

ORDINANCES

On the Boardwalk: Regulating Tourist-Intensive Areas

by Sophia M. Stadnyk, Senior Associate Counsel

Mark Chase was a self-described "spray paint can artist" and street performer who used quick-drying, gloss-based enamel spray paint to create his paintings in the open air before a live audience. Chase played music during his painting "for inspiration" and to "set a tempo" for his work. He sold these paintings to the public. His venue was a location adjacent to the boardwalk in the seaside resort town of Ocean City, Maryland. The boardwalk, which was several miles long, was lined with shops and other attractions for pedestrians, and was also used to operate a tram, a vehicle that towed several trailers, each of which had 10-15 rows of passenger seating. There were no access restrictions for the public regarding the boardwalk, but since it was a point of access to the beach, it was often congested and crowded with pedestrians.

A fly in the gloss-based enamel spray paint was that various ordinances restricted the activities of peddling, soliciting, hawking or street performing on the boardwalk, prohibited all sales on and near the boardwalk, and established registration requirements. City officials testified that, on a clear summer night, as many as 25 to 40 street performers could be performing at various locations along the boardwalk, some drawing crowds of hundreds of spectators. This caused access and public safety concerns. As a result, the town imposed a "categorical limitation" on selling and commercial activity on the entire boardwalk, on public streets within 75 feet of the boardwalk, and certain additional areas. Second, for public safety reasons, an ordinance specified the locations on the boardwalk where a person could engage in "peddling, soliciting, hawking or street performing"—such activities were restricted to the areas within the extended boundaries of street ends. Third, the Town restricted the manner in which a person could engage in "peddling, soliciting, hawking or street performing." The performers could not conduct sales; set up displays within ten feet of a property entrance or exit or boardwalk tram lane; could not obstruct or block pedestrian or vehicular traffic, entrances, stairways; violate the noise ordinance; set a price or fee or accept same (other than a tip) for observing or participating in a performance; or hand out or distribute any advertising or promotional material. Last, those who came within the business licensing categories and wished to solicit, distribute or peddle "merchandise or commodity upon the streets or sidewalks" had to obtain a license from the City. The ordinance provided for a exemption or permit for an "unlicensed solicitor," which was applied to street performers and those soliciting as part of non-commercial political or religious activities. According to the City, this was included so that police could identify these persons, after an incident in which a performer had allegedly inappropriately touched a child. No license would be granted for sales on the boardwalk, and it was an offence for any person, licensed or unlicensed, to sell anything on the boardwalk or beach. Ocean City did not assign locations to street performers.

Chase sued, seeking an injunction against enforcement, claiming that these ordinances violated his right to free expression, guaranteed by the First Amendment, and Article 40 of the Maryland Declaration of Rights ("every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects"). The ordinances, he claimed, were content-based restrictions on speech because they applied only to certain kinds of speech: peddling, soliciting, hawking and street performing. It was not disputed that the boardwalk was a traditional public forum. (Note, however, that some cases have held that publicly-owned tourist areas are not traditional public fora. *See, e.g., New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 22-23 (1st Cir. 2002), on Boston's Fish Pier, and *Chicago ACORN v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir. 1998), on Chicago's Navy Pier).

The court granted in part, and denied in part, the plaintiff's motion for a preliminary injunction.

Chase's paintings and his public performances of painting were expressive conduct. The restriction of "permitted activities" of hawking, peddling, soliciting, and street performing on the boardwalk was a content-neutral restriction on the time, place, and manner of speech, and was justified by Ocean City's substantial interests in public safety and the free flow of pedestrian traffic. However, the ban on a price or fee (other than a tip) for performing, and the categorical ban on sales on the boardwalk of items created, written, or composed by the vendor and that were inherently communicative, were invalid. These failed intermediate scrutiny, as the restrictions were not narrowly tailored. (In *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009), a passive solicitation rule for street performers was found to be a content-based regulation that did not satisfy strict scrutiny.) There was no evidence as to why sales would affect the "aesthetics of the boardwalk," the ban did not extend to the adjacent brick and mortar businesses, and no adequate alternatives for the expressive conduct were available. However, there was "no free speech concern as to a prohibition on the sale of items that [had] no expressive content and thus [were] not entitled to First Amendment protection."

The registration scheme for "unlicensed

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solicitors" also failed on overbreadth grounds. Based on *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), it broadly restricted speech and failed to strike a balance "between the speech affected and the governmental interests" asserted by the City. The only interest that Ocean City advanced in support of the registration requirement was the need to protect children from potential inappropriate conduct by costumed street performers, and the registration requirement was "vastly overinclusive with respect to the City's stated concerns." The case is *Chase v. Town of Ocean City*, No. ELH-11-1771, 2011 U.S. Dist. LEXIS 102162 (D. Md. Sept. 09, 2011). ML

Code Enforcement

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because the individual was subject to increased penalties without being afforded a hearing to contest the validity of the violation. As a result, I changed our ordinance's penalty provision. Now, it provides for a set minimum fine, and allows an individual to pay a reduced amount if he or she chooses to admit the violation and pay within a short time after the violation date. An individual wishing to contest a violation merely faces the established minimum fine. Since the provision does not automatically increase the fine amount without a hearing, the provision should pass constitutional muster.

Municipalities always struggle to balance the needs of their businesses with the need for parking regulations—namely, how strict should enforcement be if the municipality wants to encourage customers to come downtown and patronize local businesses? Municipalities may address that balance in different ways, but rest assured that, as long as parking regulations exist, *Parking Wars* will continue. Perhaps your best bet is to make violators an offer they can't refuse. ML

Second Look

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facts not within the testifying individual witness' own knowledge.

I believe that we should use the 30(b)(6) deposition to discover the names of those persons employed by, or contracting with, the organization that *do* have personal knowledge of the relevant facts, and then either depose them, or (if within subpoena distance and also within our client's risk tolerance) call them as trial witnesses. Time and rules permitting, one could also use the Rule 30(b)(6) testimony as the basis for requests for admission, and ask that the opposing party be required to pay the expenses of proving any denied facts.

Notes

1. (6) **Notice or Subpoena Directed to an Organization.** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

2. Based on the Advisory Committee notes and the only four decisions under Rule 4.1, I think that the "other process" contemplated by the Rule means court orders for contempt, civil committal or the like. However, nothing in Rule 4.1 excludes using it for serving subpoenas, and one could argue that a "subpoena" is one example of "process." Indeed, prior to the 1993 amendments, Rule 4 referred to "process other than a subpoena ... ":

> In support of the contention that the word "process" in [ERISA] section 502(e)(2) includes a trial subpoena, plaintiff cites to the portion of [former] Rule 4 that states:
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> > *Process, other than a subpoena or a summons and complaint*, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.
>
> [Former] FRCP 4(c)(1) (emphasis added) [now recodified in Rule 4.1, without reference to "subpoena"].
>
> As the passage cited by plaintiff indicates, "process" certainly can include a subpoena. It need not be construed so broadly though, as:
>
> > The word "process" ... as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ.
>
> Black's Law Dictionary at 1085 (West 5th ed 1979). The court accordingly does not find the broad use of the word "process" in Federal Rule of Civil Procedure 4 conclusive on the question of the meaning of "process" in section 502(e)(2) of ERISA.

Martin v. Cont'l Cas. Co., 807 F. Supp. 1359, 1360 (N.D. Ill. 1992).

In any event, we would find out very quickly if the Rule applies to serving subpoenas if we try to use it for that purpose—the Rule requires service by the U.S. Marshals Service or a person specially appointed by the court. I suspect that at least until a court otherwise orders, the Marshals Service will take the position that Rule 4.1 does not apply to subpoenas. A district court probably would grant a motion to appoint a person to make personal service of a subpoena upon a corporation, but not necessarily relying on Rule 4.1. If we sought such order, we should try to include specific instructions on how the organization is to be served. ML

Zoning Decision Immunity

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Chicago Joe's

In the *Chicago Joe's* case, Chicago Joe's submitted an application for a special use permit to operate an adult use facility in the Village of Broadview, Illinois. The District Court for the Northern District of Illinois reviewed whether the Village Trustees were immune from liability for their denial of the permit.[24] In accordance with the Village's zoning ordinance, the Planning and Zoning Commission held a public hearing on the application, and recommended to the Village's corporate authorities, the Village Board of Trustees, that the requested permit be denied. The Board of Trustees