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JAN 2 1992 IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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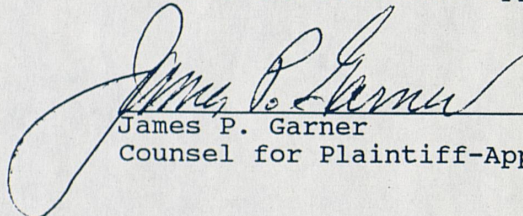
THE PLAIN DEALER PUBLISHING CO.	)	CASE NO. 84-3683 and
	)	84-3722
Plaintiff-Appellant,	)	
Cross Appellee,	)	
	)	
vs.	)	
	)	ON REMAND FROM
CITY OF LAKEWOOD,	)	THE UNITED STATES
	)	SUPREME COURT
Defendant-Appellee.	)	486 U.S. 760 (1988)

STIPULATION OF DISMISSAL

Settled and dismissed with prejudice at defendant-
appellee's costs.



Michael E. Murman
Counsel for Defendant-Appellee



James P. Garner
Counsel for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

LEONARD GREEN
CLERK

U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

TELEPHONE
(513) 684-2953
FTS 684-2953

January 6, 1992

TO: JUDGE Keith

RE: 84-3683/3722 Plain Dealer vs. City of Lakewood

Argued/~~Submitted~~: 12/05/85 before: Judges Keith, Kennedy and

Opinion/~~Order~~/~~Per Curiam~~ Filed: 7/10/86 Unthank
Authoring Judge: Judge Keith

Enclosed please find:

- () Motion to: _____
- () Response of _____
- () Motion to Stay or Recall Mandate
- () Petition for Rehearing
- () Citations updating brief of _____
- (xx) Stipulation to dismiss _____

Remarks: The U.S. Supreme Court in June of 1988 affirmed the 6th
Circuit in part and remanded for further proceedings. The clerk's
office will prepare an order dismissing the appeal pursuant to

Rule 42(b) unless the hearing panel directs that the stipulation be
rejected.

cc: Judges Kennedy and Unthank
TO: Clerk's Office

Barbara Burns
Deputy Clerk

GRANT: _____

DENY: _____

Other: _____

Deciding Judge _____

Date _____

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

JOHN P. HEHMAN
CLERK

U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

TELEPHONE
(513) 684-2953
FTS 684-2953

June 25, 1986

Date

TO: JUDGES KEITH, KENNEDY & UNTHANK

RE: 84-3683/3722 - Plain Dealer Publishing Co. v. City of Lakewood

Argued/~~Submitted~~ 12/05/85 before: ABOVE PANEL

Opinion/Order/Per Curiam filed: _____

Writing Judge: _____

Enclosed please find:

() Motion to _____

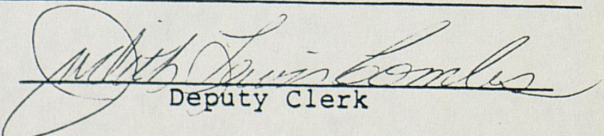
() Response of _____

() Bill of Cost

() Petition for rehearing

(x) Additional citation submitted by appellee.

Remarks: _____


Deputy Clerk

Walter, Haverfield, Buescher & Chockley

Attorneys at Law

1215 Terminal Tower

Cleveland, Ohio 44113

216/781-1212

In Columbus, Ohio
100 East Broad Street
Columbus, Ohio 43215

614/221-7371

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JOHN P. HEHMAN, Clerk June 23, 1986

Paul W. Walter
D. Rusk Haverfield
Edward D. Wyner
F. Wilson Chockley, Jr.
Homer W. Giles
Arthur P. Steinmetz
Robert L. Musser
Howard A. Marken
J. Robert Malloy
Robert T. Rosenfeld
Michael T. McMenamin
Robert S. Horbaly
Charles T. Riehl
John H. Gibbon
Jeffrey G. Wyner
James E. Betts
Henry B. Fischer
William A. Welty
David W. Welty

Christopher L. Gibbon
Victor J. Leo
Marcia E. Hurt
Frederick W. Whatley
Marian C. Abram
Nancy A. Noall
Kenneth A. Zirm
Mark T. Wassell
Robert M. Humphrey
Mary G. Balazs
Alexis H. Johnson
Ricky L. Bertram

Loyal V. Buescher (1915-1979)

Of Counsel

Susan E. Batal
William D. Buss II
Oscar H. Johnson
Walter J. McNamara III
John A. Podgurski

Clerk of Court
United States Court of Appeals
Sixth Circuit
Room 524-Post Office and
Courthouse Building
Cincinnati, Ohio 45202

Re: Plain Dealer Publishing Company v.
City of Lakewood, Case Nos. 84-3683/3722

Dear Sir:

Pursuant to Rule 28 (j) of the Rules of Appellate Procedure, the undersigned counsel for Defendant-Appellee, City of Lakewood in the captioned case hereby advises the Court of the decision in Pursley v. City of Fayetteville Arkansas, 628 F.Supp. 676 (W.D. Ark. 1986). The Pursley case is pertinent and significant to the captioned case in which oral argument was heard before Judges Keith, Kennedy and Unthank on December 5, 1985. As of this date, no decision has been rendered.

The Pursley case dealt with the issue of whether the residential streets and sidewalks of the City of Fayetteville, Arkansas, were public forums. This same issue (relative to the residential streets and sidewalks of the City of Lakewood) was extensively briefed and argued by the parties to the captioned case [See, §§III C 5 a (pp. 25-26) and III D 4 (pp. 34-38) of "Brief of Appellee and Cross-Appellant, The City of Lakewood"].

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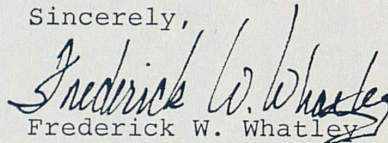
Clerk of Court
Page 2

June 23, 1986

In Pursley, just as in the case sub judice, the Plaintiff contended that residential streets and sidewalks are traditional public forums which are to be accorded First Amendment protection for those who wish to express their views in such locales. The Court agreed with The City of Fayetteville holding that residential streets and sidewalks are not public forums, either by tradition or designation, and upheld the constitutionality of the ordinance prohibiting all picketing on streets and sidewalks in residential areas.

A copy of the Pursley decision is enclosed for the Court's convenience.

Sincerely,


Frederick W. Whatley

FWW:yh
Enc.

cc: James P. Garner, Esq.
Baker & Hostetler

WHEREUPON, upon consideration and being duly advised, the Court finds that claimant Will's motion to dismiss the complaint is without merit and it is, therefore DENIED. The Court further finds that Will's motion to quash is meritorious and it is, therefore, GRANTED. However, whereas the record indicates that there is probable cause to seize Will's premises pursuant to 21 U.S.C. § 881, the Court hereby DIRECTS the Clerk of Court to reissue an *in rem* arrest warrant for the West Fifth Avenue premises herein described.

IT IS SO ORDERED.



Dr. Dow PURSLEY, Dr. Doty Murphy,
Rev. Mark Brooks and Rev. Paul
Sagan, Plaintiffs,

v.

CITY OF FAYETTEVILLE, ARKANSAS;
Paul Noland, Individually and as Mayor;
Ron Bumpass, Jeremy Hess, Marilyn Johnson, Ernest Lancaster, William Martin and Marion Orton, All Individually and in their Official Capacities as Members of the Board of Directors of the City of Fayetteville, Arkansas, Defendants.

Civ. No. 85-5174.

United States District Court,
W.D. Arkansas,
Fayetteville Division.

Feb. 11, 1986.

Potential picketers brought action seeking declaration that city ordinance proscribing picketing of residence or dwelling place was unconstitutional, and seeking injunction forbidding enforcement of the ordinance, and city moved for summary judgment. The District Court, H. Franklin Waters, Chief Judge, held that: (1) ordinance

was not unconstitutionally vague and did not abridge potential picketers' free exercise of religion; (2) ordinance did not violate First Amendment, even though it precluded picketing street and sidewalk in front of residence; (3) ordinance was lawful under Arkansas law to extent it permitted imposition of penalties of imprisonment for violation of city ordinance; but (4) ordinance was valid under Arkansas law for purposes of defining offense and authorizing fine of not more than \$500 for its violation.

Summary judgment granted in part and denied in part.

1. Municipal Corporations ¶594(2)

City ordinance proscribing picketing of residence or dwelling place was not unconstitutional, vague.

2. Constitutional Law ¶84.5(1)

City ordinance prohibiting picketing of residence or dwelling place did not abridge freedom of religion of potential picketers, although it precluded potential picketers from picketing residence of physician who performed elective abortions as part of his medical practice. U.S.C.A. Const. Amend. 1.

3. Constitutional Law ¶84.5(11)

City ordinance proscribing picketing of residence or dwelling place did not violate the First Amendment, even though it precluded picketing on public streets or sidewalks in front of residences; streets and sidewalks in residential areas were not traditional loci for assembly and debate, societal values of privacy were vouchsafed to the home and curtilage, and preservation of that interest was a compelling interest for the state. U.S.C.A. Const. Amend. 1.

4. Federal Courts ¶47

Court would address question of whether city ordinance proscribing picketing of residence or dwelling place and permitting imprisonment of violators of the ordinance was invalid as a matter of state law due to the imprisonment penalty, and though questions concerning proper

pretation of state laws were generally best left to state courts, where potential picketers challenging the ordinance had petitioned court to give them guidance, and ordinance itself would be invalid if the penalties it provided for were invalid.

5. Municipal Corporations §592(3)

City ordinance proscribing picketing of residence or dwelling place was unlawful under Arkansas law to extent that it permitted imprisonment of ordinance violators, where there was no Arkansas state law validly prohibiting residential picketing. Ark.Stats. §§ 19-2408, 19-2409.

6. Municipal Corporations §592(3)

Arkansas statutes permitting municipalities to enact their own ordinances pursuant to police power entrusted to them [Ark.Stats. §§ 19-2408, 19-2409] were not intended to permit cities to impose penalties of imprisonment for violation of city ordinances, unless those ordinances regulated conduct proscribed under valid state statute, in which case cities were not permitted to provide lesser penalties than those demanded by state statute [Ark. Stats. § 19-2411].

7. Municipal Corporations §592(3)

Authorization of fine of not more than \$500 for violation of city ordinance proscribing picketing of residence or dwelling place was permissible under Arkansas law, where no Arkansas state law validly regulated picketing in residential area. Ark. Stats. §§ 19-2408, 19-2409.

8. Municipal Corporations §111(4)

City ordinance proscribing picketing of residence or dwelling place was valid under Arkansas law for purposes of defining the offense and authorizing a fine for its violation, even though authorization for imprisonment of ordinance violator was invalid, where the ordinance penalties were severable.

David E. Morris, Hall, Wright & Morris, Fayetteville, Ark., for plaintiffs.

James N. McCord, City Atty., Fayetteville, Ark., for defendants.

MEMORANDUM OPINION

H. FRANKLIN WATERS, Chief Judge.

On October 16, 1985, plaintiffs filed this action seeking a declaration that Fayetteville, Arkansas, City Ordinance No. 3125 is unconstitutional, and for an injunction forbidding its enforcement. The ordinance states in relevant part:

It shall be unlawful for any person or persons to engage in demonstrations of any type or to picket before or about the residence or dwelling place of any individual.

Any person convicted of violating this section shall be punished by a fine of not more than \$500 or by imprisonment of not more than six (6) months, or by both such fine and imprisonment.

The Fayetteville City Council passed this ordinance on September 17, 1985. For some time, opponents of legalized abortion had been picketing the residence of William F. Harrison, M.D., a physician who performs elective abortions as part of his medical practice. Individuals have also picketed the Fayetteville Women's Clinic on North College Avenue, the main commercial artery of the city, where Dr. Harrison maintains his office. The Fayetteville ordinance does not purport to regulate conduct in front of commercial locations such as Dr. Harrison's office.

Neighbors of Dr. Harrison initiated complaints about demonstrations in the neighborhood and directed them to the City Prosecutor. He consulted state law, Ark.Stat. Ann. § 41-2967 (Repl.1977), and declined to bring a prosecution under it. The statute in question prohibited picketing in front of residences, but created exceptions for labor disputes. The prosecutor felt that the statute was unconstitutional under *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 283 (1980), which held that a similar Illinois statute created an invalid content-based abridgement of First Amendment rights. The prosecutor thereafter drafted a proposed ordinance for the city,

deleting the labor dispute exception found offensive in *Carey*, and submitted it to the City Council, acknowledging that its submission was prompted by the activities in front of the Harrison home, but closing with the suggestion that any Fayetteville citizen thrust into the public light might enjoy its protections.

The city answered the plaintiffs' complaint and filed a separate motion for summary judgment. After determining from the parties, pursuant to local Rule No. 28, that no material facts are disputed, and that the issue sought to be resolved by declaratory judgment did indeed involve only questions of law, the court determined that the case was eligible for summary judgment.

Plaintiffs advance a number of objections against Ordinance No. 3125. They protest that it is unconstitutionally vague, that it abridges their rights to freedom of religion, and that it violates rights granted to them by the assembly and speech clauses of the First Amendment. In addition, they argue that the ordinance is invalid under state law, because it imposes penalties different from and in addition to those originally proposed under the state statute deemed unconstitutional under *Carey v. Brown, supra*.

[1, 2] The court has little difficulty determining that the ordinance survives a challenge for vagueness. In no case cited to the court, where state laws prohibited demonstrations or picketing at residences, *Carey v. Brown, id.*, or on public grounds, *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), has it ever been suggested that words such as "picketing" are incapable of being understood by persons of average intelligence. Nor does the ordinance, in the opinion of the court, abridge plaintiffs' free exercise of religion. That laws may prohibit behavior without impermissibly affecting belief is a principle too long settled in the law to require extensive citation. *United States v. Pence*, 410 F.2d 557 (8th Cir.1969).

[3] Plaintiffs advance a closer case when they suggest that the city violates the First Amendment by banning residential picketing entirely. Indeed, their position receives support from a recent decision invalidating a similar ordinance on constitutional grounds. *Schultz v. Frisby*, 619 F.Supp. 792 (E.D.Wis.1985). The City of Fayetteville rests its position on *dicta* in *Carey v. Brown*, 447 U.S. at 470-71, 100 S.Ct. at 2295-96, which suggests that residential picketing may properly be subject to reasonable time, place and manner restrictions. The court did not squarely address the issue whether it might be permissible totally to ban picketing, etc., in residential areas. Instead, it held that once such a policy is in place, the state could not create an exception so as to allow picketing a residence involved in a labor dispute. The holding of *Carey v. Brown, supra*, denounced content discrimination in laws regulating speech and assembly. It did not purport to settle the question raised by this case: whether demonstrations in front of a person's home might be prohibited entirely.

The central question presented by this ordinance is whether the street or sidewalk in front of a residence is the kind of "public place" triggering First Amendment protections for those who would use such locales to advance their views. The court believes that this question cannot be answered mechanically, but must be addressed functionally. As *United States v. Grace, supra*, makes clear: "Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Id.* 461 U.S. at 177, 103 S.Ct. at 1707. *Adderly v. Florida*, 385 U.S. 39, 47, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966), also recognized that "[t]he State, no less than the private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." The foregoing statements invite a functional analysis of this problem, and *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), draws the guidelines along which the case must be decided where it declares

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that "In places which by long tradition ... have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks ... In these quintessential public forums, the government may not prohibit all communicative activity ... The State may enforce regulations of the time, place and manner of expression which are content neutral, narrowly tailored ... [l]eaving open ample alternative channels of communication." *Id.* at 45, 103 S.Ct. at 955 (emphasis added).

The court does not believe that streets and sidewalks in residential sections of a modern city are traditional *loci* for assembly and debate, *i.e.*, "quintessential public forums." Residential developers create additions to cities by platting properties conformably with governmental planning and zoning rules. Certain parts are dedicated to the public, not for the purpose of assembly and debate, but for means of ingress and egress. Zoning rules, street plans, and subdivision regulations, as well as additional restrictive covenants and bills of assurances arrived at privately, contemplate a diminished level of activity in residential areas. To this end, streets there are narrower, setbacks are required to prevent overbuilding on lots, and even very limited kinds of commercial activity are prohibited.

When one speaks of a forum, even in the attenuated modern sense of that word, the court takes this to refer to that part of a city into which the public collects for commercial activity, a part which has traditionally become a place for assembly and debate. In simpler times, these areas were fairly certain and definable: town squares, courthouse grounds and commons, as well the market stalls and shops nearby. Such cases as *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), speak in passing of "the business area of a municipality" as being "so historically associated with the exercise of the First Amendment that access to them for purposes of exercising such rights cannot be denied absolutely." *Id.* at 559, 92 S.Ct. at 2224.

Today, the focus of public activity in a city is more diffuse. It is easier by far to determine areas which by design and usage are not devoted to public assembly and debate, a quintessential example of which would be the area in front of an individual's home. The rules by which new neighborhoods are developed, and older ones maintained, show that cities are sensitive to the need to create areas of refuge where one might enjoy "a very basic right to be free from sights, sounds, and tangible matter [one] does not want." *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970) (semble).

The mechanical reading of *Perry* which this court declines to adopt, *i.e.*, one which deems all streets and sidewalks to be public forum grounds for purposes of the First Amendment, leads to anomalous results: a city might forbid demonstrations on the grounds of public buildings, even though the sidewalks upon which protesters would be permitted to congregate were so far from the locus of activity they wished to protest as to dilute substantially the expressive message they wish to convey. On the other hand, picketing a residence removed only 30 feet from a sidewalk would be allowed, despite the fact that the residence is wholly unconnected with any activity the protestants might denounce.

Common sense tells us that a residential area ought not to be considered a public forum. Societal values of privacy are vouchsafed to the home and curtilage. The preservation of this interest is deemed to be a compelling one for the state. In this connection, whatever burdens Ordinance No. 3125 places on these plaintiffs are lightened by the fact that they have, and use, alternative channels of communication, *viz.*, picketing the office of Dr. Harrison, located on what undoubtedly is the busiest street in Fayetteville. If the picketers' objective is to get their message to the public, they could do no better than to picket on the main Fayetteville thoroughfare over which literally thousands of travelers pass

each day. If, on the other hand, their objective is to disturb and harass Dr. Harrison and his neighbors by picketing in what is normally a quiet, residential neighborhood not frequented by the general public, their objective is not constitutionally protected.

[4] Finally the plaintiffs contend that the Fayetteville ordinance is invalid as a matter of state law, because it allows the city to imprison individuals for violation of an ordinance, and because the maximum fine allowable under the penalty provision of the ordinance exceeds that which is allowed by a similar state statute prohibiting residential picketing. The court hesitates to issue declarations concerning the proper interpretation of state laws, feeling that these matters are best left to the state courts, particularly in close cases like this one. For two reasons, however, the court has determined to exercise its discretion in this area.

First, the plaintiffs have petitioned the court to give them some guidance, and a refusal of the court to address the question whether it is legal for the city to punish parties who trespass its ordinance would "place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974). The court is not convinced that in this case the choice is quite as Homeric as the Supreme Court would indicate, but it does appreciate the dilemma of the parties, and realizes that if some declaration concerning the propriety of the penalties is not made, the parties would be hardly better off than they were before applying to this court.

Second, if the penalties are invalid, then the ordinance itself is invalid, and the court may at some time in the future be faced with grave due process questions if anyone were in fact arrested and imprisoned under it. In order to avoid as many controversies as reasonably possible, the court will at-

tempt to settle all objections to the ordinance which the defendants have raised, even though they entail extended discussion of purely state law matters. In so passing on these questions, the court acts to avoid a proliferation of litigation, which is an object the declaratory judgment procedure seeks to obtain. *Cf. Twin City Fed. Savings and Loan Ass'n v. Gelhar*, 525 F.Supp. 802 (D.Minn.1981).

[5] The plaintiffs contend that the ordinance is invalid because it prescribes a penalty of imprisonment, and because the fine authorized is one greater than that called for by the violation of a similar state statute. The recent case of *Wright v. Burton*, 279 Ark. 1, 648 S.W.2d 794 (1983), held ordinances of Conway, Arkansas, to be invalid because they did not impose jail sentences, whereas state laws regulating the same kind of conduct did. The difference between the *Wright* case, and the one at bar, is that at this moment there is no state law prohibiting residential picketing validly in place if, as both parties maintain, the state statute was invalidated by *Carey v. Brown*, *supra*. The holding of *Wright v. Burton*, *ibid.*, was in relation to a state statute designed to end the frustration of state law enforcement caused by a patchwork of city ordinances whose penalties were substantially less than those demanded by the General Assembly for identical acts. By its terms, *Wright v. Burton*, *id.*, does not allow and certainly does not demand that cities impose jail sentences for conduct which does not violate state policies.

In cases where the General Assembly has not enacted rules of criminal conduct, the laws of Arkansas hold that municipalities can enact their own ordinances pursuant to the police power entrusted to them. Ark.Stats. Ann. §§ 19-2408 and 2409 state that cities shall be allowed to punish violations of these ordinances by "fines, forfeitures and penalties." These laws derived from the Acts of the 1875 General Assembly, and appear to limit a city's power in this respect. However, in 1971 the state

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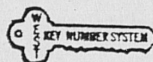
passed a Home Rule Act which freed Arkansas cities from the rigors of the so-called Dillon Rule which severely circumscribed municipal power. See *Tompas v. City of Fayetteville*, 280 Ark. 435, 433, 658 S.W.2d 404, 406 (1983). Under standard Home Rule analysis, the city might arguably receive the power to impose jail sentences for violations of ordinances. See McQuillen, *Municipal Corporations* § 17-07 (3d ed., rev. vol.). Four years after passage of the Home Rule Act, however, the General Assembly amended Ark.Stat. Ann. § 19-2409 to place higher limits (\$500) on the penalties which cities might impose for violations of their ordinances, in those cases where state laws had not already validly defined breaches of the criminal laws. The amended statute now reads, "Municipal corporations shall not have power to inflict any fine or penalty by ordinance or otherwise to a greater sum than five hundred dollars (\$500) for any one (1) specified offense or violation of such law or ordinance..." (emphasis added). The ordinance, by its explicit terms, inflicts against violators a fine "of not more than \$500 or by imprisonment of not more than six (6) months, or both..." (emphasis added).

[6] The court does not believe that the General Assembly intended for cities to impose penalties of imprisonment for violation of city ordinances, unless those ordinances regulate conduct proscribed under a valid state statute, in which case the General Assembly has ordered that cities are not permitted to provide lesser penalties than those demanded by the statutes. Ark.Stat. Ann. § 19-2411.

[7, 8] The fines authorized by Ordinance No. 3125 are within those allowed by state law, and are not violative of the constitution. To the extent, however, that they would exceed any allowances under state law, they might be reduced under the authority of Ark.Stat. Ann. § 19-2409. Inasmuch as the penalties are severable, the ordinance, though invalid in part, is valid

for purposes of defining the offense and authorizing a fine for its violation.

For the reasons stated, therefore, defendants' motion for summary judgment will be granted in part and denied in part, with a separate order to be filed contemporaneously herewith showing that Fayetteville Ordinance No. 3125 is valid to the extent that it constitutionally prohibits residential picketing, and levies fines for violations, but unlawful to the extent that it seeks to impose penalties of imprisonment therefor.



Charles HEALEY, Sr., d/b/a Healey's
Shellfish. Plaintiff,

v.

Robert L. BENDICK, Jr., individually and in his capacity as the Director of the Department of Environmental Management, and as Chairperson of the Marine Fisheries Council, Joseph Dawson, Jr., Francis B. Manchester, George Mendosa, Louis Othote, Michael Parascandolo, Dr. Saul Saila, Robert Randall, Robert Smith, individually and as members of the Marine Fisheries Council, and Arlene Violet as Attorney General for the State of Rhode Island, Defendants.

Civ. A. No. 85-0341-S.

United States District Court,

D. Rhode Island.

Feb. 12, 1986.

Seller of shellfish brought action against director of Rhode Island Department of Environmental Management, Rhode Island Marine Fisheries Council and its individual members, and against Rhode Island Attorney General challenging the regulation of shellfishing in state. The District Court, Selya, J., held that: (1) conduct that seller castigated was conduct of state itself, and therefore immune, from Sherman Anti-Trust Act charges under state action principle; (2) state statutory scheme for regulating shellfish did not violate commerce clause, was not unconstitutionally vague and was not unconstitutional.

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

June 16, 1986

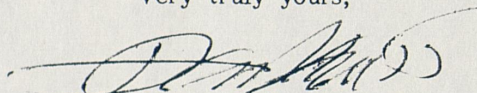
Mr. John P. Hehman
Clerk of Courts
United States Court of Appeals
for the Sixth Circuit
527 USPO & Courthouse Bldg.
Cincinnati, OH 45202

Re: **Nos. 84-3683/84-3722**
Plain Dealer Publishing Co. v. City of Lakewood
Case Heard: 12/5/85

Dear Mr. Hehman:

Enclosed for filing is an opinion, designated for publication, in the above-captioned case. Judges Kennedy and Unthank have concurred. Also enclosed is Judge Unthank's separate concurrence to be filed with the majority opinion.

Very truly yours,



Damon J. Keith

DJK/cw
Encl.

cc: Judge Kennedy
Judge Unthank
Peggy Eshman

FOR PUBLICATION

84-3683

84-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING CO.,	)	
	)	
Plaintiff-Appellant,	)	
Cross-Appellee,	)	On Appeal from the United
v.	)	States District Court for the
	)	Northern District of Ohio.
CITY OF LAKEWOOD,	)	
	)	
Defendant-Appellee,	)	
Cross-Appellant.	)	

Decided and Filed _____

BEFORE: KEITH and KENNEDY, Circuit Judges; and UNTHANK*, District Judge.

KEITH, Circuit Judge. Appellant Plain Dealer Publishing Company challenges the constitutionality of a municipal ordinance that regulates the placement of newspaper dispensing devices ("newsracks") on the city streets of Lakewood, Ohio. Plain Dealer filed the instant action against the City of Lakewood ("City") after being denied permission to place its newsracks on City property pursuant to Section 901.181 of the Lakewood Codified Ordinances, as amended. On July 12, 1984, the district court entered judgment for the City with court costs assessed against the City. For the following reasons, we affirm in part and reverse in part.

I.

FACTS

The Plain Dealer daily newspaper is distributed as a publication of general circulation throughout the Cleveland Metropolitan area and Ohio. Generally, Plain Dealer daily newspaper sales are 77 percent by home delivery through carriers and 80 percent on Sundays by home delivery. The balance of the sales are by single copy

*Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

through retail outlets and coin-operated vending boxes, the latter constituting 4.6 to 5.27 percent of total sales.

The City of Lakewood is approximately 5.5 square miles. It is an older residential community located in Cuyahoga County, Ohio, west of Cleveland. In 1980, the population of the City was 61,963. Lakewood has historically been a city of homes. The commercial areas of the City are located essentially along Madison and Detroit Avenues, conveniently close to all residential areas of the City. There is no area within the City more than one-quarter mile from an all-night newspaper outlet.

In May 1982, Plain Dealer sought permission from the City Law Director to place coin-operated newsracks at sites within the City. The various sites included the commercial areas along Madison and Detroit Avenues and the residential areas along Clifton Boulevard. The City Law Director denied the request citing Section 901.18 of the Lakewood Codified Ordinances which provided at that time:

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

Plain Dealer filed suit eight months later on January 5, 1983, attacking the constitutionality of Section 901.18. On August 18, 1983, the district court granted plaintiff's motion for summary judgment ruling the ordinance provision was an unconstitutional exercise of police power, and that it banned a reasonable means of newspaper distribution. The court held the issuance of a permanent injunction in abeyance for sixty (60) days in order to give the City an opportunity to enact constitutional provisions regulating placement of newsracks on public property.

On October 17, 1983, the City amended Section 901.18 to permit erection of a structure on public property with the consent of the City where permitted by city or state law. Under the amended ordinance, Plain Dealer would have to apply to the

Mayor for a rental agreement or permit. After initial enactment of the amended ordinance, the City re-examined Plain Dealer's objections to the ordinance and on January 3, 1984, again amended the ordinance. Section 901.181,¹ as amended, provides

¹**901.181** NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

(a) The term "newspaper dispensing device", as used in this Section, shall mean a mechanical, coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6) inches distant therefrom or near and parallel to the curb not less than eighteen (18) inches and not more than twenty-four (24) inches distant from the curb at such locations applied for and determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01. Provided further, however, that no newspaper dispensing device shall be placed, installed, used or maintained:

- (1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet;
- (2) within five (5) feet of any fire hydrant or other emergency facility;
- (3) within five (5) feet of any intersecting driveway, alley, or street;
- (4) within three (3) feet of any marked crosswalk;
- (5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;
- (6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and

that the Mayor may grant a rental permit application upon payment of a \$10.00 rental fee for each site, submission of a certificate of insurance and compliance with the

(cont.)

(7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be Ten Dollars (\$10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

.....

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds

appearance and architectural standards set by the Architectural Board of Review ("the Board"). Under subsection (c)(7) of the amended ordinance, however, the Mayor may subject an application to any additional conditions he or she deems necessary. The amended code would permit Plain Dealer, upon application, to place newsracks at locations it requested on Madison and Detroit Avenues in the commercial district, but not along Clifton Boulevard in the residential use districts.

After the City had amended the regulatory scheme twice, Plain Dealer filed its amended complaint challenging the constitutionality of the regulatory scheme. Trial was scheduled on April 11, 1984, to hear Plain Dealer's request for a preliminary and permanent injunction.

There was evidence at trial that although Plain Dealer made no application for a permit, it had intended to place newsracks at eighteen locations in Lakewood, eight of which were located in residential districts on Clifton Boulevard. The district court concluded the amended ordinances were constitutional and entered judgment for the City. On appeal, Plain Dealer argues that Sections 901.18 and 901.181 should be declared unconstitutional because they impose prior restraints on the freedom of press by requiring permits and the payment of rental fees, absolutely ban newsracks in residential districts, and impose unduly burdensome procedures for compliance. Essentially, this appeal analyzes the constitutionality of the Mayor's power to grant or refuse permits, the constitutionality of the Board's power to approve the designs of newsracks, the insurance requirement and the absolute ban in residential districts of

(cont.)

for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified hereinabove. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

newsracks.² We reverse the district court decision in part because Sections 901.18 and 901.181 unconstitutionally give the Mayor unlimited discretion in denying permits; unconstitutionally provide the Board with standardless discretion in approving newsrack designs; and unconstitutionally require applicants to provide insurance to the City. However, we affirm the the remainder of the district court's decision, specifically holding constitutional that part of the ordinance banning newsracks in all residential areas.

II.

ANALYSIS OF ORDINANCE

A. Provision Giving Mayor Unbridled Discretion To Grant Or Deny Permit Is Unconstitutional

The right to distribute newspapers by means of newsracks is protected by the First Amendment to the United States Constitution. Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 673 (11th Cir. 1984); see Lovell v. City of Griffin, 303 U.S. 444 (1938); see also Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971). However, the State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant interest, and leave open ample alternative channels of communication. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983) (citations omitted). Laws which vest municipal officials with unguided discretion to grant or deny a newsrack license or permit "do not regulate with [the] narrow specificity" required by the First Amendment. Association of Community Organizations for Reform Now, (ACORN) v. Municipality of Golden, Colorado, 744 F.2d 739, 746 (10th Cir. 1984). The Supreme

²However, we do not specifically discuss each issue raised by Plain Dealer because they are not dispositive of the ultimate determination of this case. For example, we believe the imposition of a rental fee withstands constitutional scrutiny.

Court in Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984), stated:

But even if the Secretary were correct, and the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State.

Id. at 964 n.12 (citations omitted); See also Fernandes v. Limmer, 663 F.2d 619, 631 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982) (holding unconstitutional ordinance that gave executive director excessive discretion in deciding whether the grant of a permit would be detrimental to the public). Thus, in order to qualify as narrowly tailored, a content neutral ordinance must avoid vesting city officials with discretion to grant or deny licenses, for

It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958); See also Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 151 (1969).

In Staub, the Supreme Court struck down an ordinance under which the Mayor and the City Council had the discretion to grant or deny a permit. 355 U.S. at 321. The Court held that the ordinance on its face imposed an unconstitutional prior restraint because it authorized the Mayor and the Council to refuse or to grant a permit in their uncontrolled discretion. Id. at 325. Similarly, in Shuttlesworth, the Supreme

Court refused to uphold a conviction for demonstrating without a permit because the City Commission had virtually unbridled discretion to grant or deny the permit.

We find that the City of Lakewood's ordinance unconstitutionally permits the granting of permits to be contingent upon the Mayor's unbridled discretion. Section 901.181(c)(7) provides that a rental permit is granted upon "terms and conditions deemed necessary and reasonable by the Mayor." It is clear from subsection (c)(7) that the Mayor is vested with unlimited discretion to grant or deny a permit and make it subject to almost any conditions he may choose. Furthermore, although the language of the ordinance limits the conditions under which the Mayor may grant a permit, it does not contain any standards for the Mayor to use when denying a permit. Consequently, the ordinance's restriction is not narrowly tailored to serve a significant government interest. See Shuttlesworth, 394 U.S. 147.

The Supreme Court has repeatedly struck down ordinances which condition the exercise of First Amendment activities on the broad discretion of local officials, resulting in virtually unreviewable prior restraints on First Amendment rights. Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948). When a city allows an official to ban a means of communication through uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. Saia, 334 U.S. at 562.³ The constitutional problem here lies in the very existence of such unfettered discretion.

The City argues that the Mayor can refuse a permit only "upon health and safety reasons". Although municipalities may enact laws in furtherance of the public health and safety, the City is incorrect in its argument for two reasons. First, no language

³Saia involved a city ordinance which prohibited the use of a sound amplification device without the permission of the police chief. Other licensing systems which are similar have been held unconstitutional prior restraints on speech because they vest broad discretion in granting or withholding a permit upon broad criteria unrelated to proper regulation of public places. See Shuttlesworth v. City of Birmingham, 394 U.S. at 153; See also Kuntz, 340 U.S. 290.

appears in the ordinance specifically limiting the Mayor's power to refuse a permit for health and safety reasons.⁴ The district court ruled the City's evidence of such a standard was inadmissible. Second, if health and safety or other legitimate concerns are what the City seeks to address, the language of the ordinance should be limited accordingly. See Wulp v. Corcoran, 454 F.2d 826, 834 (1st Cir. 1972). An ordinance providing for unguided governmental discretion is inherently inconsistent with a valid time, place and manner regulation because it provides for potential suppression of a particular point of view. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

The district court held that application and appeal procedures pursuant to Section 901.181(e) and Ohio Revised Code Chapter 2506 provide an adequate remedy for any wrong alleged by Plain Dealer.⁵ The "adequate state remedies" include the application for a permit, appeal to City Council and appeal to the court of common pleas under Chapter 2506 of the Ohio Revised Code. However, these procedures require Plain Dealer to apply for a permit and appeal any denial prior to placing newsracks on the sidewalks and subject acquisition of the permit to standardless administrative discretion. The fact that the ordinance provides an appeal process does not cure the unconstitutionally broad discretion it accords the Mayor to impose prior restraints on

⁴Section 901.181(b) states that in determining the location of the newsracks the Mayor should not cause an undue health or safety hazard. However, the language does not state that the Mayor can only refuse a permit for health and safety reasons.

⁵The district court relied upon Parratt v. Taylor, 451 U.S. 527 (1981), and Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), cert. denied, ____ U.S. ____, 105 S.Ct. 125 (1984), which hold that actions for money damages cannot be brought under 42 U.S.C. Section 1983 if there are adequate remedies at state law. However, these cases are distinguishable to the instant case in that this case is not an action for money damages under Section 1983. It is an action for declaratory and injunctive relief from an ordinance which allegedly abrogates First Amendment rights.

First Amendment rights. Consequently, the district court erred in concluding that these remedies are adequate.

The City argues that under the holdings of Greer v. Spock, 424 U.S. 828 (1976), and Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984), Plain Dealer cannot attack the ordinance because the newspaper has never applied for a permit. We are not persuaded by this argument. In Greer, the Supreme Court upheld Fort Dix regulations banning partisan political speeches and demonstrations and prohibiting the distribution of any literature without the prior written approval of a commanding officer. An Army regulation specified that the commander could only disapprove publications presenting an apparent danger to military morale, loyalty or discipline. Id. at 840. The Court in Greer specifically considered the facial validity issue and held that the regulations at issue were constitutional on their face because they applied to a federal military reservation, not a traditional public forum. Greer, 424 U.S. at 838. Having found the regulations facially valid, the Court held that it would not reach the question of unconstitutional application because no approval had been sought from the appropriate authorities. In the instant case, Plain Dealer challenges the facial validity of Lakewood's ordinances and does not rely on a claim of unconstitutional application. Accordingly, Greer is not contrary to Plain Dealer's position.

In Gannett Satellite Information Network, Inc., supra, after holding that the Metropolitan Transportation Authority's ("MTA") unregulated licensing scheme for the placement of newspaper vending machines in MTA commuter stations violated the First and Fourteenth Amendments, the district court ordered the adoption of reasonable standards governing the issuance and terms of licenses. The Second Circuit reversed, holding, in part, that MTA need not adopt such guidelines at that time. The court of appeals questioned whether the Gannett company could require the MTA to establish standards governing the issuance of licenses stating:

But there is no evidence or finding that MTA has arbitrarily denied licenses or imposed unreasonably discriminatory terms on anyone, or that there is any threat of such conduct. It is doubtful that this record presents a justiciable controversy with respect to the reasonableness of the licensing terms. Therefore, while guidelines might be helpful, we will not require them at this time.

Id. at 776. However, in this case, the City has issued regulations the validity of which is directly challenged by Plain Dealer. Moreover, subsection (c)(7) of those regulations permits, on its face, unbridled discretion and therefore an inherent threat of arbitrary decision making. Since Gannett did not involve a facial challenge to adopted licensing requirements, it is inapplicable to this instant case.

B. Provision Granting the Architectural Board of Review With Standardless Discretion Is Unconstitutional

The provision requiring the Board to approve the design of newsracks is unconstitutional under a time, place and manner analysis because the provision is not narrowly tailored to serve a significant governmental interest. See Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983). In essence, the provision gives the Board standardless discretion to approve the design of newsracks. The City claims that Section 1325.03 of the Lakewood Codified Ordinances provides the Board with adequate standards. Section 1325.03 allows the Board to regulate the construction or alteration of buildings according to "accepted and recognized architectural principles". A newsrack, however, is not a building. The Chairman of the Architectural Board admitted at trial that the Board had no standards for approving or disapproving the design of newsracks. Since the ordinance contains no standards to guide the Board in approving or rejecting newsrack designs, we hold that provision unconstitutional under the First and Fourteenth Amendments.

C. Provision Requiring Indemnification Before Access to Public Streets and Sidewalks Is Unconstitutional

On appeal Plain Dealer also challenges the constitutionality of Section 901.181(c)(5) of the Lakewood Codified Ordinance requiring that "permittees" indemnify and insure the City as a condition to gaining access to its public streets and sidewalks.⁶ We believe this provision also violates the First Amendment.

The district court held that since the City is liable under Ohio Revised Code Section 723.01 for the failure to maintain the streets, sidewalks, and publicways, it should not be exposed to additional liability without indemnification by any private commercial use on such City owned property. The district court cites Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E. 2d 749 (1982) (holding that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in a negligence action); Dickerhoof v. City of Canton, 6 Ohio St. 3d 128, 451 N.E. 2d 1193 (1983) (holding that a municipal corporation may be liable for injuries resulting from its failure to keep the shoulder of a highway in repair); and Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937) (holding that the National Labor Relations Act does not unconstitutionally abridge the freedom of the press in that it does not interfere with the right to discharge any employee for any proper cause) as authority for the above proposition. However, these cases are inapposite in that none of them discusses insurance or indemnification. They stand only for the general propositions that **1)** local governments retain power to indemnify themselves, Haverlack, 2 Ohio St. 3d at 30; **2)** local governments may be liable for negligence in maintaining the streets, Dickerhoof, 6 Ohio St. 3d at 131; and **3)** news

⁶Section 901.181(c)(5) provides that a newspaper box "permittee" must indemnify the City for all liability "for any reason whatsoever occasioned upon the installation and use" of a newspaper box. Furthermore, the ordinance requires the permittee to provide property damage and personal injury insurance in the amount of \$100,000, naming the City as an insured.

organizations are subject to overall regulations and laws and are not entitled to special privileges. Associated Press, 301 U.S. at 132-33. The City does not require other permittees to provide insurance. For example, neither the bus nor telephone companies are required to insure bus shelters or telephone equipment. Since the City cannot impose more stringent requirements on First Amendment rights than it does on others, we believe the indemnification aspect of the ordinance places an undue burden on Plain Dealer.

D. Ban Of All Newsracks In Residential Areas Is Constitutional

The state may enforce time, place and manner regulations which are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).

We find that the City's total ban of newsracks in residential areas is a constitutional time, place and manner regulation. First, the ordinance is content-neutral because it bans all newracks in residential areas of the City. Second, the ordinance is narrowly tailored to serve a significant government interest. We agree with the district court's holding that "traffic safety, proper functioning of a city's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial government interests and the subject ordinances reach no further than necessary to accomplish the City's objectives." See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) (plurality opinion). Finally, the ordinance leaves open ample alternative channels of communication. For example, the City admits that a person may sell newspapers by mail or by direct home delivery in residential areas free from governmental interference. Moreover, there are eleven sites within the City, and two sites immediately adjacent to the City, where newsracks are located on private property within commercial zones. In fact, all residences in the City are within one quarter of a mile from an existing newsrack. Furthermore, there are eleven

"all-night" businesses within the City and two "all-night" businesses adjacent to the City which sell the Plain Dealer 24 hours a day, seven days a week. Thus, the City's total ban of newsracks in residential districts is a constitutional time, place and manner regulation. We also agree with the District Court that the remaining provisions of ordinances are not unconstitutional.

III.

SEVERABILITY

The Supreme Court has held that invalid portions of a statute should be severed unless it is clear that the Legislature would not have enacted those provisions which are constitutional, independent of those provisions which are not. INS v. Chadha, 462 U.S. 919, 931 (1983); Buckley v. Valeo, 424 U.S. 1, 108 (1976). Moreover, a provision is presumed severable if what remains after severance is fully operative as a law. Chadha, 462 U.S. at 934. When the unconstitutional portions of the ordinance dealing with the Mayor's unlimited discretion in denying permits, the Board's standardless discretion in approving newsrack designs, and the insurance requirements for proposed applicants are deleted from the remaining portion of the ordinance dealing with newsracks in commercial areas, what is left cannot stand on its own. Consequently, the portion of the ordinance regulating newsracks in commercial areas must be held unconstitutional. The remaining portion of the ordinance banning newsracks in residential areas, however, survives as a workable ordinance because it is fully operable as a law. Since prior ordinances under the City's regulatory scheme sought to ban all newsracks under all circumstances, we believe this indicates clear legislative intent to ban newsracks in residential areas. Consequently, we sever the ordinance's unconstitutional provisions and hold that the City may constitutionally ban newsracks in residential areas.

IV.

CROSS APPEAL FOR COSTS

The final issue is whether the district court abused its discretion in awarding costs to appellant Plain Dealer. The City argues that the district court committed reversible error by denying its requests for costs without stating reasons. In view of our disposition of the case on appeal, the district court's award of costs to Plain Dealer is not erroneous. Furthermore, to prevail on cross-appeal, Lakewood must show more than error. We review decisions awarding costs under an abuse of discretion standard. Owen v. Modern Diversified Industries, Inc., 643 F.2d 441 (6th Cir. 1981); see also Missouri Pacific Railroad Company v. Star City Gravel Company, Inc., 592 F.2d 455 (8th Cir. 1979). Under the abuse of discretion standard, an appellate court may overturn a lower court's ruling only if it finds that the ruling was arbitrary, unjustifiable or clearly unreasonable. See NLRB v. Guernsey-Muskingum Electric Co-operative, Inc., 285 F.2d 8, 11 (6th Cir. 1960). In the instant case, the City amended the ordinance twice in response to a lawsuit by Plain Dealer. Specifically, the district court granted the Plain Dealer's motion for summary judgment on its initial complaint. No appeal was taken from that decision. Since the City has failed to show that the ruling in this case was arbitrary or unreasonable, the district court did not abuse its discretion in awarding costs to Plain Dealer.

Accordingly, the decision of the district court is affirmed in part and reversed in part consistent with the analysis of this opinion.

Nos. 84-3683/84-3722, Plain Dealer Publishing Co. v. City of Lakewood

UNTHANK, District Judge, concurring. I concur in the opinion of the Court with the exception of the holding that the insurance or indemnity requirements of the Lakewood ordinance violate the First Amendment. I consider them legitimate and reasonable provisions for the protection of the city from liability. The fact that the city does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services.

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

June 2, 1986

Honorable Cornelia G. Kennedy
744 Federal Building
Detroit, MI 48226

Honorable G. Wix Unthank
P.O. Box 278
Pikeville, Kentucky 41501

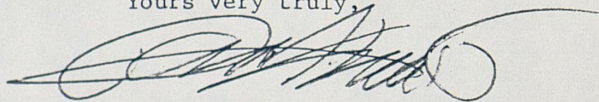
Re: Plain Dealer Publishing Co. v. City of Lakewood
Case Nos. 84-3683/84-3722 - Case Heard: 12/5/85

Dear Judges:

Enclosed is a revised opinion, designated for publication, in the above-captioned case. This case was heard on December 5th and has taken an unusual amount of my time in trying to incorporate all of the suggestions that have been made.

In this latest proposed opinion, I have made the suggested changes and they appear on pages 2, 6, 13, 14, and 15. I would appreciate hearing from you as soon as possible so that this case can be submitted to the printer.

Yours very truly,



Damon J. Keith

DJK/cw
Encl.

FOR PUBLICATION

84-3683

84-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING CO.,	)	
	)	
Plaintiff-Appellant,	)	
Cross-Appellee,	)	On Appeal from the United
v.	)	States District Court for the
	)	Northern District of Ohio.
CITY OF LAKEWOOD,	)	
	)	
Defendant-Appellee,	)	
Cross-Appellant.	)	

Decided and Filed _____

BEFORE: KEITH and KENNEDY, Circuit Judges; and UNTHANK*, District Judge.

KEITH, Circuit Judge. Appellant Plain Dealer Publishing Company challenges the constitutionality of a municipal ordinance that regulates the placement of newspaper dispensing devices ("newsracks") on the city streets of Lakewood, Ohio. Plain Dealer filed the instant action against the City of Lakewood ("City") after being denied permission to place its newsracks on City property pursuant to Section 901.181 of the Lakewood Codified Ordinances, as amended. On July 12, 1984, the district court entered judgment for the City with court costs assessed against the City. For the following reasons, we affirm in part and reverse in part.

I.

FACTS

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(3) within five (5) feet of any intersecting driveway, alley, or street;

(4) within three (3) feet of any marked crosswalk;

(5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;

(6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and

that the Mayor may grant a rental permit application upon payment of a \$10.00 rental fee for each site, submission of a certificate of insurance and compliance with the

(cont.)

(7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be Ten Dollars (\$10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

....

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds

appearance and architectural standards set by the Architectural Board of Review ("the Board"). Under subsection (c)(7) of the amended ordinance, however, the Mayor may subject an application to any additional conditions he or she deems necessary. The amended code would permit Plain Dealer, upon application, to place newsracks at locations it requested on Madison and Detroit Avenues in the commercial district, but not along Clifton Boulevard in the residential use districts.

After the City had amended the regulatory scheme twice, Plain Dealer filed its amended complaint challenging the constitutionality of the regulatory scheme. Trial was scheduled on April 11, 1984, to hear Plain Dealer's request for a preliminary and permanent injunction.

There was evidence at trial that although Plain Dealer made no application for a permit, it had intended to place newsracks at eighteen locations in Lakewood, eight of which were located in residential districts on Clifton Boulevard. The district court concluded the amended ordinances were constitutional and entered judgment for the City. On appeal, Plain Dealer argues that Sections 901.18 and 901.181 should be declared unconstitutional because they impose prior restraints on the freedom of press by requiring permits and the payment of rental fees, absolutely ban newsracks in residential districts, and impose unduly burdensome procedures for compliance. Essentially, this appeal analyzes the constitutionality of the Mayor's power to grant or refuse permits, the constitutionality of the Board's power to approve the designs of newsracks, the insurance requirement and the absolute ban in residential districts of

(cont.)

for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified hereinabove. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

newsracks.² We reverse the district court decision in part because Sections 901.18 and 901.181 unconstitutionally give the Mayor unlimited discretion in denying permits; unconstitutionally provide the Board with standardless discretion in approving newsrack designs; and unconstitutionally require applicants to provide insurance to the City. However, we affirm the the remainder of the district court's decision, specifically holding constitutional that part of the ordinance banning newsracks in all residential areas.

II.

ANALYSIS OF ORDINANCE

A. Provision Giving Mayor Unbridled Discretion To Grant Or Deny Permit Is Unconstitutional

The right to distribute newspapers by means of newsracks is protected by the First Amendment to the United States Constitution. Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 673 (11th Cir. 1984); see Lovell v. City of Griffin, 303 U.S. 444 (1938); see also Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971). The State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant interest, and leave open ample alternative channels of communication. Perry Education Association v. Perry Local Educators' Association, 406 U.S. 37, 45 (1983) (citations omitted). Laws which vest municipal officials with unguided discretion to grant or deny a newsrack license or permit "do not regulate with [the] narrow specificity" required by the First Amendment. Association of Community Organizations for Reform Now, (ACORN) v. Municipality of

²However, we do not specifically discuss each issue raised by Plain Dealer because they are not dispositive of the ultimate determination of this case. For example, we believe the imposition of a rental fee withstands constitutional scrutiny.

Golden, Colorado, 744 F.2d 739, 746 (10th Cir. 1984). The Supreme Court in Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984) stated:

But even if the Secretary were correct, and the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State.

Id. at 964 n.12 (citations omitted); See also Fernandes v. Limmer, 663 F.2d 619, 631 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982) (holding unconstitutional ordinance that gave executive director excessive discretion in deciding whether the grant of a permit would be detrimental to the public). Thus, in order to qualify as narrowly tailored, a content neutral ordinance must avoid vesting city officials with discretion to grant or deny licenses, for

It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958); See also Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 151 (1969).

In Staub, the Supreme Court struck down an ordinance under which the Mayor and the City Council had the discretion to grant or deny a permit. 355 U.S. at 321. The Court held that the ordinance on its face imposed an unconstitutional prior restraint because it authorized the Mayor and the Council to refuse or to grant a permit in their uncontrolled discretion. Id. at 325. Similarly, in Shuttlesworth, the Supreme

Court refused to uphold a conviction for demonstrating without a permit because the City Commission had virtually unbridled discretion to grant or deny the permit.

We find that the City of Lakewood's ordinance unconstitutionally permits the granting of permits to be contingent upon the Mayor's unbridled discretion. Section 901.181(c)(7) provides that a rental permit is granted upon "terms and conditions deemed necessary and reasonable by the Mayor." It is clear from subsection (c)(7) that the Mayor is vested with unlimited discretion to grant or deny a permit and make it subject to almost any conditions he may choose. Furthermore, although the language of the ordinance limits the conditions under which the Mayor may grant a permit, it does not contain any standards for the Mayor to use when denying a permit. Consequently, the ordinance's restriction is not narrowly tailored to serve a significant government interest. See Shuttlesworth, 394 U.S. 147.

The Supreme Court has repeatedly struck down ordinances which condition the exercise of First Amendment activities on the broad discretion of local officials, resulting in virtually unreviewable prior restraints on First Amendment rights. Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948). When a city allows an official to ban a means of communication through uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. Saia, 334 U.S. at 562.³ The constitutional problem here lies in the very existence of such unfettered discretion.

The City argues that the Mayor can refuse a permit only "upon health and safety reasons". Although municipalities may enact laws in furtherance of the public health and safety, the City is incorrect in its argument for two reasons. First, no language

³Saia involved a city ordinance which prohibited the use of a sound amplification device without the permission of the police chief. Other licensing systems which are similar have been held unconstitutional prior restraints on speech because they vest broad discretion in granting or withholding a permit upon broad criteria unrelated to proper regulation of public places. See Shuttlesworth v. City of Birmingham, 394 U.S. at 153; See also Kuntz, 340 U.S. 290.

appears in the ordinance specifically limiting the Mayor's power to refuse a permit for health and safety reasons.⁴ The district court ruled the City's evidence of such a standard was inadmissible. Second, if health and safety or other legitimate concerns are what the City seeks to address, the language of the ordinance should be limited accordingly. See Wulp v. Corcoran, 454 F.2d 826, 834 (1st Cir. 1972). An ordinance providing for unguided governmental discretion is inherently inconsistent with a valid time, place and manner regulation because it provides for potential suppression of a particular point of view. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

The district court held that application and appeal procedures pursuant to Section 901.181(e) and Ohio Revised Code Chapter 2506 provide an adequate remedy for any wrong alleged by Plain Dealer.⁵ The "adequate state remedies" include the application for a permit, appeal to City Council and appeal to the court of common pleas under Chapter 2506 of the Ohio Revised Code. However, these procedures require Plain Dealer to apply for a permit and appeal any denial prior to placing newsracks on the sidewalks and subject acquisition of the permit to standardless administrative discretion. The fact that the ordinance provides an appeal process does not cure the unconstitutionally broad discretion it accords the Mayor to impose prior restraints on

⁴Section 901.181(b) states that in determining the location of the newsracks the Mayor should not cause an undue health or safety hazard. However, the language does not state that the Mayor can only refuse a permit for health and safety reasons.

⁵The district court relied upon Parratt v. Taylor, 451 U.S. 527 (1981), and Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), cert. denied, ____ U.S. ____, 105 S.Ct. 125 (1984), which hold that actions for money damages cannot be brought under 42 U.S.C. Section 1983 if there are adequate remedies at state law. However, these cases are distinguishable to the instant case in that this case is not an action for money damages under Section 1983. It is an action for declaratory and injunctive relief from an ordinance which allegedly abrogates First Amendment rights.

First Amendment rights. Consequently, the district court erred in concluding that these remedies are adequate.

The City argues that under the holdings of Greer v. Spock, 424 U.S. 828 (1976), and Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984), Plain Dealer cannot attack the ordinance because the newspaper has never applied for a permit. We are not persuaded by this argument. In Greer, the Supreme Court upheld Fort Dix regulations banning partisan political speeches and demonstrations and prohibiting the distribution of any literature without the prior written approval of a commanding officer. An Army regulation specified that the commander could only disapprove publications presenting an apparent danger to military morale, loyalty or discipline. Id. at 840. The Court in Greer specifically considered the facial validity issue and held that the regulations at issue were constitutional on their face because they applied to a federal military reservation, not a traditional public forum. Greer, 424 U.S. at 838. Having found the regulations facially valid, the Court held that it would not reach the question of unconstitutional application because no approval had been sought from the appropriate authorities. In the instant case, Plain Dealer challenges the facial validity of Lakewood's ordinances and does not rely on a claim of unconstitutional application. Accordingly, Greer is not contrary to Plain Dealer's position.

In Gannett Satellite Information Network, Inc., supra, after holding that the Metropolitan Transportation Authority's ("MTA") unregulated licensing scheme for the placement of newspaper vending machines in MTA commuter stations violated the First and Fourteenth Amendments, the district court ordered the adoption of reasonable standards governing the issuance and terms of licenses. The Second Circuit reversed, holding, in part, that MTA need not adopt such guidelines at that time. The court of appeals questioned whether the Gannett company could require the MTA to establish standards governing the issuance of licenses stating:

But there is no evidence or finding that MTA has arbitrarily denied licenses or imposed unreasonably discriminatory terms on anyone, or that there is any threat of such conduct. It is doubtful that this record presents a justiciable controversy with respect to the reasonableness of the licensing terms. Therefore, while guidelines might be helpful, we will not require them at this time.

Id. at 776. However, in this case, the City has issued regulations the validity of which is directly challenged by Plain Dealer. Moreover, subsection (c)(7) of those regulations permits, on its face, unbridled discretion and therefore an inherent threat of arbitrary decision making. Since Gannett did not involve a facial challenge to adopted licensing requirements, it is inapplicable to this instant case.

B. Provision Granting the Architectural Board of Review With Standardless Discretion Is Unconstitutional

The provision requiring the Board to approve the design of newsracks is unconstitutional under a time, place and manner analysis because the provision is not narrowly tailored to serve a significant governmental interest. See Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983). In essence, the provision gives the Board standardless discretion to approve the design of newsracks. The City claims that Section 1325.03 allows the Board to regulate the construction or alteration of buildings according to "accepted and recognized architectural principles". A newsrack, however, is not a building. The Chairman of the Architectural Board admitted at trial that the Board had no standards for approving or disapproving the design of newsracks. Since the ordinance contains no standards to guide the Board in approving or rejecting newsrack designs, we hold that provision unconstitutional under the First and Fourteenth Amendments.

C. Provision Requiring Indemnification Before Access to Public Streets and Sidewalks Is Unconstitutional

On appeal Plain Dealer also challenges the constitutionality of Section 901.181(c)(5) of the Lakewood Codified Ordinance requiring that "permittees" indemnify and insure the City as a condition to gaining access to its public streets and sidewalks.⁶ We believe this provision also violates the First Amendment.

The district court held that since the City is liable under Ohio Revised Code Section 723.01 for the failure to maintain the streets, sidewalks, and publicways, it should not be exposed to additional liability without indemnification by any private commercial use on such City owned property. The district court cites Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E. 2d 749 (1982) (holding that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in a negligence action); Dickerhoof v. City of Canton, 6 Ohio St. 3d 128, 451 N.E. 2d 1193 (1983) (holding that a municipal corporation may be liable for injuries resulting from its failure to keep the shoulder of a highway in repair); and Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937) (holding that the National Labor Relations Act does not unconstitutionally abridge the freedom of the press in that it does not interfere with the right to discharge any employee for any proper cause) as authority for the above proposition. However, these cases are inapposite in that none of them discusses insurance or indemnification. They stand only for the general propositions that **1)** local governments retain power to indemnify themselves, Haverlack, 2 Ohio St. 3d at 30; **2)** local governments may be liable for negligence in maintaining the streets, Dickerhoof, 6 Ohio St. 3d at 131; and **3)** news

⁶Section 901.181(c)(5) provides that a newspaper box "permittee" must indemnify the City for all liability "for any reason whatsoever occasioned upon the installation and use" of a newspaper box. Furthermore, the ordinance requires the permittee to provide property damage and personal injury insurance in the amount of \$100,000, naming the City as an insured.

organizations are subject to overall regulations and laws and are not entitled to special privileges. Associated Press, 301 U.S. at 132-33. The City does not require other permittees to provide insurance. For example, neither the bus nor telephone companies are required to insure bus shelters or telephone equipment. Since the City cannot impose more stringent requirements on First Amendment rights than it does on others, we believe the indemnification aspect of the ordinance places an undue burden on Plain Dealer.

D. Ban Of All Newsracks In Residential Areas Is Constitutional

The state may enforce time, place and manner regulations which are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).

We find that the City's total ban of newsracks in residential areas is a constitutional time, place and manner regulation. First, the ordinance is content-neutral because it bans all newsracks in residential areas of the City. Second, the ordinance is narrowly tailored to serve a significant government interest. We agree with the district court's holding that "traffic safety, proper functioning of a city's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial government interests and the subject ordinances reach no further than necessary to accomplish the City's objectives." See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) (plurality opinion). Finally, the ordinance leaves open ample alternative channels of communication. For example, the City admits that a person may sell newspapers by mail or by direct home delivery in residential areas free from governmental interference. Moreover, there are eleven sites within the City, and two sites immediately adjacent to the City, where newsracks are located on private property within commercial zones. In fact, all residences in the City are within one quarter of a mile from an existing newsrack. Furthermore, there are eleven

"all-night" businesses within the City and two "all-night" businesses adjacent to the City which sell the Plain Dealer 24 hours a day, seven days a week. Thus, the City's total ban of newsracks in residential districts is a constitutional time, place and manner regulation. We also agree with the District Court that the remaining provisions of ordinances are not unconstitutional.

III.

SEVERABILITY

The Supreme Court has held that invalid portions of a statute should be severed unless it is clear that the Legislature would not have enacted those provisions which are constitutional, independent of those provisions which are not. INS v. Chadha, 462 U.S. 919, 931 (1983); Buckley v. Valeo, 424 U.S. 1, 108 (1976). Moreover, a provision is presumed severable if what remains after severance is fully operative as a law. Chada, 462 U.S. at 934. When the unconstitutional portions of the ordinance dealing with the Mayor's unlimited discretion in denying permits, the Board's standardless discretion in approving newsrack designs, and the insurance requirements for proposed applicants are deleted from the remaining portion of the ordinance dealing with newsracks in commercial areas, what is left cannot stand on its own. Consequently, the portion of the ordinance regulating newsracks in commercial areas must be held unconstitutional. The remaining portion of the ordinance banning newsracks in residential areas, however, survives as a workable ordinance because it is fully operable as a law. Since prior ordinances under the City's regulatory scheme sought to ban all newsracks under all circumstances, we believe this indicates clear legislative intent to ban newsracks in residential areas. Consequently, we sever the ordinance's unconstitutional provisions and hold that the City may constitutionally ban newsracks in residential areas.

IV.

CROSS APPEAL FOR COSTS

The final issue is whether the district court abused its discretion in awarding costs to appellant Plain Dealer. The City argues that the district court committed reversible error by denying its requests for costs without stating reasons. In view of our disposition of the case on appeal, the district court's award of costs to Plain Dealer is not erroneous. However, to prevail on cross-appeal, Lakewood must show more than error. We review decisions awarding costs under an abuse of discretion standard. Owen v. Modern Diversified Industries, Inc., 643 F.2d 441 (6th Cir. 1981); see also Missouri Pacific Railroad Company v. Star City Gravel Company, Inc., 592 F.2d 455 (8th Cir. 1979). Under the abuse of discretion standard, an appellate court may overturn a lower court's ruling only if it finds that the ruling was arbitrary, unjustifiable or clearly unreasonable. See NLRB v. Guernsey-Muskingum Electric Cooperative, 285 F.2d 8, 11 (6th Cir. 1960). In the instant case, the City amended the ordinance twice in response to a lawsuit by Plain Dealer. Specifically, the district court granted the Plain Dealer's motion for summary judgment on its initial complaint. No appeal was taken from that decision. Since the City has failed to show that the ruling in this case was arbitrary or unreasonable, the district court did not abuse its discretion in awarding costs to Plain Dealer.

Accordingly, the decision of the district court is affirmed in part and reversed in part consistent with the analysis of this opinion.

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

April 28, 1986

Mr. John P. Hehman
Clerk of the Court
United States Court of Appeals
for the Sixth Circuit
U.S.P.O. and Courthouse
Cincinnati, Ohio 45202

Re: **No. 84-3675**
New York Times Company v. City of Lakewood
(argued 12/05/86)

Dear Mr. Hehman:

Attached hereto for filing is a per curiam which has been concurred in by the judges indicated below. This per curiam is not for publication.

Sincerely,


Damon J. Keith

DJK/get
Enclosure

cc: Judge Kennedy
Judge Unthank

NOT FOR PUBLICATION

84-3675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEW YORK TIMES COMPANY,	)	
	)	
Plaintiff-Appellant,	)	On Appeal from the United States
	)	District Court for the Northern
v.	)	District of Ohio.
	)	
CITY OF LAKEWOOD,	)	
	)	
Defendant-Appellee.	)	

Decided and Filed: _____

BEFORE: KEITH and KENNEDY, Circuit Judges; and UNTHANK*

PER CURIAM: Appellant, The New York Times ("The Times"), appeals an order of the district court denying a preliminary injunction against the City of Lakewood ("City"). The Times filed this action against the City for declaratory and injunctive relief to establish The Times' First Amendment right to distribute newspapers on City streets by means of coin-operated newsracks. For the following reasons we vacate the district court's judgment denying appellant's motion for preliminary injunction and remand the case to the district court to be dismissed without prejudice under the doctrine of abstention.

I.

The appellant is the publisher of The New York Times, a newspaper of general circulation, with readership throughout the United States. In January of 1984, the

*Honorable G. Wix Unthank, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Times began an effort to broaden the distribution of the national edition of the Times in the Cleveland area. The City of Lakewood is located immediately to the west of Cleveland. The ordinances of the City of Lakewood prohibit placement of newsracks in any residential use district, including the City's principal street, Clifton Boulevard. Section 901.181 of the City Ordinances also requires a permit and rental fee before a newspaper box is placed anywhere else in the City. Despite knowledge of these ordinances, the Times placed newsracks on Clifton Boulevard.

This action commenced after the City seized newsracks placed by the Times along Clifton Boulevard and after the City filed forty-two criminal complaints accusing the Times of violating City zoning and licensing ordinances that ban newsracks in all residentially zoned areas of the City. This action was consolidated with Plain Dealer Publishing Company v. City of Lakewood, which involved similar questions of law and fact. The trial of Plain Dealer and the Times' motion for preliminary injunction were both heard on the merits.

On July 12, 1984 the district court entered judgment for the City in the Plain Dealer case. The court held that all the relevant City ordinances were constitutional and entered judgment for the City. On the basis of the findings of fact and conclusions of law in the Plain Dealer case, the district court found that there was no probability that the Times would succeed on the merits of its suit. Therefore, the court denied the Times' motion for preliminary injunction.

II.

The issue on appeal concerns the constitutionality of Sections 902.18, 901.181 and 901.99 of the Codified Ordinances of the City of Lakewood regarding the placement of newsracks in residential districts. The Times argues that the "public forum" doctrine requires this Court to reverse the district court decision for the City. Under the doctrine of abstention, we vacate the district court's judgment.

The doctrine of abstention permits federal courts to decline or postpone the exercise of jurisdiction pending the state court's opportunity to decide the case. Colorado River Water Conservation District v. United States, 424 U.S. 800, 813, reh'g. denied, 426 U.S. 912 (1976). However, abstention is a narrow and extraordinary exception to the duty of the federal courts to adjudicate matters which are correctly before them. Id. We believe the doctrine of abstention should be applied here.

The Supreme Court in Younger v. Harris, 401 U.S. 37 (1971) held that absent extraordinary circumstances, a federal court is precluded from enjoining a pending state criminal proceeding. However, Younger approved the possibility of federal injunctive relief in extraordinary circumstances:

- (1) Where irreparable injury is both "great and immediate," Younger, 401 U.S. at 46 . . .
- (2) Where the state law is "flagrantly and patently violative of express constitutional prohibitions," Id. at 53, . . . and (3) Where there is a showing of "bad faith, harassment, or other unusual circumstances that would call for equitable relief[.]" Id. at 54. . . .

Ada-Cascade Watch Co., Inc. v. Cascade Resource Recovery, 720 F.2d 897, 902 n.2 (6th Cir. 1983).

In the present case, the Times presented no evidence at the trial pertaining to irreparable injury. The only evidence in the record pertaining to possible irreparable harm are affidavits which state that "cost effectiveness of the newsboxes helps keep the cost of the paper as low as possible" and that "if the Times is not permitted to maintain newspaper vending machines . . . sales will be diminished. . . ." With a daily circulation of 930,000 papers, we find it difficult to believe that the Times suffered "great and immediate" irreparable injury caused by the City's prohibition of seven newsracks within the residential zones of the City.

Next, the Times does not indicate how the City's ordinances are "flagrantly" violative of "express constitutional prohibitions." Nor can any flagrant violations be construed from the City's Ordinances. Finally, there has been no allegation nor any

proof of bad faith prosecution. Consequently, we find that the present case falls within the Younger doctrine of abstention.

Accordingly, we vacate the judgment of the district court and remand to the district court with instructions to dismiss the case without prejudice under the doctrine of abstention.

United States District Court

FOR THE

Eastern District of Kentucky

April 17, 1986

Chambers of
G. Wix Unthank
Judge

Hikeville, Kentucky 41501

Honorable Damon J. Keith
United States Court of Appeals
for the Sixth Circuit
Detroit, Michigan 48226

Dear Judge Keith:

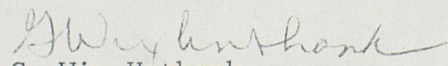
In the case of Plain Dealer Publishing Co. v. City of Lakewood, Nos. 84-3683/84-3722, I concur in your opinion that the City of Lakewood's ordinance grants the mayor unbridled discretion in the issuance of permits, and that such discretion violates the First Amendment. I agree with Judge Kennedy that the Architectural Board of Review provisions are impermissible for the same reason. On the issue of severance, I conclude that the ban on newspaper boxes in residential areas should be severed from the invalid portions of the ordinance.

I do not concur in that portion of the decision holding the insurance or indemnity requirements in violation of the First Amendment. I consider them legitimate and reasonable provisions for the protection of the city from liability. The fact that the city does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services.

I concur in your decision in the case of New York Times Co. v. City of Lakewood, No. 84-3675. I believe, however, that Judges Kennedy and Lively correctly point out that abstention should be ordered at the trial level.

Finally, in Sisk v. Commissioner of Internal Revenue, I concur in your decision as modified by Judge Kennedy's suggestions. I too, however, see no reason to delete the reference to installments.

Very truly yours,


G. Wix Unthank

cc: Honorable Cornelia G. Kennedy

84-3675
(CASE NO.)

*Rescheduled
apply for permit*

COURTROOM # 1

12/5/85
(DATE)

STYLE OF CASE:

COUNSEL

NEW YORK TIMES COMPANY

Frances Floriano Goins

Plaintiff-Appellant

v.

CITY OF LAKEWOOD

Henry B. Fischer

Defendant-Appellee

*mayland
81 Led*

15 Minutes Per Side
(TIME ALLOCATION)

6CA-47

4/80

84-3683

84-3722
(CASE NO.)

COURTROOM # 1

12/5/85
(DATE)

STYLE OF CASE:

COUNSEL

PLAIN DEALER PUBLISHING CO.

James P. Garner

Plaintiff

v.

Concede Content "neutral"
1st Amendment creates no property right.

CITY OF LAKEWOOD

Henry B. Fischer

Defendant

15 Minutes Per Side
(TIME ALLOCATION)

~~Individual~~ Process vs: Product
Speech vs: Non Speech
Use vs: taking

6CA-47

4/80

MEMORANDUM

I. NATURE OF THE ACTIONS

Appellants, Plain Dealer Publishing Company and the New York Times Company, have challenged ordinances of the Appellee, City of Lakewood, which regulate the use of newspaper boxes.

II. STATEMENT OF FACTS

On January 5, 1983, the Plain Dealer filed the present action after the City of Lakewood denied it permission to place its news boxes on City property pursuant to § 901.18 of the Ordinances of the City of Lakewood. Appellant sought a declaration from the Court that the ordinance violated the First Amendment as it operated as a "blanket prohibition" against news boxes on public property. The Court, after finding the ordinance to be a per se violation of the First and Fourteenth Amendments, granted the Plain Dealer's motion for summary judgment on August 18, 1983. The Court gave the City sixty days to enact reasonable regulations on the placement of news boxes on public property.

On October 17, 1983, the City enacted an amended version of § 901.18, and a new ordinance, § 901.181. The new ordinances do not allow news boxes on property zoned as residential areas. This includes Clifton Boulevard, one of the major streets in the City. The ordinances also require payment of a rental fee before boxes can be placed on public property.

The decision of whether or not a permit shall be issued to a particular newspaper rests with the Mayor and the Board of Architectural Review. The decision of the Mayor may be appealed to the City Council. There are no standards to guide the Mayor's decision, and no time limits are placed upon the decision process.

Under the ordinances, newspapers must indemnify and insure the City as a condition for a permit. The newspaper must also agree to keep clean the area around the boxes.

The Plain Dealer found numerous alleged constitutional defects in the new ordinances, and filed an amended complaint asking for a declaration that the ordinances were unconstitutional. It also asked for preliminary and permanent injunctive relief. The Court scheduled a trial for April 11, 1984. The Court consolidated it with the hearing of the New York Time's motion for preliminary relief in its case against the City.

On March 8, 1984, City official discovered New York Time's news boxes at several locations in the residential area of the City. The City directed the Times to remove the boxes, but it refused. The City Prosecutor then issued Complaints and Summons to the Times for violations of the ordinances. The boxes were removed for use as evidence. Criminal prosecutions based upon the violations are pending in the City's municipal court. On March 29, 1984, the Times filed a Complaint in federal court for declaratory and in-

junctive relief to enjoin prosecution or enforcement of the ordinances. The Court granted the Time's motion to consolidate its case with that of the Plain Dealer, and a combined trial on the merits of the Plain Dealer case and a hearing on the Time's motion was held on April 11 and 12, 1984.

On July 12, 1984, the Court issued its Memorandum and Order denying the Time's Motion and entering judgment for the City against the Plain Dealer. Costs were assessed against the City in the Plain Dealer case. Both the Plain Dealer and the New York Times appealed, and the City cross-appealed from the portion of the judgment ordering it to pay costs.

The Plain Dealer is a newspaper of general circulation in the Cleveland, Ohio area. It has an average weekly paid circulation of approximately 500,000 copies. The Plain Dealer has used newspaper boxes for about ten years, and it alleges that they have not caused a single harmful accident or safety problem. It presently uses approximately 2000 boxes. Single copy sales account for 28.5 percent of daily sales, and one-fourth of single copy daily sales are from newspaper boxes. The Plain Dealer wants to place boxes in 18 locations in the City, including 8 places along Clifton Boulevard. Photographs attached as exhibits to its Brief demonstrate how such boxes would be placed along the streets. The Plain Dealer notes that these locations also have bus shelters, telephone booths, and trash containers.

Appellants argue that the District Court erred in not according First Amendment protection to the distribution of newspapers by boxes; in declaring that streets are not public forums for the distribution of newspapers by boxes; in failing to address the issues of prior restraint and "unbridled" administrative discretion; in failing to find the ban on newspapers boxes in residential areas invalid as time, place or manner restrictions.

In its defense, the City argues that news boxes are located on non-public property, and that all residents of Lakewood are within one-quarter mile from a newspaper box. It cites the testimony of a City policeman who states that news boxes may cause traffic problems. The Superintendent of Streets stated that the City has frequent reports of pedestrians tripping on the City's sidewalks, and he speculated that the placement of boxes would increase the probability of more tripping. He also stated that the boxes could be struck by vehicles. The City Planner stated that news boxes cause visual clutter, and that litter collects around the boxes. The City defends its ban on boxes in the residential areas based on zoning laws; commercial sales would violate those laws.

III. ISSUES PRESENTED

- (A) DOES THE FIRST AMENDMENT PROTECT THE DISTRIBUTION OF NEWSPAPERS BY NEWSPAPER BOXES ON "PUBLIC FORUM" PROPERTY.
- (B) ARE THE CITY ORDINANCES CONSTITUTIONALLY REASONABLE TIME, PLACE AND MANNER RESTRICTIONS.
- (C) DOES THE DISTRIBUTION OF NEWSPAPERS THROUGH NEWSPAPER BOXES ON PUBLIC PROPERTY AMOUNT TO A "TAKING OF PROPERTY" FOR WHICH COMPENSATION MUST BE MADE.
- (D) DO THE ORDINANCES GIVE CITY OFFICIALS "UNBRIDLED ADMINISTRATIVE DISCRETION" IN DECIDING WHETHER OR NOT TO ISSUE A PERMIT FOR A NEWSPAPER BOX.

IV. DISCUSSION

The privilege to use the streets and parks for communication may be regulated in the interest of all; it is not absolute but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order, but it must not, in the guise of regulation, be abridged or denied. Hague v. CIO, 307 U.S. 496, 515-516 (1939) (opinion of Roberts, J.)

The existence of a right of access to public property and the standard by which limitations upon a right must be evaluated differ depending on the character of the property at issue. Perry Education Assoc. v. Perry Local Educator's Assoc., 460 U.S. ___, ___ (1983). Sidewalks are among the areas of public property which the Court has held open to the public for expressive activity, and are clearly within those areas of public property that may be considered, generally without

further inquiry, to be public forum property. United States v. Grace, 461 U.S. 171, 179 (1983).

In a public forum, "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Grace, 461 U.S. at 177. Additional restrictions, "such as an absolute prohibition on a particular type of expression, will be upheld only if narrowly drawn to accomplish a compelling government interest." Ibid.

In Grace, the Supreme Court considered a total ban on demonstrations on the sidewalks around the Supreme Court building. In finding the statute unconstitutional, it noted that "there is no suggestion, for example, that appellee's activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." 461 U.S. at 182.

The Appellants are undoubtedly correct in their assertion that the sidewalks of the City of Lakewood, both commercial and residential, are public forums protected under the First Amendment from unreasonable government regulation. Therefore, for the ordinances to be constitutional, they must be (1) content neutral; (2) narrowly tailored to

serve a significant government interest; and (3) leave open ample alternative channels of communication.

The ordinances are, apparently, content neutral. The Appellants dispute, however, the Court's finding that they serve a significant government interest in protecting the health, safety, and esthetic sense of the community. A review of the trial record indicates that substantial evidence supports the Appellant's position.

Robert Finney, a member of the five member Architectural Review Board, admitted that he and two other Board members have not studied art or architecture. He stated that the Board has no standards for approval of newspaper boxes. He states that the City had not consulted him before passage of the ordinances, and he admitted that he had no knowledge of the requirements of the ordinance. (Vol. 4, pages 810-816.)

Michael Connors, the City Engineer, testified that newspaper boxes could feasibly be placed on public property, including the residential street, Clifton Boulevard. (Vol. 4, page 830).

Glenn Walker, Captain of the City Police Department, could only speculate as to the traffic problems that would result from the placement of newspaper boxes along the streets. He, too, stated that no one consulted him before passage of the ordinance. (Vol. 4, pages 838-839). Eric Lane, former Planning Director, made the same revelation. (Vol. 4, page 856).

Frank Ziegenrueker, Superintendant of Streets, testified that people fall and hit some obstruction on the sidewalks approximately once a month. (Vol. 4, page 870). Robert Thrasher, circulation manager of the Plain Dealer for four years, testified that he knew of no complaints of serious harm or safety problems resulting from the presence of a newspaper box. He stated that the newspaper boxes were designed for distribution of papers to commuters and pedestrians.

Although, the evidence supports a finding that newspaper boxes possibly result in safety or traffic problems, the evidence does not support a finding that the City "narrowly tailored" them to serve those interests. The City also provided evidence from a city planner, David Hartt, who acknowledged that adequate regulations for newspaper boxes in Lakewood are possible. (Vol. 4, pages 887-888) Yet, he stated that the City should prohibit all boxes, because, in his opinion, newspaper boxes do not serve any public purpose. (Vol. 4, page 910).

The ordinances for the commercial section of the town may be construed as legitimate time, place and manner restrictions if the Court's findings are accepted. The blanket prohibition on boxes in residential areas, however, clearly violates the First Amendment as interpreted in *Grace*, supra, and the Court should find it unconstitutional.

As noted by the Appellee, and found by the Court, the requirement of a fee for the use of City property by the Appellants prevents a "taking of property" without compensation. The issue to be determined is whether or not the fact that newspaper boxes are "permanent" makes them a special case under the First Amendment. (Does the federal government compensate towns for the space take up by the placement of mail boxes?)

Even if the ordinances pass the above tests of constitutionality, the fact that there are no standards or limitations upon the Mayor's discretion or the discretion of the Architectural Review Board strongly supports a finding of unconstitutionality. Robert Finney, a member of the Board, stated that it could take at least a month for the board to approve a box design. (Vol. 4, page 813). The ordinances set out no time limitations upon the Mayor's decision. The Supreme Court has held such discretion on the issuance or non-issuance of permits unconstitutional. The Court has consistently condemned licensing systems which vest an administrative official with discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. Shuttlesworth v. Birmingham, 394 U.S. 147, 153 (1969). Prior restraints on freedom of the press, in the absence of narrowly drawn, reasonable or definite standards for officials to follow, must be invalid." (Niemotko v. Maryland, 340 U.S. 268, 271 (1951). An ordinance

which makes the peaceful enjoyment of freedoms contingent upon the uncontrolled will of an official-- as by the requirement of a permit or a license granted or withheld in the discretion of such official-- is an unconstitutional restraint upon the enjoyments of those freedoms. Staub v. City of Baxley, 355 U.S. 313, 322 (1958).

In the present case, the Supreme Court's decision in Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 649 (1981) suggests that there must be a "straight-forward first-come, first-served system" in the allocation of space. Such a rule would not be open to discretion capable of suppressing a particular viewpoint.

V. CONCLUSION

The First Amendment protects the Appellants' right to distribute newspapers in public forums through newspaper boxes, but the City can enact reasonable time, place and manner regulations. The trial record suggests that the regulations enacted were not reasonable, as they were not narrowly tailored to protect a compelling government interest. Even if the ordinances are valid time, place and manner regulations, they must still be found unconstitutional since they give the Mayor and other officials unlimited discretion in the decision to permit or not to permit placement of news boxes. The blanket exclusion of boxes in residential areas should also be found unconstitutional.

Chambers of
G. Wix Unthank
Judge
Bikeville, Kentucky 41501

United States District Court

FOR THE
Eastern District of Kentucky

April 17, 1986

Honorable Damon J. Keith
United States Court of Appeals
for the Sixth Circuit
Detroit, Michigan 48226

Dear Judge Keith:

In the case of Plain Dealer Publishing Co. v. City of Lakewood, Nos. 84-3683/84-3722, I concur in your opinion that the City of Lakewood's ordinance grants the mayor unbridled discretion in the issuance of permits, and that such discretion violates the First Amendment. I agree with Judge Kennedy that the Architectural Board of Review provisions are impermissible for the same reason. On the issue of severance, I conclude that the ban on newspaper boxes in residential areas should be severed from the invalid portions of the ordinance.

I do not concur in that portion of the decision holding the insurance or indemnity requirements in violation of the First Amendment. I consider them legitimate and reasonable provisions for the protection of the city from liability. The fact that the city does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services.

I concur in your decision in the case of New York Times Co. v. City of Lakewood, No. 84-3675. I believe, however, that Judges Kennedy and Lively correctly point out that abstention should be ordered at the trial level.

Finally, in Sisk v. Commissioner of Internal Revenue, I concur in your decision as modified by Judge Kennedy's suggestions. I too, however, see no reason to delete the reference to installments.

Very truly yours,

G. Wix Unthank
G. Wix Unthank

cc: Honorable Cornelia G. Kennedy

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

April 28, 1986

Mr. John P. Hehman
Clerk of the Court
United States Court of Appeals
for the Sixth Circuit
U.S.P.O. and Courthouse
Cincinnati, Ohio 45202

Re: **No. 85-1310**
James W. Sisk v. Commissioner of Internal Revenue
(argued 12/05/86)

Dear Mr. Hehman:

Attached hereto for filing and publication is a per curiam which has been concurred in by the judges indicated below.

Sincerely,



Damon J. Keith

DJK/get
Enclosure

cc: Judge Kennedy
Judge Unthank

FOR PUBLICATION

85-1310

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES W. SISK,	)	
	)	
Petitioner-Appellant,	)	On Appeal From the United States
	)	Tax Court.
v.	)	
	)	
COMMISSIONER OF INTERNAL	)	
REVENUE,	)	
	)	
Respondent-Appellee.	)	

Decided and Filed: _____

BEFORE: KEITH and KENNEDY, Circuit Judges, and UNTHANK, District Judge*

KEITH, Circuit J.: This is an appeal from a judgment of the Tax Court which determined that the taxpayer, James W. Sisk, was deficient in the payment of federal income taxes for the years 1979-80 in the amount of \$59,674. The Tax Court imposed a fifty percent civil fraud penalty of \$29,837 against the taxpayer pursuant to 26 U.S.C. §6653(b). The Tax Court also found taxpayer liable under 26 U.S.C. §6654 in the amount of \$3,158 due to underpayment of estimated taxes. Taxpayer now appeals this decision of the Tax Court.

During the taxable years 1979 and 1980, taxpayer operated, as sole proprietor, a computer consultant service firm. Taxpayer failed to maintain or submit to the Internal Revenue Service adequate books or records of the operation of his business for the taxable years of 1979 and 1980. Although he received adjusted gross income in

*Honorable G. Wix Unthank, United States District Judge for the Eastern District of Kentucky, sitting by designation.

1979 and 1980 in the amounts of \$65,282.13 and \$62,894.76, respectively, he did not file income tax returns for those years. Neither did taxpayer make installment payments of estimated tax, as he was required to do, per quarter for 1979 and 1980.

I.

Taxpayer has not filed a federal income tax return since 1976, although he had sufficient income to require that a return be filed for each year since 1976. Moreover, taxpayer was repeatedly advised by the Internal Revenue Service that the protest documents he had filed since 1976 did not constitute income tax returns. Further, in a deliberate attempt to avoid the recordation of his income, taxpayer cashed checks received in payment for his services at a number of financial institutions but deposited less than half of his gross receipts in bank accounts. In 1981, taxpayer was convicted on two counts of violating 26 U.S.C. §7206(1) of the Internal Revenue Code by filing false returns for 1975 and 1976 and on two counts of violating Section 7203 of the Code by willfully and knowingly failing to file returns for 1977 and 1978. After his conviction, taxpayer told his probation officer that he transferred title to his house and was dealing in cash so that the Internal Revenue Service would not be able to reach his assets.

The Commissioner of the Internal Revenue Service determined deficiencies in taxpayer's income taxes for 1979 and 1980 and further assessed civil penalties for each of those years. Taxpayer opposed the proposed deficiencies and fraud penalties by claiming that his labor was not income and that the deficiency was based on fraud. Moreover, taxpayer filed a motion to dismiss the proceedings claiming the Internal Revenue Service lacked jurisdiction over him. Taxpayer also moved for attorney fees. The Tax Court found that payment for services is taxable income. It also denied taxpayer's motion to dismiss for lack of jurisdiction and motion for attorney fees. Finally, the Tax Court sustained the Commissioner's deficiency determination and civil fraud penalties.

II.

On appeal, taxpayer claims that the Tax Court erred in using evidence developed in the course of a grand jury investigation and that the Tax Court lacked subject matter jurisdiction. For the following reasons we reject taxpayer's contentions and affirm the decision of the Tax Court.

A.

Taxpayer first argues that the notice of deficiency was improperly calculated using evidence developed in the course of a grand jury investigation and released to the Internal Revenue Service in violation of Rule 6(e) of the Federal Rules of Criminal Procedure. Rule 6(e)(2) of the Federal Rules of Criminal Procedure imposes a general rule of secrecy over matters occurring before a grand jury. However, subsection (e)(3)(C)(i) of Rule 6(e) provides that disclosure otherwise prohibited may be made "when so directed by a court preliminarily to or in connection with a judicial proceeding." Taxpayer thus contends that the calculation of his civil tax liabilities with evidence from the grand jury investigation is prohibited by Rule 6(e)(2) and the Supreme Court's holdings in United States v. Baggot, 463 U.S. 476 (1983) and United States v. Sells Engineering, Inc., 463 U.S. 418 (1983).

The Supreme Court in Sells Engineering held that government attorneys, other than those working on the criminal matters to which the grand jury investigation pertains, must obtain a court order under subparagraph (C)(i) to obtain grand jury material. 463 U.S. at 441-442. In Baggot the Supreme Court held that an Internal Revenue Service audit of civil tax liability was not "preliminary to or in connection with a judicial proceeding" and, therefore, that disclosure of grand jury material could not be made under the exception in subparagraph (C)(i) for such purposes.

We do not believe the Supreme Court's holdings in Sells Engineering or Baggot are applicable to the instant case. Neither case prohibits the use of evidence presented at a criminal trial in determining a taxpayer's civil tax liability. Evidence presented at

a criminal trial is not protected by the guarantees of secrecy surrounding a grand jury investigation, but are matters of public record.

Even if the material in question had been presented only to a grand jury and not at trial, Baggot would not prohibit its use in this instance. The evidence brought before the grand jury that indicted taxpayer had been developed in the course of an investigation previously conducted by a special agent of the Internal Revenue Service. The agent's report was in the possession of the Internal Revenue Service prior to the grand jury investigation. Thus, the basis for determining taxpayer's income tax liability for the years in issue was generated internally and was not derived from grand jury material.

B.

Taxpayer's second argument is that the Tax Court lacks subject matter jurisdiction in this case because the Sixteenth Amendment was never ratified by a sufficient number of states to become part of the Constitution. Specifically, taxpayer argues that the Sixteenth Amendment was not actually ratified because: **(1)** Ohio was not an enrolled state at the time it ratified the amendment and yet the Secretary of State counted Ohio as a ratifying state; and **(2)** many of the other states' resolutions ratifying the amendment contained typographical and punctuation errors. This argument is without merit.

The Supreme Court first recognized that the Sixteenth Amendment was part of the Constitution nearly seventy years ago, Brushaber v. Union Pacific Railroad Company, 240 U.S. 1 (1916), and "recognition of the validity of [that] amendment [has] continue[d] in an unbroken line." Knoblauch v. Commissioner, 749 F.2d 200, 202 (5th Cir. 1984), quoting Parker v. Commissioner, 724 F.2d 469, 471 (5th Cir. 1984). Appellant's argument that Ohio was not a state when the amendment was ratified has been rejected by every court considering it. See Knoblauch, 749 F.2d at 201. Next, since taxpayer does not claim that the alleged typographical errors went to the meaning of the amendment, we can only conclude that they did not effect the drafters' purpose. Moreover, inasmuch

as the state legislatures are empowered by the Constitution only to ratify or reject and not to amend a proposed amendment, it must be presumed, in the absence of any indication to the contrary, that they intended to ratify it.

The Secretary of State certified that the Sixteenth Amendment had been ratified by the legislatures of the required number of states, and the Supreme Court has held his certification is binding on the courts. See Leser v. Garnett, 258 U.S. 130 (1922). Taxpayer argues that the Secretary acted fraudulently in certifying the amendment. However, taxpayer offers no evidence of fraud in the Secretary's action. Consequently, taxpayer's argument concerning the validity of the Sixteenth Amendment is totally without merit.

Taxpayer did not challenge the correctness of the Tax Court's determination of the deficiencies in or the additions to his taxes. In the absence of clearly erroneous findings, this Court will not disturb the decision of the Tax Court.

Accordingly, for the reasons given above, we affirm the ruling of the Tax Court against James W. Sisk.

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

December 31, 1985

Honorable Damon J. Keith
United States Court of Appeals
for the Sixth Circuit
Detroit, MI 48226

Re: No. 84-3675, The New York Times Company
v. City of Lakewood

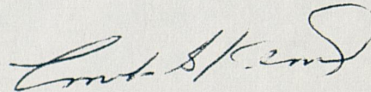
Heard 12/5/85

Dear Judge Keith:

I concur in your decision in this case except for the ultimate disposition. I think we have to vacate the judgment of the District Court and remand to the District Court with instructions to dismiss the case without prejudice under the doctrine of abstention. As the matter stands now, it has been dismissed with prejudice.

On page 3 of your proposed per curiam, you refer to "eight" newsracks. I note that on page 11 of the appellant New York Times Company brief, they mention "seven" newsracks. I can't tell from the information I have which is correct and I'm not sure of the relationship between the seven or eight newsracks and the forty-two criminal complaints.

Sincerely,



Cornelia G. Kennedy

CGK:cm

cc: Honorable G. Wix Unthank

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

PIERCE LIVELY
CHIEF JUDGE
FEDERAL BUILDING
DANVILLE, KENTUCKY

December 30, 1985

REPLY TO:
POST OFFICE BOX 1226
DANVILLE, KENTUCKY 40422

The Honorable Damon J. Keith
Judge
United States Court of Appeals
240 Federal Building
Detroit, Michigan 48226

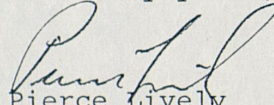
re No. 84-3675 (argued 12/2/85)
New York Times Company v. City of Lakewood

Dear Judge Keith:

In reading over panel reports this weekend I noticed that you wrote the per curiam in the above case in such a way that the court of appeals abstained. It has always been my impression that when the court of appeals believes that abstention is proper, it vacates the judgment of the district court and remands with direction that the district court enter an order abstaining. It may be that I have overlooked something in this case, but I believe abstention should be ordered at the trial level rather than being exercised by the court of appeals.

I will appreciate your reaction to these comments.

Sincerely yours,


Pierce Lively

cc: Judges Kennedy and Unthank

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

JOHN P. HEHMAN
CLERK

U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

TELEPHONE
(513) 684-2953
FTS 684-2953

July 1, 1986

Date

TO: JUDGES KEITH, KENNEDY, UNTHANK

RE: 84-3683/84-3722 - Plain Dealer Publishing Co. v. City of Lakewood

Argued/~~Submitted~~ 12/05/85 before: Above Panel

Opinion/Order/Per Curiam filed:

Writing Judge:

Enclosed please find:

() Motion to

() Response of

() Bill of Cost

() Petition for rehearing

(X) Letter from appellant responding to appellee citation of
6/23/86.

Remarks:

Judith Lewis Combs
Deputy Clerk

BAKER & HOSTETLER

COUNSELLORS AT LAW

3200 NATIONAL CITY CENTER

CLEVELAND, OHIO 44114

(216) 621-0200

RCA TELEX 215-032

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IN WASHINGTON, D. C.
1050 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036
(202) 861-1500

IN COLUMBUS, OHIO
65 E. STATE STREET
COLUMBUS, OHIO 43215
(614) 228-1541

IN ORLANDO, FLORIDA
13TH FLOOR BARNETT PLAZA
ORLANDO, FLORIDA 32801
(305) 841-1111

IN DENVER, COLORADO
303 E. 17TH AVENUE
DENVER, COLORADO 80203
(303) 861-0600

DIRECT DIAL NUMBER
(216) 861-7372

RECEIVED
JUN 30 1986
JOHN P. HEHMAN, Clerk

June 26, 1986

FILED

JUN 30 1986

JOHN P. HEHMAN, Clerk

Clerk of Court
United States Court of Appeals
Sixth Circuit
Room 524--Post Office and
Courthouse Building
Cincinnati, Ohio 45202

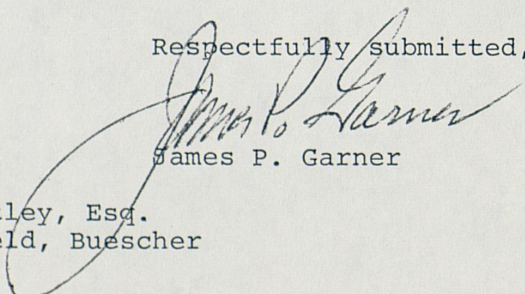
Re: Plain Dealer Publishing Company v. City
of Lakewood, Case Nos. 84-3683/3722

Dear Sir:

This letter is written on behalf of the Plain Dealer Publishing Company ("Appellant") in response to the letter dated June 23, 1986 from counsel for the City of Lakewood advising the Court of a district court decision in Arkansas, Pursley v. City of Fayetteville, 628 F. Supp. 676 (W.D. Ark. 1986). That decision has been appealed to the United States Court of Appeals for the Eighth Circuit. The case has been briefed, but the Eighth Circuit has not yet rendered a decision.

Approaching the matter "functionally" as did the Pursley court and considering the factual differences, we read Pursley as consistent with the position developed in Appellant's Brief, Section IV(A), pages 29-31, i.e., it is the nature of the street (in Lakewood, a main thoroughfare) and the activity involved which is apposite in gauging the reach of First Amendment rights. There should be no blind countenancing of a blanket denial of such rights by municipal fiat through zoning.

Respectfully submitted,


James P. Garner

0034:2916

00995-82-015

cc: Frederick W. Whatley, Esq.
(Walter, Haverfield, Buescher
& Chockley)

17

United States District Court
FOR THE
Eastern District of Kentucky

Chambers of
G. Mix Unthank

Judge

Hikeville, Kentucky 41501

July 1, 1986

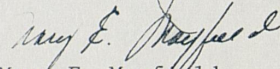
Peggy Eshman, En Banc Coordinator
UNITED STATES COURT OF APPEALS
Sixth Circuit
502 U. S. Post Office & Courthouse Building
5th & Walnut Streets
Cincinnati, Ohio 45202

RE: Nos. 84-3683/84/3722
Plain Dealer Publishing Co. v. City of Lakewood
Petition for rehearing en banc

Dear Ms. Eshman:

Because of Judge Unthank's illness he is unable to make a response to the petition for rehearing in the above referenced case.

Very truly yours,



Mary E. Mayfield
Administrative Secretary

mem

cc: Honorable Cornelia G. Kennedy
Honorable Damon J. Keith

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

July 28, 1986

Honorable Cornelia G. Kennedy
744 Federal Building
Detroit, MI 48226

Honorable G. Wix Unthank
P.O. Box 278
Pikeville, Kentucky 41501

Re: Case Nos. 84-3683/84-3722
Plain Dealer Publishing Co. v. City of Lakewood

Dear Judges:

The appellant in the above-captioned case has filed a petition for rehearing which I have reviewed and recommend that we adhere to our original disposition.

I would appreciate your comments and/or suggestions at your earliest convenience.

Very truly yours,



Damon J. Keith

DJK/cw

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

July 29, 1986

Honorable Damon J. Keith
U.S. Circuit Judge
240 Federal Building
Detroit, MI 48226

Re: Nos. 84-3683/84-3722
Plain Dealer Publishing Co. v. City of Lakewood
Petition for rehearing en banc

Dear Judge Keith:

I would deny the petition for rehearing. Clifton Boulevard does in fact pass through a residential area. Those residences may be burdened by the heavy traffic, the bus shelters and trash cans. However, that does not mean that the City of Lakewood has no interest in preserving the residential nature of the area to the extent it can. Chicago Boulevard in Detroit is a good example of a heavily traveled street which has bus service and it may even have bus shelters, but it is still residential and the City of Detroit should be able to ban a gaggle of newspaper boxes in front of people's homes or at the side of their homes. It should be kept in mind that we are not really talking about a single newspaper box. If Plain Dealer is allowed to place a box on the corner, so is The New York Times, The Wall Street Journal, USA Today, and other local and regional newspapers.

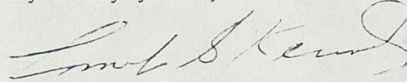
Plain Dealer is really arguing that the residential area along Clifton should not be treated as a residential area. But the line has to be drawn somewhere and the City of Lakewood has decided that despite the highway through the area it should remain residential. I do not think that Grayned Greenwell v. City of Rockford, 408 U.S. 104 (1972) is to the contrary. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 116. The presence of newspaper boxes, 24 hours a day, is incompatible with the esthetic appearance of the residential area. I

Hon. Damon J. Keith
July 29, 1986

-2-

am unwilling to say that because a heavily traveled street passes through a residential area the city can no longer treat it as residential.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Cornelia G. Kennedy". The signature is fluid and cursive, with the first name "Cornelia" being more prominent.

Cornelia G. Kennedy

CGK/lah

cc: Honorable G. Wix Unthank

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

TO: Judges Keith, Kennedy, Unthank
FROM: Clerk's Office
Peggy Eshman, En Banc Coordinator
DATE: July 24, 1986
Case No. 84-3683 Case Title Plain Dealer Publishing Co. v.
RE: City of Lakewood
Argued/~~Submitted~~ 12-5-85 Opinion/~~Per Curiam~~ Filed 7-10-86
Writing Judge Keith Action Judge Keith

Enclosed is a petition for rehearing en banc and opinion/~~per curiam~~ in the above case.

By August 7, the action judge should return the bottom portion of this form with the panel's response to the issues raised in the petition for rehearing.

TO: Clerk's Office
Attn: En Banc Coordinator

The panel has considered the petition for rehearing en banc and:

_____ Adheres to original disposition

_____ Would amend or replace its original disposition with the attached order or opinion.

Please circulate the petition for rehearing en banc, along with the hearing panel's comments, to the en banc court.

(Date)

(Signature)

FILED

JUL 24 1986

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 84-3683

JOHN P. HEHMAN, Clerk

PLAIN DEALER PUBLISHING COMPANY

Plaintiff-Appellant,

v.

CITY OF LAKEWOOD,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

PETITION OF APPELLANT PLAIN DEALER
PUBLISHING COMPANY FOR REHEARING
AND SUGGESTION
FOR REHEARING EN BANC

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Counsel For Appellant Plain
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Suggestion That Case Be Reheard En Banc

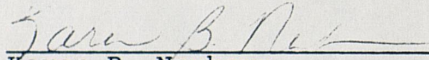
To the Honorable Judges of The United States Court of Appeals for the Sixth Circuit: Petitioner Plain Dealer Publishing Company, the appellant, respectfully suggests that the above-entitled proceeding is appropriate for consideration by all of the judges of this Court convened en banc.

Required Statement For Rehearing En Banc

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether the panel acted contrary to the First Amendment by establishing a precedent that upholds a total ban of the distribution of newspapers by newsboxes throughout residential areas based entirely on a municipality's generalized zoning classification without any independent review whatsoever of whether the area in question is constitutionally incompatible with the intended exercise of First Amendment rights.

2. Whether the First Amendment permits a municipality to charge a newspaper publisher a rental fee, as opposed to a reasonable administrative fee, as a condition of access to public rights of way for the distribution of newspapers to the public through newsboxes.


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Attorney of record for:
Appellant Plain Dealer
Publishing Company

DM21 (A)

PRELIMINARY STATEMENT

This case involves fundamental constitutional issues of transcendent importance that, due to a precedent setting error by a panel of this Court, will have a vital effect on the distribution and circulation of newspapers directly to the public within municipalities in this Court's jurisdiction. It is therefore appropriate that the entire Court consider fully the issues set forth in the preceding statement of counsel.

THE SIXTH CIRCUIT PANEL RULING CONTRAVENES FUNDAMENTAL
CONSTITUTIONAL LAW

- A. In Upholding Lakewood's Total Ban Of The Distribution Of Newspapers By Newsboxes In Residentially Zoned Areas, The Sixth Circuit Panel Contravened Fundamental Constitutional Principles.

On July 10, 1986, a panel of this Court ruled that, although the First Amendment protects the distribution of newspapers by newsboxes placed along public rights of way, a municipality may totally ban that protected method of newspaper circulation along all public sidewalks and streets throughout residentially zoned areas. The Court upheld this total ban without considering the individual nature of the particular multi-lane, heavily travelled thoroughfare along which Petitioner ("The Plain Dealer") intended to distribute its newspapers. (A copy of the Opinion is attached.)

By upholding a total ban of the distribution of newspapers by newsboxes along all public rights of way throughout residential zones, the panel issued a broad constitutional ruling with vital ramifications to the press and public. In doing so, it failed to apply the constitutionally required test of Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972), that a court must examine independently the particular place at issue to determine whether it is "basically incompatible" with the intended exercise of First Amendment rights. The panel's failure to conduct that examination results in precedent setting error: a constitutional standard which improperly substitutes a municipality's generalized zoning judgment for the independent constitutional judgment of the Court.

Petitioner ("The Plain Dealer") challenged appellee City of Lakewood's ("Lakewood") prohibition as constitutionally overbroad because it included the unusual, major thoroughfare of Clifton Boulevard. The Plain Dealer did not seek to place newsboxes along any other public street within Lakewood's residential zones.

Although most of Clifton Boulevard runs through an area zoned as residential, Clifton is not typical of ordinary quiet residential streets, tucked away from the sights and sounds of busy thoroughfares and heavy traffic. Clifton is a six lane federal and state route, a major bus and commuter

route to and from downtown Cleveland, Ohio, and one of the busiest thoroughfares in Lakewood. On the public sidewalks along Clifton are numerous large bus shelters, telephones booths, trash cans, and heavy pedestrian traffic.

Without examining (or even mentioning) Clifton Boulevard or its special attributes, the panel ruled that "the City's total ban of newsracks in residential areas is a constitutional time, place and manner regulation." (Opinion, 15.)

The panel's broad ruling did not include the Grayned analysis required by the United States Supreme Court. That well settled precedent required the panel to look beyond Lakewood's generalized zoning classifications and examine for itself Clifton Boulevard's special characteristics:

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." ... The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.... Access to the "streets, sidewalks, parks, and other similar public places ... for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly...."

Grayned, 408 U.S. at 116-17 (1972) (emphasis added); Schad v. Mount Ephraim, 452 U.S. 61, 75 (1981); see Gannett Satellite Information Network, Inc. v. Metropolitan Trans-

portation Authority, 745 F.2d 767, 773 (2d Cir. 1984)

(Public property serves as a "forum for First Amendment expression if the expression is appropriate for the property, ... and is not 'incompatible with the normal activity of a particular place at a particular time.'") (quoting Grayned; newsboxes in train station); Beckerman v. City of Tupelo, 664 F.2d 502, 516 (5th Cir. 1981).

In Beckerman, the United States Court of Appeals for the Fifth Circuit struck down an ordinance which totally banned the use of sound equipment in residentially zoned areas. The Court ruled that the ordinance was constitutionally overbroad since it "presumes incompatibility because an area is zoned residential." (Emphasis in original.) Recognizing that some segments of the residentially zoned areas were not "incompatible" with the manner of expression at issue, the court exercised its constitutional duty to look beyond the ordinance's broad zoning classification and apply the Grayned test on an "individualized" basis.

Contrary to the above analysis, the panel in this case upheld Lakewood's claim that, by classifying an area as residential, Lakewood has foreclosed the issue of whether any particular public sidewalk within that area is an appropriate place for the exercise of First Amendment

rights.¹ The result is a new, relaxed standard of judicial scrutiny which defers to a municipality's generalized zoning decisions in lieu of independent, particularized judicial examination.²

Here, the panel's failure to apply the Grayned test led to the anomolous situation where Clifton Boulevard, a six lane federal and state highway, replete with heavy traffic, public transportation, bus shelters, and the like, is swept up in the generalization that all residential areas and streets are quiet alcoves of private bedroom communities, tucked away from the very activity that is indigenous to Clifton. The application of this generalization to Clifton Boulevard was, and is, at the heart of The Plain Dealer's challenge to Lakewood's prohibition based on broad zoning classifications.

¹ According to the Supreme Court, the use of public sidewalks for expressive activities enjoys a "special position" in terms of First Amendment protection. United States v. Grace, 461 U.S. at 180.

² Neither Lakewood nor any other municipality should be the final arbiter in deciding which places are appropriate for the enjoyment of First Amendment activities. The courts, not city councils or city administrators, have the constitutional duty to make that determination. See United States Postal Service v. Greenburgh Civic Assns, 453 U.S. 114, 133 (1981) ("[A] suburban township may not by its own ipse dixit destroy the 'public forum' status of streets and

(Footnote Continued)

By accepting the broad zoning classification of "residential," the panel permits Lakewood to bar the exercise of protected First Amendment rights on Clifton based upon governmental concerns that, in keeping with Lakewood's assertions, actually apply only to "typical" residential areas quite unlike Clifton. Consequently, the exercise of protected First Amendment rights is barred from an area where their exercise is quite appropriate, without any review under traditional First Amendment analysis. This is exactly the circumstance that the Grayned test was meant to prevent.

Thus, applying the Grayned rationale, it is irrelevant that there may be a substantial government interest in banning newsboxes from typical residential areas unless it is shown that the area in question is likewise typically residential.

With the application of Grayned to the facts of this matter, it is clear that Clifton Boulevard's characteristics place it within the type of areas where newsboxes are appropriate. Accordingly, regardless of the characteristics of other public sidewalks and streets within Lakewood's

(Footnote Continued)

parks...."); Grace, 461 U.S. at 180; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

residential zones, the panel committed precedent setting error in failing to examine for itself the individual characteristics of Clifton Boulevard.

The panel compounded the errors already discussed by setting another erroneous precedent. The panel ruled that the availability of newspapers on private property, in adjoining municipalities, and by mail enabled Lakewood's total ban in residentially zoned areas to pass constitutional muster.

The United States Supreme Court and other federal courts have repeatedly rejected the suggestion that the availability of private facilities or the facilities of other governments justifies a prohibition of First Amendment activities in appropriate places. E.g., Bolger v. Youngs Drug Products Corp., 77 L. Ed. 2d 469, 478 n.18 (1983); Schad v. Mount Ephraim, 452 U.S. 61, 78 (1981) (Blackmun, J., concurring) ("Were I a resident of Mount Ephraim, I would not expect my right to ... purchase a novel to be contingent upon the availability of such opportunities in 'nearby' Philadelphia, a community in whose decisions I would have no political voice."); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Spence v. Washington, 418 U.S. 405, 411 n.4 (1974); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 926 (7th Cir. 1975);

Philadelphia Newspapers, Inc. v. Borough of Swarthmore, 381 F. Supp. 228, 242 n.8 (E.D. Pa. 1974) (newsboxes).

If the panel's ruling were to stand, the exercise of First Amendment rights could be controlled by the discretion of private store owners who are not subject to constitutional requirements, and public officials in neighboring municipalities who have no obligation to the citizens most affected by a municipality's prohibition.

Because the panel's precedent setting errors contravene the long-established principle that "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place,"³ the ruling should be vacated and heard again, en banc, by this Court.

B. The Court's Opinion Concerning Lakewood's Rental Fee Contravenes Important Principles Of Constitutional Law.

To the extent that the Sixth Circuit panel's opinion on the constitutionality of Lakewood's rental fee is a holding, it could be interpreted to contravene important constitutional principles.⁴

³ Schneider v. State, 308 U.S. 147, 163 (1939)

⁴ The panel commented in a footnote of the opinion that it believed that the imposition of a "rental fee" would
(Footnote Continued)

The fee that Lakewood intends to impose is characterized as a rental fee and will be charged as a condition of access to the public way during newspaper distribution. Neither the words of the ordinance nor the evidence at trial even hinted that the fee's purpose has any relation to recouping some justifiable administrative cost.⁵ The fee is simply a consideration and therefore unconstitutional.

Because public sidewalks occupy a "special position in terms of First Amendment protection,"⁶ the right of access to them for the dissemination of ideas exists apart from any privilege emanating from the municipality's ownership rights in the property itself. A municipality which charges a rental fee is in fact attempting to exact a consideration for the enjoyment of a right which is guaranteed by the Federal Constitution. The Constitution removes from the municipality the right to charge any fee, at least one such

(Footnote Continued)

pass constitutional muster, but indicated that the fee did not survive severability. For that reason, The Plain Dealer does not construe that ruling as a holding. However, to the extent that this Court regards it as a holding, it should be reargued because of its exceptional public importance and plain error.

⁵ Thus, the fee in this case is wholly unlike reasonable administrative fees which have occasionally been upheld in some circumstances. See Central Florida Nuclear Campaign v. Walsh, 774 F.2d 1515 (11th Cir. 1985).

⁶ Grace, 461 U.S. at 180.

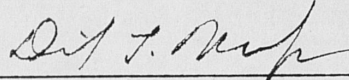
as Lakewood's which is not designed to offset nominal and justified costs incurred in administering a constitutional regulation. Murdock v. Pennsylvania, 319 U.S. 105, 114, 115 (1943); New Times, Inc. v. Arizona Board of Regents, 519 P.2d 169, 175 (Ariz. 1974) (newspaper distribution).

Accordingly, the Sixth Circuit panel's opinion that municipalities may charge rental fees to newspaper publishers who choose to exercise their First Amendment rights of access to public sidewalks, is contrary to sound, fundamental constitutional principles.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Honorable Judges of this Court order that this case be heard by the Court en banc.

Respectfully submitted,

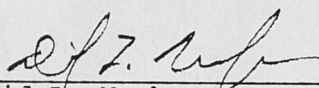


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CERTIFICATE OF SERVICE

Copies of the foregoing were sent by U.S. mail, postage prepaid, to William E. Blackie, Law Director, Roger D. Tibbetts, Assistant Director of Law, City of Lakewood, 12650 Detroit Avenue, Lakewood, Ohio 44107, and to Henry Fischer, Walter, Haverfield, Buescher & Chockley, 1215 Terminal Tower, Cleveland, Ohio 44113 on this 23rd day of July, 1986.



David L. Marburger

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-3683 & 84-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING CO.,
Plaintiff-Appellant,
Cross-Appellee,

v.

CITY OF LAKEWOOD,
Defendant-Appellee,
Cross-Appellant.

ON APPEAL from the
United States District
Court for the North-
ern District of Ohio.

Decided and Filed July 10, 1986

Before: KEITH and KENNEDY, Circuit Judges; and
UNTHANK*, District Judge.

KEITH, Circuit Judge, delivered the opinion of the court
in which KENNEDY, Circuit Judge, joined. UNTHANK,
District Judge, (p. 18) delivered a separate concurring opin-
ion.

KEITH, Circuit Judge. Appellant Plain Dealer Publishing
Company challenges the constitutionality of a municipal

*Honorable G. Wix Unthank, United States District Court, Eastern
District of Kentucky, sitting by designation.

ordinance that regulates the placement of newspaper dispensing devices ("newsracks") on the city streets of Lakewood, Ohio. Plain Dealer filed the instant action against the City of Lakewood ("City") after being denied permission to place its newsracks on City property pursuant to Section 901.181 of the Lakewood Codified Ordinances, as amended. On July 12, 1984, the district court entered judgment for the City with court costs assessed against the City. For the following reasons, we affirm in part and reverse in part.

I.

FACTS

The Plain Dealer daily newspaper is distributed as a publication of general circulation throughout the Cleveland Metropolitan area and Ohio. Generally, Plain Dealer daily newspaper sales are 77 percent by home delivery through carriers and 80 percent on Sundays by home delivery. The balance of the sales are by single copy through retail outlets and coin-operated vending boxes, the latter constituting 4.6 to 5.27 percent of total sales.

The City of Lakewood is approximately 5.5 square miles. It is an older residential community located in Cuyahoga County, Ohio, west of Cleveland. In 1980, the population of the City was 61,963. Lakewood has historically been a city of homes. The commercial areas of the City are located essentially along Madison and Detroit Avenues, conveniently close to all residential areas of the City. There is no area within the City more than one-quarter mile from an all-night newspaper outlet.

In May 1982, Plain Dealer sought permission from the City Law Director to place coin-operated newsracks at sites within the City. The various sites included the commercial areas along Madison and Detroit Avenues and the residential areas along Clifton Boulevard. The City Law Director denied the request citing Section 901.18 of the Lakewood Codified Ordinances which provided at that time:

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

Plain Dealer filed suit eight months later on January 5, 1983, attacking the constitutionality of Section 901.18. On August 18, 1983, the district court granted plaintiff's motion for summary judgment ruling the ordinance provision was an unconstitutional exercise of police power, and that it banned a reasonable means of newspaper distribution. The court held the issuance of a permanent injunction in abeyance for sixty (60) days in order to give the City an opportunity to enact constitutional provisions regulating placement of newsracks on public property.

On October 17, 1983, the City amended Section 901.18 to permit erection of a structure on public property with the consent of the City where permitted by city or state law. Under the amended ordinance, Plain Dealer would have to apply to the Mayor for a rental agreement or permit. After initial enactment of the amended ordinance, the City re-examined Plain Dealer's objections to the ordinance and on January 3, 1984, again amended the ordinance. Section 901.181,¹ as amended, provides that the Mayor may grant

(Text continued on page 6)

¹901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

4 *Plain Dealer Pub. v. City of Lakewood* Nos. 84-3683
& 84-3722

(a) The term "newspaper dispensing device", as used in this Section, shall mean a mechanical, coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6) inches distant therefrom or adjacent and parallel to the curb not less than eighteen (18) inches and not more than twenty-four (24) inches distant from the curb. The conditions applied for and determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01. Provided further, however, that no newspaper dispensing device shall be placed, installed, used or maintained:

- (1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet;
- (2) within five (5) feet of any fire hydrant or other emergency facility;
- (3) within five (5) feet of any intersecting driveway, alley, or street;
- (4) within three (3) feet of any marked crosswalk;
- (5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;
- (6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and
- (7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

- (1) the permittee shall pay a rental fee which shall be Ten

Dollars (\$10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

....
(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds for the appeal with the Clerk of Council within ten (10) days after notice of

a rental permit application upon payment of a \$10.00 rental fee for each site, submission of a certificate of insurance and compliance with the appearance and architectural standards set by the Architectural Board of Review ("the Board"). Under subsection (c)(7) of the amended ordinance, however, the Mayor may subject an application to any additional conditions he or she deems necessary. The amended code would permit Plain Dealer, upon application, to place newsracks at locations it requested on Madison and Detroit Avenues in the commercial district, but not along Clifton Boulevard in the residential use districts.

After the City had amended the regulatory scheme twice, Plain Dealer filed its amended complaint challenging the constitutionality of the regulatory scheme. Trial was scheduled on April 11, 1984, to hear Plain Dealer's request for a preliminary and permanent injunction.

There was evidence at trial that although Plain Dealer made no application for a permit, it had intended to place newsracks at eighteen locations in Lakewood, eight of which were located in residential districts on Clifton Boulevard. The district court concluded the amended ordinances were constitutional and entered judgment for the City. On appeal, Plain Dealer argues that Sections 901.18 and 901.181 should be declared unconstitutional because they impose prior restraints on the freedom of press by requiring permits and the payment of rental fees, absolutely ban newsracks in residential districts, and impose unduly burdensome procedures for compliance. Essentially, this appeal analyzes the constitu-

the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified hereinabove. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

tionality of the Mayor's power to grant or refuse permits, the constitutionality of the Board's power to approve the designs of newsracks, the insurance requirement and the absolute ban in residential districts of newsracks.² We reverse the district court decision in part because Sections 901.18 and 901.181 unconstitutionally give the Mayor unlimited discretion in denying permits; unconstitutionally provide the Board with standardless discretion in approving newsrack designs; and unconstitutionally require applicants to provide insurance to the City. However, we affirm the remainder of the district court's decision, specifically holding constitutional that part of the ordinance banning newsracks in all residential areas.

II.

ANALYSIS OF ORDINANCE

A. *Provision Giving Mayor Unbridled Discretion To Grant Or Deny Permit Is Unconstitutional*

The right to distribute newspapers by means of newsracks is protected by the First Amendment to the United States Constitution. *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984); see *Lovell v. City of Griffin*, 303 U.S. 444 (1938); see also *Hull v. Petrillo*, 439 F.2d 1184 (2d Cir. 1971). However, the State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant interest, and leave open ample alternative channels of communication. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) (citations omitted). Laws which vest municipal officials with unguided discretion to grant or deny a newsrack license or

²However, we do not specifically discuss each issue raised by *Plain Dealer* because they are not dispositive of the ultimate determination of this case. For example, we believe the imposition of a rental fee withstands constitutional scrutiny.

permit "do not regulate with [the] narrow specificity" required by the First Amendment. *Association of Community Organizations for Reform Now, (ACORN) v. Municipality of Golden, Colorado*, 744 F.2d 739, 746 (10th Cir. 1984). The Supreme Court in *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984), stated:

But even if the Secretary were correct, and the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State.

Id. at 964 n.12 (citations omitted); *See also Fernandes v. Limmer*, 663 F.2d 619, 631 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982) (holding unconstitutional ordinance that gave executive director excessive discretion in deciding whether the grant of a permit would be detrimental to the public). Thus, in order to qualify as narrowly tailored, a content neutral ordinance must avoid vesting city officials with discretion to grant or deny licenses, for

It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such

official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958); *See also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969).

In *Staub*, the Supreme Court struck down an ordinance under which the Mayor and the City Council had the discretion to grant or deny a permit. 355 U.S. at 321. The Court held that the ordinance on its face imposed an unconstitutional prior restraint because it authorized the Mayor and the Council to refuse or to grant a permit in their uncontrolled discretion. *Id.* at 325. Similarly, in *Shuttlesworth*, the Supreme Court refused to uphold a conviction for demonstrating without a permit because the City Commission had virtually unbridled discretion to grant or deny the permit.

We find that the City of Lakewood's ordinance unconstitutionally permits the granting of permits to be contingent upon the Mayor's unbridled discretion. Section 901.181(c)(7) provides that a rental permit is granted upon "terms and conditions deemed necessary and reasonable by the Mayor." It is clear from subsection (c)(7) that the Mayor is vested with unlimited discretion to grant or deny a permit and make it subject to almost any conditions he may choose. Furthermore, although the language of the ordinance limits the conditions under which the Mayor may grant a permit, it does not contain any standards for the Mayor to use when denying a permit. Consequently, the ordinance's restriction is not narrowly tailored to serve a significant government interest. *See Shuttlesworth*, 394 U.S. 147.

The Supreme Court has repeatedly struck down ordinances which condition the exercise of First Amendment activities on the broad discretion of local officials, resulting in virtually unreviewable prior restraints on First Amendment rights. *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948). When a city allows an official to ban

a means of communication through uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. *Saia*, 334 U.S. at 562.³ The constitutional problem here lies in the very existence of such unfettered discretion.

The City argues that the Mayor can refuse a permit only "upon health and safety reasons." Although municipalities may enact laws in furtherance of the public health and safety, the City is incorrect in its argument for two reasons. First, no language appears in the ordinance specifically limiting the Mayor's power to refuse a permit for health and safety reasons.⁴ The district court ruled the City's evidence of such a standard was inadmissible. Second, if health and safety or other legitimate concerns are what the City seeks to address, the language of the ordinance should be limited accordingly. See *Wulp v. Corcoran*, 454 F.2d 826, 834 (1st Cir. 1972). An ordinance providing for unguided governmental discretion is inherently inconsistent with a valid time, place and manner regulation because it provides for potential suppression of a particular point of view. See *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

The district court held that application and appeal procedures pursuant to Section 901.181(e) and Ohio Revised Code Chapter 2506 provide an adequate remedy for any wrong alleged by Plain Dealer.⁵ The "adequate state remedies"

³*Saia* involved a city ordinance which prohibited the use of a sound amplification device without the permission of the police chief. Other licensing systems which are similar have been held unconstitutional prior restraints on speech because they vest broad discretion in granting or withholding a permit upon broad criteria unrelated to proper regulation of public places. See *Shuttlesworth v. City of Birmingham*, 394 U.S. at 153; See also *Kunz*, 340 U.S. 290.

⁴Section 901.181(b) states that in determining the location of the newsracks the Mayor should not cause an undue health or safety hazard. However, the language does not state that the Mayor can only refuse a permit for health and safety reasons.

⁵The district court relied upon *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), cert. denied. —

include the application for a permit, appeal to City Council and appeal to the court of common pleas under Chapter 2506 of the Ohio Revised Code. However, these procedures require Plain Dealer to apply for a permit and appeal any denial prior to placing newsracks on the sidewalks and subject acquisition of the permit to standardless administrative discretion. The fact that the ordinance provides an appeal process does not cure the unconstitutionally broad discretion it accords the Mayor to impose prior restraints on First Amendment rights. Consequently, the district court erred in concluding that these remedies are adequate.

The City argues that under the holdings of *Greer v. Spock*, 424 U.S. 828 (1976), and *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir. 1984), Plain Dealer cannot attack the ordinance because the newspaper has never applied for a permit. We are not persuaded by this argument. In *Greer*, the Supreme Court upheld Fort Dix regulations banning partisan political speeches and demonstrations and prohibiting the distribution of any literature without the prior written approval of a commanding officer. An Army regulation specified that the commander could only disapprove publications presenting an apparent danger to military morale, loyalty or discipline. *Id.* at 840. The Court in *Greer* specifically considered the facial validity issue and held that the regulations at issue were constitutional on their face because they applied to a federal military reservation, not a traditional public forum. *Greer*, 424 U.S. at 838. Having found the regulations facially valid, the Court held that it would not reach the question of unconstitutionality because no approval had been sought

U.S. —, 105 S.Ct. 125 (1984), which hold that actions for *money damages* cannot be brought under 42 U.S.C. Section 1983 if there are adequate remedies at state law. However, these cases are distinguishable to the instant case in that this case is not an action for money damages under Section 1983. It is an action for declaratory and injunctive relief from an ordinance which allegedly abrogates First Amendment rights.

from the appropriate authorities. In the instant case, Plain Dealer challenges the facial validity of Lakewood's ordinances and does not rely on a claim of unconstitutional application. Accordingly, *Greer* is not contrary to Plain Dealer's position.

In *Gannett Satellite Information Network, Inc.*, *supra*, after holding that the Metropolitan Transportation Authority's ("MTA") unregulated licensing scheme for the placement of newspaper vending machines in MTA commuter stations violated the First and Fourteenth Amendments, the district court ordered the adoption of reasonable standards governing the issuance and terms of licenses. The Second Circuit reversed, holding, in part, that MTA need not adopt such guidelines at that time. The court of appeals questioned whether the Gannett company could require the MTA to establish standards governing the issuance of licenses stating:

But there is no evidence or finding that MTA has arbitrarily denied licenses or imposed unreasonably discriminatory terms on anyone, or that there is any threat of such conduct. It is doubtful that this record presents a justiciable controversy with respect to the reasonableness of the licensing terms. Therefore, while guidelines might be helpful, we will not require them at this time.

Id. at 776. However, in this case, the City has issued regulations the validity of which is directly challenged by Plain Dealer. Moreover, subsection (c)(7) of those regulations permits, on its face, unbridled discretion and therefore an inherent threat of arbitrary decision making. Since *Gannett* did not involve a facial challenge to adopted licensing requirements, it is inapplicable to this instant case.

B. *Provision Granting the Architectural Board of Review With Standardless Discretion Is Unconstitutional*

The provision requiring the Board to approve the design of newsracks is unconstitutional under a time, place and man-

ner analysis because the provision is not narrowly tailored to serve a significant governmental interest. See *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). In essence, the provision gives the Board standardless discretion to approve the design of newsracks. The City claims that Section 1325.03 of the Lakewood Codified Ordinances provides the Board with adequate standards. Section 1325.03 allows the Board to regulate the construction or alteration of buildings according to "accepted and recognized architectural principles". A newsrack, however, is not a building. The Chairman of the Architectural Board admitted at trial that the Board had no standards for approving or disapproving the design of newsracks. Since the ordinance contains no standards to guide the Board in approving or rejecting newsrack designs, we hold that provision unconstitutional under the First and Fourteenth Amendments.

C. *Provision Requiring Indemnification Before Access to Public Streets and Sidewalks Is Unconstitutional*

On appeal Plain Dealer also challenges the constitutionality of Section 901.181(c)(5) of the Lakewood Codified Ordinance requiring that "permittees" indemnify and insure the City as a condition to gaining access to its public streets and sidewalks.⁶ We believe this provision also violates the First Amendment.

The district court held that since the City is liable under Ohio Revised Code Section 723.01 for the failure to maintain the streets, sidewalks, and publicways, it should not be exposed to additional liability without indemnification by

⁶Section 901.181(c)(5) provides that a newspaper box "permittee" must indemnify the City for all liability "for any reason whatsoever occasioned upon the installation and use" of a newspaper box. Furthermore, the ordinance requires the permittee to provide property damage and personal injury insurance in the amount of \$100,000, naming the City as an insured.

any private commercial use on such City owned property. The district court cites *Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26, 442 N.E. 2d 749 (1982) (holding that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in a negligence action); *Dickerhoof v. City of Canton*, 6 Ohio St. 3d 128, 451 N.E. 2d 1193 (1983) (holding that a municipal corporation may be liable for injuries resulting from its failure to keep the shoulder of a highway in repair); and *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937) (holding that the National Labor Relations Act does not unconstitutionally abridge the freedom of the press in that it does not interfere with the right to discharge any employee for any proper cause) as authority for the above proposition. However, these cases are inapposite in that none of them discusses insurance or indemnification. They stand only for the general propositions that 1) local governments retain power to indemnify themselves, *Haverlack*, 2 Ohio St. 3d at 30; 2) local governments may be liable for negligence in maintaining the streets, *Dickerhoof*, 6 Ohio St. 3d at 131; and 3) news organizations are subject to overall regulations and laws and are not entitled to special privileges. *Associated Press*, 301 U.S. at 132-33. The City does not require other permittees to provide insurance. For example, neither the bus nor telephone companies are required to insure bus shelters or telephone equipment. Since the City cannot impose more stringent requirements on First Amendment rights than it does on others, we believe the indemnification aspect of the ordinance places an undue burden on Plain Dealer.

D. *Ban Of All Newsracks In Residential Areas Is Constitutional*

The state may enforce time, place and manner regulations which are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

We find that the City's total ban of newsracks in residential areas is a constitutional time, place and manner regulation. First, the ordinance is content-neutral because it bans *all* newsracks in residential areas of the City. Second, the ordinance is narrowly tailored to serve a significant government interest. We agree with the district court's holding that "traffic safety, proper functioning of a city's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial government interests and the subject ordinances reach no further than necessary to accomplish the City's objectives." See *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (plurality opinion). Finally, the ordinance leaves open ample alternative channels of communication. For example, the City admits that a person may sell newspapers by mail or by direct home delivery in residential areas free from governmental interference. Moreover, there are eleven sites within the City, and two sites immediately adjacent to the City, where newsracks are located on private property within commercial zones. In fact, all residences in the City are within one quarter of a mile from an existing newsrack. Furthermore, there are eleven "all-night" businesses within the City and two "all-night" businesses adjacent to the City which sell the Plain Dealer 24 hours a day, seven days a week. Thus, the City's total ban of newsracks in residential districts is a constitutional time, place and manner regulation. We also agree with the District Court that the remaining provisions of ordinances are not unconstitutional.

III.

SEVERABILITY

The Supreme Court has held that invalid portions of a statute should be severed unless it is clear that the Legislature would not have enacted those provisions which are constitutional, independent of those provisions which are not. *INS v. Chadha*, 462 U.S. 919, 931 (1983); *Buckley v. Valeo*, 424

U.S. 1, 108 (1976). Moreover, a provision is presumed severable if what remains after severance is fully operative as a law. *Chadha*, 462 U.S. at 934. When the unconstitutional portions of the ordinance dealing with the Mayor's unlimited discretion in denying permits, the Board's standardless discretion in approving newsrack designs, and the insurance requirements for proposed applicants are deleted from the remaining portion of the ordinance dealing with newsracks in commercial areas, what is left cannot stand on its own. Consequently, the portion of the ordinance regulating newsracks in commercial areas must be held unconstitutional. The remaining portion of the ordinance banning newsracks in residential areas, however, survives as a workable ordinance because it is fully operable as a law. Since prior ordinances under the City's regulatory scheme sought to ban *all* newsracks under all circumstances, we believe this indicates clear legislative intent to ban newsracks in residential areas. Consequently, we sever the ordinance's unconstitutional provisions and hold that the City may constitutionally ban newsracks in residential areas.

IV.

CROSS APPEAL FOR COSTS

The final issue is whether the district court abused its discretion in awarding costs to appellant Plain Dealer. The City argues that the district court committed reversible error by denying its requests for costs without stating reasons. In view of our disposition of the case on appeal, the district court's award of costs to Plain Dealer is not erroneous. Furthermore, to prevail on cross-appeal, Lakewood must show more than error. We review decisions awarding costs under an abuse of discretion standard. *Owen v. Modern Diversified Industries, Inc.*, 643 F.2d 441 (6th Cir. 1981); see also *Missouri Pacific Railroad Company v. Star City Gravel Company, Inc.*, 592 F.2d 455 (8th Cir. 1979). Under the abuse of discretion standard, an appellate court may overturn a lower court's ruling

only if it finds that the ruling was arbitrary, unjustifiable or clearly unreasonable. See *NLRB v. Guernsey-Muskingum Electric Co-operative, Inc.*, 285 F.2d 8, 11 (6th Cir. 1960). In the instant case, the City amended the ordinance twice in response to a lawsuit by Plain Dealer. Specifically, the district court granted the Plain Dealer's motion for summary judgment on its initial complaint. No appeal was taken from that decision. Since the City has failed to show that the ruling in this case was arbitrary or unreasonable, the district court did not abuse its discretion in awarding costs to Plain Dealer.

Accordingly, the decision of the district court is affirmed in part and reversed in part consistent with the analysis of this opinion.

UNTHANK, District Judge, concurring. I concur in the opinion of the Court with the exception of the holding that the insurance or indemnity requirements of the Lakewood ordinance violate the First Amendment. I consider them legitimate and reasonable provisions for the protection of the City from liability. The fact that the City does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services.

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

RECEIVED

JUL 30 1986

CORNELIA G. KENNEDY
U.S. Court of Appeals
Circuit Judge

July 28, 1986

Honorable Cornelia G. Kennedy
744 Federal Building
Detroit, MI 48226

Honorable G. Wix Unthank
P.O. Box 278
Pikeville, Kentucky 41501

Re: Case Nos. 84-3683/84-3722
Plain Dealer Publishing Co. v. City of Lakewood

Dear Judges:

The appellant in the above-captioned case has filed a petition for rehearing which I have reviewed and recommend that we adhere to our original disposition.

I would appreciate your comments and/or suggestions at your earliest convenience.

Very truly yours,



Damon J. Keith

DJK/cw

Dear Judge Keith, 7/30/86
Our letter have
arrived in the mail.
I agree the petition should
be denied.
C. G. Kennedy
cc: Judge Unthank