagreed, asserting that "even if we assume ... that the city might entirely prohibit the use of news racks on public property, as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech."

Lower courts

Lower courts appear divided in how they resolve news-rack controversies. Some have struck down regulations, while others have upheld them. For example, the 1st U.S. Circuit Court of Appeals upheld a ban on all "street

furniture,” including news racks in Boston’s historic Beacon Hill District.

The newspaper publishers involved in that case argued that the total ban on street furniture violated their First Amendment rights. The 1st Circuit disagreed in *Globe Newspaper Company v. Beacon Hill Architectural Commission*, writing: “That the Street Furniture Guideline results in a total ban on news racks is nothing more than an incidental effect of its stated aesthetic goal of enhancing the historic architecture of the District by reducing visual clutter.” The appeals court also reasoned that there were still ample alternative means for publishers to distribute their newspapers in the district, including “home delivery, sales by stores, street vendors, and mail.”

The 11th U.S. Circuit Court of Appeals upheld many news-rack regulations in *Gold Coast Publications, Inc. v. Corrigan*. Several publishers challenged a variety of restrictions imposed by the city of Coral Gables, Fla., including the required use of a particular model of news rack, uniform color requirement for all racks, and a uniform size of lettering on the racks.

The city, whose motto is “the City Beautiful,” sought to regulate the growing number of news racks, which to many city leaders were becoming eyesores. The city argued that the regulations were important for both safety and aesthetic reasons.

“It is well-settled that the right to distribute its newspapers through news racks is protected under the First Amendment,” the appeals court acknowledged. However, it also noted that “a newspaper publisher does not have complete freedom in setting up a news rack distribution scheme.” The court concluded that the city’s rules were valid restrictions on the time, place and manner of speech that did not affect the content of the speech.

Treating publishers differently

Sometimes news-rack ordinances are challenged by a particular type of newspaper, which alleges that its First Amendment and equal-protection rights have been violated because it is treated differently than other publications. This resembles the types of claims advanced in *Discovery Network*.

For example, the *Honolulu Weekly*, a free publication, challenged the city’s permitting scheme for the special district of Waikiki, which provided for separate news racks (coin-operated and non-coin-operated) for publications that charged readers and those that did not. The *Honolulu Weekly* bid for coin-operated space because it wanted to be displayed closer to its competitors (paid daily newspapers) and because the display windows for the coin-operated machines were larger. The free weekly publication feared it would not be taken seriously as a “credible media outlet” if it were lumped together with a host of other free publications such as tourist promotional papers and advertising leaflets. The *Honolulu Weekly* planned to obtain the right to distribute in coin-operated machines and then disable the coin mechanism so its readers could access the publication without

charge.

After the city denied its permit for coin-operated racks, the weekly sued in federal court, advancing a First Amendment claim in its complaint. A federal district court granted partial summary judgment to the newspaper, reasoning that the city's ordinance was content-neutral but that it was not narrowly tailored to the city's substantial interests in safety and aesthetics. The court wrote that "there is no relation between the act of dropping a coin into a box and aesthetics." The court reasoned that a better-designed ordinance would distinguish between publications based on size, not whether it was free or not.

However, the 9th U.S. Circuit Court of Appeals reversed in *Honolulu Weekly, Inc. v. Harris* (2002), ruling that the news-rack ordinance was both content-neutral and narrowly tailored.

The 9th Circuit agreed with the lower court that the ordinance was content-neutral. "This content-neutral scheme balances various needs and goals: maximizing the uniformity in the appearance of newsracks, accommodating the coin-collecting apparatus that the charging publications must use, and minimizing the space newsracks require on city streets by requiring free publications that do not need a coin-collecting apparatus to use the smaller, space-saving newsracks," the appeals court wrote.

The appeals court disagreed with the lower court on the question of whether the ordinance was narrowly tailored. "The district court tried a little too hard to imagine an ordinance that would best balance the goals of the city with the desires of the publisher," the 9th Circuit wrote. It emphasized that it would not "inquire into whether the city's method of addressing the problem was the best possible solution." According to the 9th Circuit, free publications still had "ample, alternative channels of communication" to distribute their publications — through noncoin-operated newsracks."

Atlanta news-rack dispute

Other courts have rejected cities' plans to regulate news racks. An example is the litigation between the *Atlanta Journal-Constitution* and Atlanta's Department of Aviation.

The litigation began after the city's Department of Aviation implemented a plan in preparation for the 1996 Summer Olympic Games (held in Atlanta) that would regulate the design, placement, location and fees for news racks in the airport.

In this case, the city determined that it wanted to replace privately owned news racks in the city airport with city-owned news racks. The city also arranged a deal with Coca-Cola that provided that the city-owned news racks would carry Coke ads.

Newspapers, led by the *Atlanta Journal-Constitution*, challenged the removal

occupants — whether the vendors stand on roadways or on sidewalks. But there is strong reason to believe that laws prohibiting newspaper vendors from soliciting pedestrians on public sidewalks, when vendors are peaceful and not impeding sidewalk traffic, are constitutionally suspect; government has a diminished interest in regulating vendor-to-pedestrian activity, some courts and litigants have recognized, when vehicle traffic isn't involved.

Ultimately, the validity of any street-vendor restriction will be dependent on the precise language of the law, and on the extent to which it is content neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.

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¹ Most of these cases involved newspaper distribution, though some were about commercial activity or donation solicitation generally.

² Cases in which courts have upheld news-vendor bans: *Denver Publishing Company v. City of Aurora*, 896 P.2d 306, 326 (Colo. 1995); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1262 (9th Cir. 1986); *Sun-Sentinel Co. v. City of Hollywood*, 274 F. Supp. 2d 1323, 1327 (S.D. Fla. 2003); *Times-News Publishing v. City of Burlington*, 2008 U.S. Dist. LEXIS 56451, 2-3; *Intern. Soc. for Krishna Conscious. of New Orleans, Inc. v. City of Baton Rouge*, 876 F. 2d 494, 496 (5th Cir. 1989); and *ACORN v. St. Louis County*, 930 F.2d 591, 593 (8th Cir. 1991).

³ Cases in which courts have invalidated news-vendor bans: *Young v. Municipal Court*, 16 Cal. App. 3d 766, 767 (Ca. Ct. App. 3rd App. Dist. 1971); *News and Sun-Sentinel Co. v. Cox*, 702 F. Supp. 891, 898 (S.D. Fla. 1988); *Houston Chronicle, etc. v. City of Houston*, 620 S.W.2d 833, 835 (Tex. Ct. Civ. App. 1981); and *Acorn v. City of New Orleans*, 606 F. Supp. 16, 19 (E.D. La. 1984).

Updated February 2012

of their news racks and the forced advertising scheme on First Amendment grounds. In January 2002 a three-judge panel of the 11th Circuit agreed the city's plan was unconstitutional for several reasons in *Atlanta Journal and Constitution v. City of Atlanta Department of Aviation*.

The appeals court noted that the city could not force newspapers to accept certain ads. "Even if it is constitutional for government to ban advertisements on its news racks completely, once it permits some commercial speech to be exhibited there, its prohibition of commercial speech 'raises the danger of content and viewpoint discrimination,'" the court wrote.

The appeals court also struck down an Atlanta license-fee plan for news racks as imposing too high a price to pay for the exercise of First Amendment freedoms. Citing an earlier decision, the appeals court reasoned that cities can charge licensing fees as long as the fees do not cover more than what is needed to offset administrative costs.

Finally, the appeals court determined that the city's news-rack plan gave the city's Department of Aviation too much power over news racks, including unlimited power to cancel licenses.

The appeals court concluded: "The Department's plan impermissibly compels some speech, prohibits other speech based upon its viewpoint, imposes a revenue-raising fee on protected speech, and vests in government an unfettered discretion to discriminate among speech based upon viewpoint and content."

However, the full 11th Circuit set aside this decision and decided to review this case on a full-panel basis (called en banc review). The full 11th Circuit disagreed with part of the panel decision in its February 2003 opinion in *Atlanta Journal and Constitution v. City of Atlanta Department of Aviation*. The 11th Circuit determined that the city could charge fees that cover more than administrative costs.

"In a proprietary capacity, the City has a substantial interest in the 'bottom line,' and, when the City acts as a proprietor, reasonable regulations may include profit-conscious fees for access for expressive conduct, in a manner similar to fees that would be charged if the forum was owned by a private party," the court wrote.

The appeals court concluded that the fee was reasonable, constitutional and not a special tax on the press. The panel did reinstate the part of the panel decision concerning the broad discretion of the city's department of aviation to determine which publications are placed in news racks.

The court concluded: "[W]e find that the Department can impose a profit-conscious fee on the use of newsracks in the Airport, but that the discretion surrounding such fee must be restrained through procedures or instructions designed to reduce or eliminate the possibility of viewpoint discrimination."

The court sent the case back down to the district court with instructions to give the city “an opportunity to formulate ascertainable non-discriminatory standards for the exercise of discretion by the appropriate Department official.”

On remand, the district court accepted the city aviation department’s modified plan, awarded the city some restitution for fees that it was not able to collect during the suit proceedings and awarded the publishers 80% of their attorney fees, as they were the prevailing party in the litigation. The city once again appealed to the 11th Circuit, contending the federal district court did not award them enough money in restitution and should not have awarded the publishers 80% of their attorney fees.

In March 2006, the 11th Circuit upheld the district court’s ruling on both issues. On the attorney-fee issue, the appeals court wrote: “As the district court recognized, we consider vindication of a constitutional right against a municipal defendant an important measure of success. Thus, we agree with the district court that the publishers’ success was significant.”

Future

Larger newspaper companies and city governments often have the economic resources to fund legal actions in these First Amendment disputes. Publishing companies have a tremendous economic incentive to fight these battles, because many consumers purchase their newspapers through free-standing news racks. On the other hand, cities want to prevent a proliferation of news racks with multiple colors that hurt the eyes and clog the sidewalks. In other locations, the cities want to eliminate privately owned news racks and replace them with city-owned racks for economic reasons.

In spring 2007, a group of newspaper publishers in Nashville, Tenn., objected to Metro government’s proposed news-rack ordinance that would require \$50 per rack for initial permits and \$10 per year after that. The publishers then countered with a proposal to have a third party oversee the process.

As the Nashville example shows, it appears safe to say that publishers and municipalities will continue to battle over news-rack regulations.

Street sales of newspapers

By Jonathan Anderson

Just as lower courts are divided as to the constitutionality of news-rack bans, they are also divided about the constitutional validity of laws prohibiting street vendors from selling newspapers.

Though the U.S. Supreme Court hasn’t squarely confronted a challenge to a street-vendor ban, lower federal appellate courts and state courts have in at least 10 cases.¹ Courts in six of those cases upheld narrowly drawn street-

vendor bans.² Four courts struck the laws down.³

Analysis of these cases suggests a mixed bag for newspapers: There is strong reason to believe that laws prohibiting vendors from selling to pedestrians on public sidewalks are constitutionally suspect, but courts have repeatedly upheld restrictions that prohibit vendors from entering roadways and soliciting vehicle occupants.

The basis for this division is rooted in how courts scrutinize regulation of expressive activity on government-owned property. Public streets and sidewalks are presumptively traditional public forums (see *United States v. Grace*). A traditional public forum is property that “by long tradition or by government fiat [has] been devoted to assembly and debate.” (*Perry Education Assn. v. Perry Local Educators’ Assn.*) Government may not wholly proscribe “all communicative activity” in a traditional public forum. Rather, government regulation of expressive activity — which includes newspaper distribution (*Lovell v. City of Griffin*) — must be constrained to reasonable time, place and manner restrictions that are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Content-based regulations that are “necessary to serve a compelling state interest and ... narrowly drawn to achieve that end” are also permissible under *Perry*. All of the courts in this analysis concluded that the public sidewalks and streets under review were traditional public forums and that the regulations being challenged were content-neutral.

The courts that upheld street-vendor bans found that the laws were valid time, place and manner restrictions. In *Denver Publishing Company v. City of Aurora*, for instance, the Colorado Supreme Court upheld an ordinance that made it illegal to “enter[] onto the traveled portion of a street or highway” to solicit business or sales “from the occupant of any vehicle traveling upon any street or highway.” The language of this ordinance is similar to the language of the street-vendor bans other courts have upheld: The regulation makes no reference to the content of expressive activity implicated by the law; it is aimed solely at the act of entering a roadway and soliciting vehicle occupants; and it leaves open other ways to distribute newspapers (i.e., the regulation is not a total ban on newspaper distribution).

But courts that struck down street-vendor bans concluded the laws were not narrowly tailored. The regulations in these cases were generally broader in scope than the regulations in the cases that were upheld.

For example, in *Young v. Municipal Court*, the California Court of Appeals invalidated an ordinance that prohibited “peddling or giving away goods or wares ‘along or upon’ public roads and highways.” The *Young* court held that the ordinance was not narrowly tailored, and in fact was impermissibly overbroad, because the regulation covered both sidewalks and streets, and made no distinction between soliciting vehicle occupants and pedestrians on sidewalks. “The vice lies in [the ordinance’s] prohibition of pedestrian-

addressed activities when a restriction upon vehicle-addressed activities would have served its purpose,” the court concluded.

Several courts also invalidated street-vendor bans on the basis that the restrictions did not account for variables such as density of traffic, time of day, and the level of safety training vendors received. All of the courts that upheld the validity of the bans, however, rejected this position.

There is strong reason to believe that laws prohibiting vendors from soliciting pedestrians on public sidewalks are constitutionally suspect. The California court in *Young* found that vendors standing on sidewalks selling newspapers to pedestrians in a peaceful manner and in a way that does not impede sidewalk traffic “pose not the slightest hazard to public safety.” Therefore, that court said, the government’s interest in the sidewalk prohibition is diluted.

Indeed, the federal district court in *News and Sun-Sentinel Co. v. Cox* also articulated this rationale when reviewing a Florida statute that prohibited general commercial use of state-maintained roads and appendages. While recognizing that the government “has significant interests in regulating the conduct of pedestrians in its streets while motor vehicles are present,” the court declared the ordinance not narrowly tailored, in part, because the law banned solicitation of goods solely on sidewalks.

For the same reason, the defendant municipality in another case, *Contributor v. City of Brentwood*, acknowledged that an ordinance that banned commercial activity on both streets and sidewalks was likely unconstitutional. After the suit was filed, the city revised the ordinance to permit sidewalk sales of newspapers. The case remains in litigation.

Still, all of the courts — even those that invalidated street-vendor bans — recognized that government has a significant interest in public safety to warrant regulation of vendor interaction with vehicle occupants. “[T]raffic control and safety are substantial governmental goals which serve legitimate interests for the exercise of police power,” the court held in *News and Sun-Sentinel*. Said the 5th U.S. Circuit Court of Appeals in *International Society for Krishna Consciousness of New Orleans v. City of Baton Rouge*: “It requires neither towering intellect nor an expensive ‘expert’ study to conclude that mixing pedestrians and temporarily stopped motor vehicles in the same space at the same time is dangerous.”

Not all of the regulations reviewed by courts universally prohibited solicitation toward vehicle occupants, however. At least two laws restricted solicitation only when vendors were situated on roadways. Vendors could still lawfully stand on the sidewalks and solicit vehicle occupants under the regulations, the courts said in *Times-News Publishing v. City of Burlington* and *Sun-Sentinel Co. v. City of Hollywood*.

In sum, courts have repeatedly held that government may, consistent with the First Amendment, prohibit newspaper vendors from soliciting vehicle



Jennifer Tipton <jennifer.tipton@townofblackmountain.org>

RE: [ncpres] newspaper/periodical boxes

Bartos, Ramona <Ramona.Bartos@ncdcr.gov>

Thu, Jul 21, 2016 at 12:16 PM

Reply-To: NC Preservation Commissions and Staff <ncpres@listserv.unc.edu>

To: NC Preservation Commissions and Staff <ncpres@listserv.unc.edu>

Hello, Everyone:

I would like to encourage everyone interested in an outright ban of newspaper boxes and the like **to have a talk with your city or county attorney.** I am aware of one case from Massachusetts from about 20 years ago that allowed local preservation commissions to do so, **but you should all recognize that there are First Amendment principles at play here.** Here's a short article that gives you some idea of the complexity of regulating news racks and newspaper boxes: <http://www.firstamendmentcenter.org/news-racks>.

I am not aware of any North Carolina case law on point, but there may be something relevant outside of the historic preservation commission context. Here's a link to more information about the Massachusetts case: <http://napcommissions.org/wp-content/uploads/2013/08/01-Law-and-the-HPC.pdf> (look for *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, 100 F. 3d 175 (1st Cir. 1996)). There's also an earlier US Supreme Court case that did not allow permits for placement of newspaper vending racks (*Lakewood v. Plain Dealer Publishing Co.*, (U.S., 1988)).

Likewise, I would encourage you to reflect on the "preservation return" of such a regulation -- how is your local district's special character enhanced or maintained through such a guideline?

Rather than an outright ban -- **which may spark public discussion and unwelcome negative feelings towards the commission** -- why don't you all consider coming up with standards regarding the appearance of the newspaper boxes (see example from Charlottesville, VA, page 6.6 here: <http://www.charlottesville.org/Home/ShowDocument?id=9177>) or having the city build something appropriate that can shield the modern appearance of publication vending machines.

Another consideration is the relative antiquity of newspaper boxes -- the current box still has apparently been around since the late 1940s, and newspaper racks even earlier than that. Are they really modern intrusions?

Again, though, I strongly encourage you to consider what gain is to be made from a preservation standpoint with this sort of issue.

Glad to speak to anyone off line. Thanks and best,

RMB

Ramona M. Bartos, MHP, JD
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Deputy State Historic Preservation Officer
Division Director, Division of Historical Resources
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From: Stephanie Trueblood <Stephanie.Trueblood@hillsboroughnc.org>
Sent: Thursday, July 21, 2016 10:50 AM
To: NC Preservation Commissions and Staff
Subject: RE: [ncpres] newspaper/periodical boxes

[Quoted text hidden]

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