International Municipal Lawyers Association
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IMLA NEWS
Issue 10 – October 3, 2024

FEATURED CASES

Eleventh Circuit Overhauls Public Forum Doctrine

***McDonough v. Garcia*, No. 22-11421 (11th Cir. Sept. 16, 2024).**

The Eleventh Circuit addressed the First Amendment rights of a citizen banned from city council meetings after a confrontational incident. The court held that city council meetings are limited public forums, where speech restrictions must be viewpoint neutral and reasonable in light of the forum's purpose. This decision is significant because it resolved conflicting circuit precedents, explicitly overruling prior cases that had treated such meetings as designated public forums subject to stricter scrutiny. By aligning the circuit's public forum doctrine with recent Supreme Court decisions, the ruling provides clearer guidance for lower courts and local governments in the Eleventh Circuit on how to analyze and implement speech restrictions in government-sponsored forums.

Background:

James McDonough regularly attended city council meetings in Homestead, Florida, where members of the public were invited to speak for three minutes on matters "pertinent to the City." At a July 2016 meeting, McDonough confronted a city councilman during his comments, which Sergeant Garland Wright perceived as a threat. Wright ordered McDonough to leave the meeting. At the next month's meeting, McDonough was informed he had been banned from City Hall, including council meetings. When he attempted to attend anyway, he was arrested for disorderly conduct.

McDonough filed a § 1983 lawsuit against the City of Homestead and several police officers, alleging violations of his First and Fourteenth Amendment rights. The district court granted summary judgment for the defendants. On appeal, a panel of the Eleventh Circuit affirmed in part and reversed in part, analyzing the city council meetings as a designated public forum. The full Eleventh Circuit then voted to hear the case en banc to resolve conflicting circuit precedents regarding public forum analysis.

Question of Law:

What type of public forum are the City of Homestead's city council meetings, and what legal test applies to speech restrictions within that type of forum?

Holding:

The Eleventh Circuit held that the Homestead city council meetings are limited public forums. In such forums, restrictions on speech must be viewpoint neutral and reasonable in light of the purpose served by the forum.

Analysis:

The court began by tracing the evolution of public forum doctrine at the Supreme Court level. It explained that in *Perry Education Association v. Perry Local Educators' Association* (1983), the Supreme Court initially outlined three categories of public forums: traditional public forums, designated public forums, and nonpublic forums. However, in *Rosenberger v. Rector & Visitors of University of Virginia* (1995), the Court introduced a fourth category - the limited public forum - which was further solidified in *Good News Club v. Milford Central School* (2001).

The court then examined its own precedents, noting that they had not always aligned with the Supreme Court's evolving doctrine. In particular, the court highlighted the inconsistency between *Jones v. Heyman* (1989) and *Rowe v. City of Cocoa* (2004), which treated city commission meetings as designated public forums subject to strict scrutiny, and later cases like *Bloedorn v. Grube* (2011), which applied the more lenient reasonableness standard to limited public forums.

To resolve this conflict, the court explicitly overruled its prior precedents that were inconsistent with the Supreme Court's current approach. It held that the Supreme Court's decisions in *Rosenberger, Good News Club, and Christian Legal Society v. Martinez* (2010) had supplanted the outdated rules from *Jones* and *Rowe*.

Applying the current Supreme Court framework, the court determined that Homestead's city council meetings are limited public forums because they restrict speech to matters "pertinent to the City." This content-based restriction defines the scope of the forum, making it a limited rather than designated public forum.

The court emphasized that in limited public forums, restrictions on speech must be viewpoint neutral and reasonable in light of the forum's purpose, citing *Good News Club* and *Christian Legal Society*. This standard is more permissive than the strict scrutiny applied to traditional and designated public forums.

In reaching its conclusion, the court also considered and rejected arguments from the State of Florida (as amicus curiae) that would have given the government even broader discretion to control speech in public forums. The court expressed concern that adopting such an approach could undermine First Amendment protections.

The court remanded the case to the panel to apply the limited public forum standard to the specific facts of *McDonough's* case.

Judge Abudu concurred with the majority opinion but wrote separately to express concerns about granting public officials too much discretion in restricting speech in government-owned spaces. The concurrence emphasizes the importance of preserving the "marketplace of ideas" for public discourse, citing Justice John Marshall Harlan's warnings from *Cohen v. California* about the dangers of courts becoming a tool for advancing authoritarianism through increased speech restrictions.

McDonough v. Garcia

This feature case summary was guest written by Best Best & Krieger LLP

Ninth Circuit Releases the Long-Awaited Decision on Wireless Facility Modifications

The United States Court of Appeal for the Ninth Circuit recently released its long-awaited decision in *League of California Cities v. FCC*, Case No. 20-72749, governing when federal law requires localities to approve certain types of modifications to existing wireless facilities known as an eligible facilities request (EFR). This decision is a critical reminder to local governments to review their wireless siting application procedures for compliance with federal law in order to protect local permitting conditions as much as possible when receiving an EFR. The case arose from a local government challenge to the FCC's interpretation of its EFR rules (codified at 47 C.F.R. § 1.6100 *et seq.*), which implement Section 6409(a) of the Middle Class Tax Relief Act of 2012 (codified at 47 U.S.C. § 1455(a)).

Local governments prevailed on two key issues in the Ninth Circuit: 1) overturning the FCC's misinterpretation of the term "conceal"; and 2) limiting the FCC's attempt to end-run the requirements of the Administrative Procedure Act (APA). The Ninth Circuit otherwise upheld the FCC's ruling implementing Section 6409 that:

- requires express evidence to enforce a claimed pre-existing permitting condition within the 6409 process;
- gives localities less discretion as to when the Section 6409 shot clock begins;
- imposes no total cumulative limit on the number of additional cabinets attached to poles; and
- permits greater height increases than previously allowed.

Concealment receives greater protection. Localities successfully persuaded the court to overrule the Commission's misinterpretation of the concealment provisions of the FCC's EFR rules —invalidating the FCC's ruling that the term "conceal" means only "disguise" to the exclusion of "hide." The Ninth Circuit decision thereby protects permitting conditions that would hide wireless installations, not only conditions that would make an installation look like something else, such as a pine tree, flag pole, or chimney. As the court noted, the correct definition of concealment is significant because such elements receive greater protection than other permit conditions under 47 C.F.R. § 1.6100(b)(7)(v).

Localities must document permitting conditions to preserve them. On the other hand, the court upheld the FCC's ruling that pre-existing permitting conditions on a wireless facility are not enforceable against an EFR unless there is "express evidence that at the time of [the original] approval the locality required the feature and conditioned approval upon its continuing

existence." *It is critically important, therefore, that localities document concealment and any other condition at the time the original siting approval is granted.*

Federal rules fix the start of the 60-day deemed granted shot clock. If a locality fails to respond to an EFR within 60 days, it is deemed granted pursuant to federal law. 47 C.F.R. § 1.6100(c). The court upheld the FCC's decision that the EFR shot clock begins when an applicant both (1) takes the first procedural step that the local jurisdiction requires, and (2) submits written documentation showing that a proposed modification is an eligible facilities request. Under this rule, a locality that wishes its own application form to be the first procedural step in triggering the shot clock should adopt such a form and require that an application must be made on that form.

The court permits proliferation of cabinets and equipment. The Ninth Circuit upheld the FCC's equipment cabinet rule, concluding that there is no cumulative numeric limit on the number of additional cabinets that may be attached to poles under the FCC's rules. The court also affirmed that a single piece of equipment in its own housing does not count toward the cabinet limit. The court did grant localities some flexibility to prevent attempts to evade the cabinet modification limit by an applicant's artificially "splitting" its requests into smaller portions.

More expansive limits on permitted height increases upheld. The court upheld the FCC's interpretation that the height limitation—which, in part, requires approval of any change that does not increase the height of a tower by more than 10%—excludes the height of the new antenna itself and applies only to the separation between the top of an existing antenna array and the bottom of a new antenna array.

FCC must comply with the Administrative Procedure Act. The court also found the FCC cannot end-run the requirements of the APA by using a declaratory ruling where a full notice and comment rulemaking is needed. The court's opinion recognized the FCC could not adopt an interpretive ruling and then, after the fact, argue the less formal proceeding was sufficient to adopt new rules. The Ninth Circuit decision provides local governments with an important tool to press against the FCC if it attempts similar misbehavior in the future.

BBK represented more than 20 clients, filing on behalf of City of Boston, *et al.*, and argued the case in San Francisco on July 11, 2023.

The world of FCC compliance can be difficult to navigate. In the wake of the Ninth Circuit's decision, we recommend that local governments seek guidance to ensure local procedures are sufficient to protect the local permitting process as much as possible under the federal rules.

League of California Cities v. FCC

SHORT SUMMARIES:

4th Cir. – Discrimination – Settlement – Firefighters

Sylivia Smith-Phifer and Lance Patterson, both Black firefighters with over 20 years of service in the Charlotte Fire Department, sued the City of Charlotte for discrimination. During litigation, both plaintiffs attempted to settle their claims. Smith-Phifer signed a written settlement agreement, while Patterson engaged in email negotiations but never signed a formal

agreement. On appeal were two questions: 1) whether an evidentiary hearing was required to determine if Patterson and the City reached a complete settlement agreement and 2) whether the City breached its settlement agreement with Smith-Phifer by not treating the payment as pension-eligible under the Charlotte Firefighters Retirement Systems Act.

The Fourth Circuit vacated the district court's order enforcing Patterson's purported settlement agreement and remanded for an evidentiary hearing. However, it affirmed the district court's order enforcing Smith-Phifer's settlement agreement against the City.

Regarding Patterson, the court found that factual disputes over the existence and terms of an agreement required an evidentiary hearing. The court noted ambiguities in the email exchanges and unresolved questions about material terms like sick leave hours.

For Smith-Phifer, the court determined that a valid written agreement existed. The dispute centered on whether the City breached the agreement by not treating a settlement payment as pension-eligible. The court interpreted the agreement's requirement for "all applicable deductions" to include legally mandated deductions like pension contributions.

The court analyzed the Charlotte Firefighters Retirement Systems Act and relevant case law to conclude that Smith-Phifer's settlement payment constituted "Compensation" under the Act. As such, it required a pension deduction. By not making this deduction, the City breached the agreement.

The court emphasized that the parties' specific intent regarding pension eligibility was irrelevant; what mattered was the ordinary meaning of the contract terms and the legal requirements under the Act. Consequently, the court affirmed the district court's order requiring the City to reissue Smith-Phifer's payment with the proper pension deduction.

Smith-Phifer v. City of Charlotte

6th Circuit – Age Discrimination – Disparate Treatment – Hostile Work Envir.

Gary McNeal, a 61-year-old police officer with over 33 years of law enforcement experience, was terminated from the Blue Ash Police Department in 2018 after 17 years of service. McNeal claimed he faced increased scrutiny, discipline, and humiliation in his final years, alleging age discrimination. He filed suit against the City of Blue Ash, City Manager David Waltz, and Police Chief Scott Noel, asserting claims of disparate treatment and hostile work environment under the Age Discrimination in Employment Act (ADEA).

The Sixth Circuit affirmed the district court's grant of summary judgment on McNeal's disparate-treatment claim regarding his termination. However, the court reversed the district court's decision on McNeal's hostile work environment claim against the City of Blue Ash, allowing that claim to proceed.

On the disparate-treatment claim, the court found that McNeal failed to show that age was the "but-for" cause of his termination. The court noted that McNeal's untruthfulness during an investigation, which impaired his ability to testify credibly in court, was a legitimate, non-discriminatory reason for his dismissal.

Regarding the hostile work environment claim, the court determined that McNeal presented sufficient evidence for a reasonable jury to conclude he was subjected to age-based harassment that was severe or pervasive enough to alter the conditions of his employment. The court considered various factors, including alleged disproportionate discipline, increased scrutiny, and testimony from other officers supporting McNeal's claims. The court emphasized that while individual incidents might seem minor, the totality of circumstances could support a hostile work environment claim.

The court also clarified the application of discrete acts in hostile work environment claims, allowing consideration of acts that contribute to the alleged environment of harassment, even if they might be independently actionable.

McNeal v. City of Blue Ash

7th Circuit – State Created Danger

If anything, this case confirms that the law regarding state created danger remains unsettled. A fight erupted between a woman and her estranged husband in the street near a house where their children were staying. When the police arrived to deal with the conflict the wife told them that her husband was drunk, had access to weapons at their house and was threatening to kill her, the children and himself. The officers convinced the husband to get help and transported him to a hospital. The body camera recording reflect that the woman asked if he would be held, and the officers seemed to confirm that he'd be held for 24 hours and instructed her to get the weapons and secure them. Because this was a voluntary commitment, the man decided to leave and went to the common home and killed his wife and himself. In a report written after the fact, one of the officers prepared a report that described an interaction with the wife at the police station in which the officer described telling her that he could not guarantee that her husband would be held at the hospital and that she should secure the weapons and find a safe place to stay. Her estate sued and the lower court ruled in favor of the officers. The panel split 1-1-1. One member reversed as to all defendants; one member affirmed as to all defendants; and the third member reversed as to one officer and affirmed otherwise. To understand the difficulty each had applying the law to the facts, you'll need to read the opinion. Will the court agree to an *en* banc review?

Rakes v. Roederer