

Code Enforcement

Parking Enforcement, or, I Made Him an Offer He Couldn't Refuse

by David Wesner

Are you a reality TV junkie? I don't consider myself one, but on occasion, I can't help but watch some of the shows that I pass over as I channel surf. The ones that seem to attract my attention the most are those involving some aspect of my position as Corporation Counsel, so I will admit to watching *Parking Wars* on occasion. Parking enforcement is one of those things that bring municipal enforcement officers and the public together in a situation that is made for television. (I have a suspicion that it is more interesting and, sometimes, more humorous, for those of us who are directly involved with parking enforcement than it would be for the casual observer.)

Over the years, the City of Danville has changed how parking in our downtown is enforced. At one time, there was a pedestrian mall downtown, and parking areas around the pedestrian mall involved time-restricted parking spaces, with a parking enforcement officer keeping track of how long vehicles were parked. When the pedestrian mall started to fail, the City decided to remove the mall and put in a through-street. It installed parking meters, ostensibly to make enforcement easier and to collect some revenue to off-set costs. At some time subsequent to that period, the City determined that it was not cost-effective to continue to maintain meters and provide the staff necessary to empty meters and enforce any violations. The meters were removed, and parking downtown was again based on time-restrictions. The enforcement officer would create a chart of the downtown, and make timed rounds through the enforcement area to determine if any vehicles were in violation of the time restrictions. Our enforcement officer had it down to a science: he would reach each location right at the two-hour restriction. The result meant that tickets were issued to individuals who may have been couple of minutes over the two-hour time limit.

My best reality-TV moment was in dealing with an attorney (who was also a bankruptcy trustee), who filed a counter-claim against the City regarding his one parking ticket. (Please keep in mind that the fine for the ticket, had the attorney paid it right away, would have been $3.) However, he chose to fight it and offered two defenses, both of which were novel to me at the time. The first defense was that, by his watch, he was back at his car before the violation time noted on the ticket. I thought about that for a moment and then pointed out to the judge that two hours on any watch was still two hours. I think the attorney's second defense, evidenced by his counter-claim, sealed his fate. The counter-claim was that the City's enforcement activities violated the Racketeer Influenced and Corrupt Organizations Act, RICO. I started to use my best Marlon Brando voice to suggest that whoever goes against the family will swim with the fishes. Without me having to say a word, though, the judge read the riot act to the attorney and declared the counter-claim to be frivolous. He awarded the City attorney's fees for having to deal with it. The attorney ultimately paid a substantial fine, costs and attorney's fees, which made his wallet about $200 lighter.

I have faced a couple of situations that I think other municipal attorneys may face or have faced, which resulted in changes to our parking ordinance. The first situation involved the use of the parking spaces in the downtown area (and particularly a two-block area) by downtown employees. For example, one large employee group would park in the spaces and move their vehicles to the next open spaces right at the two-hour time limit. The result left the businesses with either no spaces for customers or very limited spaces. The business owners approached the City for help in keeping employees from taking customer parking spaces during working hours. We considered their request and created a provision which specifically prohibited employees and business owners, operating and employed in the Special Service Area (downtown businesses), from parking in a four-block area in the downtown. We also made the penalty for a violation higher than that for other violations. The provision has had that for the desired effect of keeping employees from taking spaces away from customers. For the record, those employees had employer-provided rental spaces, which they weren't using because the walking distance was a little bit further for these parking spaces.

The second situation was more serious and related to the penalty provision in the ordinance. Historically, the City's ordinance provided that the fine for a violation would start at a minimal amount, then provided that if the initial fine amount was not paid within certain time periods (there were two such periods), the fine would automatically increase after each period. If the fine remained unpaid after the expiration of the last period, the ticket was turned over to my office for prosecution.

During the prosecution, the individual had the opportunity to contest the ticket. However, if the individual was found guilty, he or she would be subjected to the increased fine amount, which meant that the individual would have no option to pay the initial minimal fine amount if they wanted to contest the violation. This scenario may have been common in ordinances as a way to convince individuals to pay tickets quickly. However, several years ago, this type of penalty procedure was declared unconstitutional

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Ordinances

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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

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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"].
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> 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.
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> 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