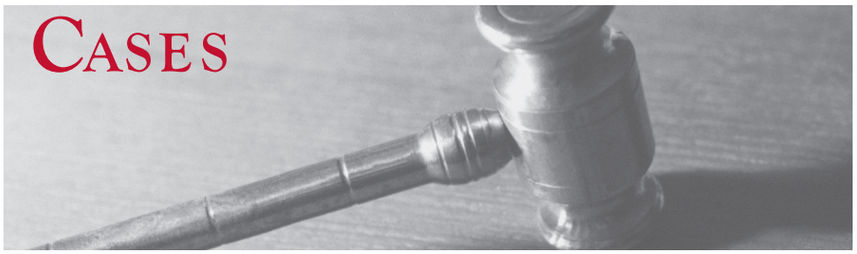
Cases



by Erich R. Eiselt, Assistant General Counsel

Get Off the Streets and Away From the Cars: Alternative Channels for Distributing Papers

In a case closely followed by IMLA, the Sixth Circuit recently upheld a Brentwood, Tennessee ordinance that prohibits the distribution of periodicals or flyers on any street or to the occupant of any motor vehicle on a street.

*The Contributo*r is a newspaper sold by homeless and formerly-homeless individuals as a way to educate people about homelessness and help vendors develop job and communications skills. In early 2011 two vendors selling the paper on the sidewalk of Brentwood, Tennessee (City) were issued $125 citations for violating the Brentwood Municipal Code, which prohibited people from using any portion of the City's street, alley, sidewalk, or public right-of-way to sell goods or materials.

The City, recognizing that the law might well be unconstitutional, revised it in July 2011. The revised ordinance (Ordinance) stated:

> Nothing in this section or in any other part of this Code shall be construed as prohibiting the sale or distribution of newspapers, magazines, periodicals, handbills, flyers or similar materials, except that:
>
> (1) Such activity shall be prohibited on any portion of any street within the city.
> (2) Such materials shall not be handed to the occupant of any motor vehicle that is on a street, nor shall any action be taken which is intended or reasonably calculated to cause the vehicle occupant to hand anything to the person selling or distributing the materials.

Brentwood Municipal Code Ordinance 58-1

The Contributor thereafter hesitated to sell in the City, fearing citations and fines. It challenged the Ordinance on First Amendment grounds, alleging that it was a content-based restriction on protected speech, not necessary to a compelling governmental interest or, alternatively, even if it was content-neutral, it was not narrowly tailored and did not leave open adequate alternative channels of communication. Plaintiffs sought to enjoin enforcement of the Ordinance. On cross motions for summary judgment, the District Court for the Middle District of Tennessee ruled in the City's favor, finding the Ordinance to be a content-neutral regulation of a traditional public forum and narrowly tailored. The district court also found that the paper had sufficient alternate channels of distribution –"door-to-door, through subscriptions, on private property with permission, to pedestrians on sidewalks or in appropriately placed newsracks."

On appeal, *The Contributor* conceded that the law was a content-neutral time, place and manner restriction of a traditional public forum. The paper's remaining argument was that the Ordinance effected a "*de facto* forum closure and leaves open only alternatives that are not used by a unique publication such as *The Contributor,*" asserting that sales to automobile occupants was its only viable forum.

The Sixth Circuit disagreed. Citing its own precedent in *Phelps-Roper* it clarified that "An alternative channel can be appropriate even the speaker is denied its best or favored means of communication." Cases cited by plaintiffs for the proposition that eliminating a particular forum can undermine First Amendment rights were not valid comparators: in one, an aggrieved Chicago Blackhawks fan was prevented from reaching fellow fans near the team's arena. In another, day laborers were prevented from reaching potential employers.

In contrast, the court said, *The Contributor's* audience was "the general citizenry of Brentwood." This group could be reached by alternatives the City had offered, including door-to-door sales, as well as via other means suggested by the court, including "e-mail subscriptions." (The court even held open the intriguing possibility that vendors could continue sales to auto occupants from the sidewalk "so long as they do not step into the road to sell a newspaper or otherwise violate the Ordinance"). The court was undeterred by *The Contributor's* argument that door-to-door sales would unfairly require newspaper vendors to "foist themselves" on the public; "an alternative is not inadequate merely because the speaker must change its tactics."

The paper also asserted that the City must demonstrate that its alternatives were effective. This overstated the point. Plainly stated, the Sixth Circuit has "never placed an onerous burden on a municipality to prove the adequacy of alternative channels of communication." Rather, a municipality is simply required to "proffer a list of potential alternative avenues of communication that are reasonable and made in good faith." The City had done so, shifting the burden to the paper to show why the alternatives were ineffective. *The Contributor* could not sustain that burden, and can no longer make sales in the streets of Brentwood.

The Contributor v. City of Brentwood, No. 12-6598 (6th Cir. August 14, 2013) http://www.ca6.uscourts.gov/opinions.pdf/13a0225p-06.pdf (last accessed August 21, 2013)

NOTE: We salute IMLA member Roger Horner, Brentwood City Attorney, and Howell & Fisher's (Nashville, Tennessee) Robert Burns (who argued the case) and Mark Harrod on the City's big win in this matter.

Neighboring Jurisdictions Can Constitute "Adequate Alternatives" For Banned Adult Business

In another decision construing alternative channels of communication, the Eighth Circuit has held that when a small town takes the extreme step of completely eliminating all commercial

zoning, an adult business can be required to look to neighboring jurisdictions for "alternative" venues.

In 2008 the City of Florence, Minnesota (City), a metropolis 0.2 square miles in area, with 39 residents, 16 single-family residences, two small city-owned buildings and a park, adopted two ordinances. The first prohibited the operation of "sexually-oriented businesses" within 250 feet of any residential property, day care, school or park, and restricted adult businesses to areas zoned "C-2." The second created three zoning classes—"R-1" (residential), "B-1" (Business) and "C-2" (Commercial). All parts of the City were zoned R-1. In December 2010 Dale Peterson opened "The Juice Bar" in town, featuring live, nude dancers. Peterson was cited the next day for operating a sexually-oriented business within 250 feet of a park, and charged with three misdemeanors under the ordinances. Peterson sued the City, alleging violations of his First Amendment rights and seeking declaratory judgment, damages, and injunctive relief.

Immediately thereafter, the City passed a new ordinance (Ordinance) declaring that Florence "desires to maintain [itself] solely as a residential community" due to its "limited infrastructure, staff, and resources," which could not support business and commercial uses. The new Ordinance repealed the prior ordinance that had created B-1 and C-2 zoning, leaving the City as a residential-only jurisdiction. The district court granted summary judgment for the City, concluding the Ordinance was content-neutral and narrowly tailored to serve an important government interest.

Peterson made three arguments on appeal: (1) the Ordinance constituted an invalid total ban on the operation of adult entertainment in Florence, or alternatively (2) it was content-based and thus subject to strict scrutiny, or (3) it constituted an invalid time, place, and manner regulation which fails intermediate scrutiny.

The Eighth Circuit affirmed. Given that the new Ordinance banned all commercial conduct in the City, it did not target adult entertainment businesses specifically and was not content-based. Restrictions on Peterson's proposed business were merely an "incidental effect" of the overall ban: "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Given that the Ordinance was content-neutral, it was subject to intermediate scrutiny, requiring the showing of narrow tailoring to achieve a substantial governmental interest and the availability of adequate alternative channels of communication. The City met that standard, articulating its substantial interest in "ensur[ing] public health, safety and general welfare . . . to improve the quality of the physical environment of the city; to protect and maintain property values, and to preserve and develop the economic base of the city." Its decision was based on "limited infrastructure, staff, and resources." In these circumstances, the Circuit Court found that restricting all commercial business was actually narrowly tailored – it was an "effective" way to achieve the "desired interest."

The remaining issue for the Eighth Circuit was determining whether alternative channels of expression remained open for Peterson. The court recognized that the Supreme Court has not expressly answered whether, in the case of small municipalities, opportunities to engage in the prohibited conduct in neighboring jurisdictions are relevant to determining that adequate alternative channels exist. The Circuit Court answered the question in the affirmative. Noting that Peterson's own expert had testified that 32% of Lyon County, Minnesota (in which Florence sits) was available for adult businesses, adequate alternatives existed for locating The Juice Bar.

Peterson v. City of Florence, **No. 12-3017 (8th Cir. Aug. 16, 2013)**
http://www.gpo.gov/fdsys/pkg/USCOURTS-ca8-12-03017/pdf/USCOURTS-ca8-12-03017-0.pdf (last accessed August 21, 2013)

He's Got a Ticket to Ride—But is it a Constitutionally Protected Property Interest in Public Transit?

In an Oklahoma case, the Tenth Circuit has held that transit on a public bus system is a constitutionally-protected property interest.

David Brown, a resident of Tulsa, Oklahoma, was late to a bus stop and attempted to get the driver to stop and wait for him, waving his ticket in the air. The driver passed without stopping. Brown waited for the bus to return and asked the driver why she had not stopped because, he said, most drivers did. Her response was that she was not 'most drivers,' and the journey deteriorated. Brown claims that for the balance of his ride, the driver harassed him without any provocation, then called her supervisor saying she was having a problem with a passenger. When she stopped the bus and demanded that Brown leave or she would call the police, he exited, cursing her. From that point on, Brown claims he was unable to use public buses in Tulsa because the drivers would not admit him.

The Metropolitan Tulsa Transit Authority (MTTA) claimed that Brown was intoxicated at the time of the interaction and that, therefore, he was banned from using the buses for 30 days. He was thereafter again removed from a bus for intoxication and disorderly conduct. At some point after this removal Brown happened to see an MTTA official and a Tulsa police officer, near the bus terminal. He cursed at both of them and was subsequently arrested by the officer after refusing to leave the area.

Brown was then permanently banned from the bus system by the MTTA.

Brown filed suit against the individual employees and the MTTA, arguing, among other things, that his procedural due process rights under the Fourteenth Amendment were violated. The federal district court for the Northern District of Oklahoma held that the MTTA, as a common carrier, had a statutory obligation to carry the passengers presented to it—but that Oklahoma law placed no significant restraint on the MTTA's ability to alter its rules of conduct for passengers at any time (other than requiring that the rules be reasonable.) Therefore, the district court found, Brown had no legitimate expectation in a continuing right to ride the bus—and no Constitutionally-cognizable property right. Given that there was no property right, the issue of whether Brown had been deprived of property without due process was immaterial.

Brown appealed to the Tenth Circuit,

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