International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 19 – October 23, 2014

Speech: Possibility of Prior Restraint Gives Billboard Company Standing in Facial Challenge to Massachusetts Permitting Law

Van Wagner Boston LLC v. Davey, No. 13-2087 (1st Cir. Oct. 20, 2014).

The First Circuit has reiterated its position that, in a First Amendment case, plaintiffs have standing based on injury due to the mere possibility of prior restraint, without having to demonstrate actual instances of restraint.

Massachusetts' outdoor advertising regulatory scheme, most recently amended in 2012, requires advertisers to obtain a license and a permit in advance of erecting a billboard or outdoor ad. The regulations vest authority to issue licenses and permits in the Commonwealth's Director of Outdoor Advertising, who may withhold a permit, in his sole discretion, upon a determination that a given sign "would not be in harmony with or suitable for the surrounding area or would do significant damage to the visual environment." The Director may--but is not required to--take into account the physical characteristics of the sign and the locality, the potential impact on scenic beauty and the "health, safety and general welfare of the public."

When issued, permits are for a fixed period and are subject to revocation or non-renewal by the Director at any time, based on a variety of factors, including violations of law, false statements, detriment to the community or environment, and other considerations, "without limitation."

Plaintiff Van Wagner, an affiliate of the nation's fourth largest outdoor advertising company, had operated successfully under the Massachusetts regulatory scheme. However, it lobbied against the 2012 amendments and once they were passed brought suit under Section 1983, arguing that the Massachusetts regulations (1) constituted a facial violation of the First and Fourteenth Amendments as a prior restraint on protected speech and (2) contravened various state laws.

The Commonwealth moved to dismiss under FRCP 12(b)(1) for lack of subject matter jurisdiction. The Federal District Court agreed, dismissing Van Wagner's complaint for lack of standing.

HELD: On appeal, the First Circuit reversed, finding that Van Wagner's complaint alleged sufficient prospective interference in First Amendment rights to overcome a standing-based challenge.

DISCUSSION: Article III limits federal courts to adjudicating "actual cases and controversies." A plaintiff's standing is a prerequisite for an "actual case or controversy" to exist, meaning that the plaintiff has sustained an injury, which was caused by the defendant, and which is likely to be redressed by the relief sought.

Here, the issue was whether Van Wagner had sustained a redressable injury. The District Court had found in the negative, noting the advertising company had applied for more than 70 permits since 2009—without a single one being denied by the Commonwealth. The seminal precedent in the arena of facial challenges to prior restraint of constitutionally-protected speech was *City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750 (1988). In *City of Lakewood*, the Mayor had unbridled discretion to regulate the grant of permits for placement of newspaper racks. The Supreme Court found that, where such discretion existed, one who is subject to the law may challenge it facially, without the necessity of applying for, and being denied, a license." (citation omitted). The mischief arising from such prior restraint is two-fold. First, it creates the prospect of self-censorship as applicants limit their expression in the hopes of being granted a permit. Second, it allows for *ex post facto* rationalization by the permitting authority, making meaningful scrutiny of its actions by a third party virtually meaningless—it can easily shift criteria or apply illegal criteria to the permitting process.

Citing similar rulings handed down by the Second, Sixth, Ninth and Eleventh Circuits, as well as its own precedent, the First Circuit found the requisite grounds for injury: "It is being subject to a prior restraint on protected expression through requirements embodying standardless discretion, not being harmed by the unfavorable exercise of such discretion, that causes the initial injury." The Circuit Court did not accept the Commonwealth's argument that, because the permitting process did not require advance disclosure of the proposed billboard content, it did not violate *City of Lakewood.*

http://media.ca1.uscourts.gov/pdf.opinions/13-2087P-01A.pdf (last accessed Oct. 21, 2014)