NOT FOR PUBLICATION

84-3675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEW YORK TIMES COMPANY,	)	
	)	
Plaintiff-Appellant,	)	On Appeal from the United States
	)	District Court for the Northern
v.	)	District of Ohio.
	)	
CITY OF LAKEWOOD,	)	
	)	
Defendant-Appellee.	)	

Decided and Filed: _____

BEFORE: KEITH and KENNEDY, Circuit Judges; and UNTHANK*

PER CURIAM: Appellant, The New York Times ("The Times"), appeals an order of the district court denying a preliminary injunction against the City of Lakewood ("City"). The Times filed this action against the City for declaratory and injunctive relief to establish The Times' First Amendment right to distribute newspapers on City streets by means of coin-operated newsracks. For the following reasons we affirm the district court's denial of appellant's motion for preliminary injunction.

I.

The appellant is the publisher of The New York Times, a newspaper of general circulation, with readership throughout the United States. In January of 1984, the Times began an effort to broaden the distribution of the national edition of the Times in the Cleveland area. The City of Lakewood is located immediately to the west of

*Honorable G. Wix Unthank, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Cleveland. The ordinances of the City of Lakewood prohibit placement of newsracks in any residential use district, including the City's principal street, Clifton Boulevard. Section 901.181 of the City Ordinances also requires a permit and rental fee before a newspaper box is placed anywhere else in the City. Despite knowledge of these ordinances, the Times placed newsracks on Clifton Boulevard.

This action commenced after the City seized newsracks placed by the Times along Clifton Boulevard and after the City filed forty-two criminal complaints accusing the Times of violating City zoning and licensing ordinances that ban newsracks in all residentially zoned areas of the City. This action was consolidated with Plain Dealer Publishing Company v. City of Lakewood, which involved similar questions of law and fact. The trial of Plain Dealer and the Times' motion for preliminary injunction were both heard on the merits.

On July 12, 1984 the district court entered judgment for the City in the Plain Dealer case. The court held that all the relevant City ordinances were constitutional and entered judgment for the City. On the basis of the finding of fact and conclusions of law in the Plain Dealer case, the district court found that there was no probability that the Times would succeed on the merits of its suit. Therefore, the court denied the Times' motion for preliminary injunction.

II.

The issue on appeal concerns the constitutionality of Sections 902.18, 901.181 and 901.99 of the Codified Ordinances of the City of Lakewood regarding the placement of newsracks in residential districts. The Times argues that the "public forum" doctrine requires this Court to reverse the district court decision for the City. We affirm the district court's decision under the doctrine of abstention.

The doctrine of abstention permits federal courts to decline or postpone the exercise of jurisdiction pending the state court's opportunity to decide the case. Colorado River Water Conservation District v. United States, 424 U.S. 800, 813, reh'g.

denied, 426 U.S. 912 (1976). However, abstention is a narrow and extraordinary exception to the duty of the federal courts to adjudicate matters which are correctly before it. Id. We believe the doctrine of abstention should be applied here.

The Supreme Court in Younger v. Harris, 401 U.S. 37 (1971) held that absent extraordinary circumstances, a federal court is precluded from enjoining a pending state criminal proceeding. However, Younger approved the possibility of federal injunctive relief in extraordinary circumstances:

> . . . **(1)** Where irreparable injury is both "great and immediate," Younger, 401 U.S. at 46 . . .; **(2)** Where the state law is "flagrantly and patently violative of express constitutional prohibitions," Id. at 53, . . .; and **(3)** where there is a showing of "bad faith, harassment, or other unusual circumstances that would call for equitable relief." Id. at 54. . . .

Ada-Cascade Watch Co., Inc. v. Cascade Resource Recovery, 720 F.2d 897, 902 n.2 (6th Cir. 1983).

In the present case, the Times presented no evidence at the trial pertaining to irreparable injury. The only evidence in the record pertaining to possible irreparable harm are affidavits which state that "cost effectiveness of the newsboxes helps keep the cost of the paper as low as possible" and that "if the Times is not permitted to maintain newspaper vending machines . . . sales will be diminished. . . ." With a daily circulation of 930,000 papers, we find it difficult to believe that the Times suffered "great and immediate" irreparable injury caused by the City's prohibition of eight newsracks within the residential zones of the City.

Next, the Times does not indicate how the City's ordinances are "flagrantly" violative of "express constitutional prohibitions." Nor can any flagrant violations be construed from the City's Ordinances. Finally, there has been no allegation nor any proof of bad faith prosecution. Consequently, we find that the present case falls within the Younger doctrine of abstention.

Accordingly, we abstain from deciding the issues presented by the Times and affirm the decision of the District Court.

PANEL REPORT

DATE: **Thursday, December 2, 1985 - Courtroom No. 1**

PANEL: **KEITH, KENNEDY and UNTHANK**

No. 84-3675
New York Times Company v. City of Lakewood
N. D. Ohio - White, J.

Attached hereto is a proposed per curiam in the above-entitled matter for the special attention of Judges **Kennedy** and **Unthank.** This per curiam is **not** for publication.

DAMON J. KEITH

DJK/gct
Enclosure

cc: All Judges
B. Eggemeier

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

June 13, 1986

Honorable Damon J. Keith
United States Court of Appeals
for the Sixth Circuit
Detroit, MI 48226

Re: Nos. 84-3683/84-3722
Plain Dealer Publishing Co. v. City of Lakewood
heard 12/5/86

Dear Judge Keith:

I concur in your proposed opinion in this case, as revised. I do believe, however, that on page 15, in the fifth line, "However" should now be "Furthermore."

As I stated on the phone, I think we can correctly state that Judge Unthank concurs in the opinion with the exception of the holding regarding insurance or indemnity requirements. As you requested, I have, from his letter, drafted such a concurrence.

Sincerely,

Cornelia G. Kennedy

CGK:cm

Enclosure

cc: Honorable G. Wix Unthank

Nos. 84-3683/84-3722, Plain Dealer Publishing Co. v. City of Lakewood

UNTHANK, District Judge, concurring. I concur in the opinion of the Court with the exception of the holding that the insurance or indemnity requirements of the Lakewood ordinance violate the First Amendment. I consider them legitimate and reasonable provisions for the protection of the city from liability. The fact that the city does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services.

Chambers of
G. Wix Unthank
Judge
Pikeville, Kentucky 41501

United States District Court
FOR THE
Eastern District of Kentucky

May 2, 1986

Honorable Damon J. Keith
Circuit Judge, United States Court of Appeals
for the Sixth Circuit
U. S. Courthouse
Detroit, Michigan 48226

RE: Nos. 84-3683/84-3722
Plain Dealer Publishing Co. v. City of Lakewood

Dear Judge Keith:

In the absence of Judge Unthank, a law clerk reviewed the revised opinion in the above-captioned case and it appears that two revisions should be made. On page 11, Title "B" reads "Distretion" when in fact it should read "Discretion". Also, on page 12, footnote 7, reads ". . . . also be constitutional", perhaps that should read ". . . . also be unconstitutional".

Very truly yours,

Mary E. Mayfield

Mary E. Mayfield
Administrative Secretary

cc: Judge Kennedy

mem

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

April 28, 1986

Honorable G. Wix Unthank
U.S. District Court
Eastern District of Kentucky
P.O. Box 278
Pikeville, Kentucky 41501

Re: **Nos. 84-3683/84-3722**
Plain Dealer Publishing Co. v. City of Lakewood
Heard: 12/5/85

Dear Judge Unthank:

Thank you for your comments and suggestions in your letter dated April 17, 1986. Attached hereto is the revised opinion in the above-captioned case, incorporating your suggestions concerning the impermissible provision of the Architectural Board of Review and severance of the provision banning newsracks in residential areas. However, I do not agree with your suggestion that the insurance and indemnity requirements are constitutional, for the reasons stated in the proposed opinion.

Your comments and/or suggestions will be appreciated.

Very truly yours,

Damon J. Keith

DJK/cw
Attach.

cc: J. Kennedy

FOR PUBLICATION

84-3683
84-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING CO., Plaintiff-Appellant Cross-Appellee, v. CITY OF LAKEWOOD, Defendant-Appellee, Cross-Appellant.	)	On Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed _____

BEFORE: KEITH and KENNEDY, Circuit Judges; and UNTHANK*, District Judge.

KEITH, Circuit Judge. Appellant Plain Dealer Publishing Company challenges the constitutionality of a municipal ordinance that regulates the placement of newspaper dispensing devices ("newsracks") on the city streets of Lakewood, Ohio. Plain Dealer filed the instant action against the City of Lakewood ("City") after being denied permission to place its newsracks on City property pursuant to Section 901.181 of the Lakewood Codified Ordinances as amended. On July 12, 1984, the district court entered judgment for the City with court costs assessed against the City. For the following reasons, we affirm in part and reverse in part.

I.

FACTS

The Plain Dealer daily newspaper is distributed as a publication of general circulation throughout the Cleveland Metropolitan area and Ohio. Generally, Plain Dealer newspaper sales are 77 percent by home delivery through carriers and 80 percent on Sundays by home delivery. The balance of the sales are by single copy through

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*Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

retail outlets and coin-operated vending boxes, the latter constituting 23 percent of the single copy sales, or 4.6 to 5.27 percent of total sales.

The City of Lakewood is approximately 5.5 square miles. It is an older residential community located in Cuyahoga County, Ohio, west of Cleveland. In 1980, the population of the City was 61,963. Lakewood has historically been a city of homes. The commercial areas of the City are located essentially along Madison and Detroit Avenues, conveniently close to all residential areas of the City. There is no area within the City more than one-quarter mile from an all-night newspaper outlet.

In May 1982, Plain Dealer sought permission from the City Law Director to place coin-operated newsracks at sites within the City. The various sites included the commercial areas along Madison and Detroit Avenues and the residential areas along Clifton Boulevard. The City Law Director denied the request citing Section 901.18 of the Lakewood Codified Ordinances which provided at that time:

> **901.18** ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.
>
> No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

Plain Dealer filed suit eight months later on January 5, 1983, attacking the constitutionality of Section 901.18. On August 18, 1983, the district court granted plaintiff's motion for summary judgment ruling the ordinance provision was an unconstitutional exercise of police power, and that it banned a reasonable means of newspaper distribution. The court ordered a permanent injunction for sixty (60) days in order to give the City an opportunity to enact constitutional provisions regulating placement of newsracks on public property.

On October 17, 1983, the City amended Section 901.18 to permit erection of a structure on public property with the consent of the City where permitted by city or state law. Under the amended ordinance, Plain Dealer would have to apply to the

Mayor for a rental agreement or permit. After initial enactment of the amended ordinance, the City re-examined Plain Dealer's objections to the ordinance and on January 3, 1984, issued the amended ordinance. Section 901.181,[1] as amended, provides

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[1]**901.181** NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

(a) The term "newspaper dispensing device" as used in this Section, shall mean a mechanical, coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6) inches distant therefrom or near and parallel to the curb not less than eighteen (18) inches and not more than twenty-four inches distant from the curb at such locations applied for and determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01. Provided further, however, that no newspaper dispensing device shall be placed, installed, used or maintained:

(1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet;

(2) within five (5) feet of any fire hydrant or other emergency facility;

(3) within five (5) feet of any intersecting driveway, alley, or street;

(4) within three (3) feet of any marked crosswalk;

(5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;

(6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and

that the Mayor may grant a rental permit application upon payment of a $10.00 rental fee for each site, submission of a certificate of insurance and compliance with the

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(cont.)

(7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be Ten Dollars ($10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars ($100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

(d) . . . .

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds

appearance and architectural standards set by the Architectural Board of Review. Under subsection (c)(7) of the amended ordinance, however, the Mayor may subject an application to any additional conditions he or she deems necessary. The amended code would permit Plain Dealer, upon application, to place newsracks at locations it requested on Madison and Detroit Avenues in the commercial district, but not along Clifton Boulevard in the residential use districts.

After the City had amended the regulatory scheme twice, Plain Dealer filed its amended complaint challenging the constitutionality of the regulatory scheme. Trial was scheduled on April 11, 1984, to hear Plain Dealer's request for preliminary and permanent injunction.

There was evidence at trial that although Plain Dealer made no application for a permit, it had intended to place newsracks at eighteen locations in Lakewood, eight of which were located in residential districts on Clifton Boulevard. The district court concluded the amended ordinance was constitutional and entered judgment for the City. On appeal, Plain Dealer argues that Sections 901.18 and 901.181 should be declared unconstitutional because they impose prior restraints on the freedom of press by requiring permits and the payment of rental fees, absolutely ban newsracks in residential districts, and impose unduly burdensome procedures for compliance. Essentially, this appeal analyzes the constitutionality of the Mayor's power to grant or refuse permits, the constitutionality of the Architectural Board of Review's power to approve the designs of newsracks, the insurance requirement and the absolute ban in residential districts of

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(cont.)

> for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified hereinabove. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

newsracks.[2] We reverse the district court decision in part because Sections 901.18 and 901.181 unconstitutionally give the Mayor unlimited discretion in denying permits; unconstitutionally provides the Board with standardless discretion in approving newsrack designs; and unconstitutionally requires applicants to provide insurance to the City. However, we affirm the the remainder of the district court's decision, specifically holding constitutional that part of the ordinance banning newsracks in all residential areas.

II.

ANALYSIS OF ORDINANCE

A. Provision Giving Mayor Unbridled Discretion To Grant Or Deny Permit Is Unconstitutional

The right to distribute newspapers by means of newsracks is protected by the First Amendment to the United States Constitution. Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 673 (11th Cir. 1984); see Lovell v. Griffin, 303 U.S. 444 (1938); see also, Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971). Laws which vest municipal officials with unguided discretion to grant or deny a newsrack license or permit "do not regulate with [the] narrow specificity" required by the First Amendment. Association of Community Organizations for Reform Now, (ACORN) v. Municipality of Golden, Colorado, 744 F.2d 739, 746 (10th Cir. 1984). The Supreme Court in Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 104 S. Ct. 2839 (1984) stated:

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[2]However, we do not specifically discuss each issue raised by Plain Dealer because they are not dispositive of the ultimate determination of this case. For example, we believe the imposition of a rental fee withstands constitutional scrutiny.

> But even if the Secretary were correct, and the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech . . . . Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State.

104 S. Ct. at 2851 n.12 (citations omitted); See also, Fernandes v. Limmer, 663 F.2d 619, 631 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982) (holding unconstitutional ordinance that gave executive director excessive discretion in deciding whether the grant of a permit would be detrimental to the public). Thus, in order to qualify as narrowly tailored, a content neutral ordinance must avoid vesting city officials with discretion to grant or deny licenses, for

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958); See also, Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 151 (1969).

In Staub, the Supreme Court struck down an ordinance under which the Mayor and the City Council had the discretion to grant or deny a permit. 355 U.S. at 321. The Court held that the ordinance on its face imposed an unconstitutional prior restraint because it authorized the Mayor and the Council to refuse or to grant a permit in their uncontrolled discretion. Id. at 325. Similarly, in Shuttlesworth, the Supreme Court refused to uphold a conviction for demonstrating without a permit because the City Commission had virtually unbridled discretion to grant or deny the permit.

We find that the City of Lakewood's ordinance unconstitutionally permits the granting of permits to be contingent upon the Mayor's unbridled discretion. Section 901.181(c)(7) provides that a rental permit is granted upon "terms and conditions deemed necessary and reasonable by the Mayor." It is clear from subsection (c)(7) that the Mayor is vested with unlimited discretion to grant or deny a permit and make it subject to any conditions he may choose. Furthermore, although the language of the ordinance limits the conditions under which the Mayor may grant a permit, it does not contain any standards for the Mayor to use when denying a permit. Consequently, the ordinance's restriction is not narrowly tailored to serve a significant government interest. See Shuttlesworth, 394 U.S. 147.

The Supreme Court has repeatedly struck down ordinances which condition the exercise of First Amendment activities on the broad discretion of local officials, resulting in virtually unreviewable prior restraints on First Amendment rights. Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948). When a city allows an official to ban a means of communication through uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. Saia, 334 U.S. at 562.[3] The constitutional problem here lies in the very existence of such unfettered discretion.

The City argues that the Mayor can refuse a permit only "upon health and safety reasons". Although municipalities may enact laws in furtherance of the public health and safety, the City is incorrect in its argument for two reasons. First, no language appears in the ordinance specifically limiting the Mayor's power to refuse a permit for

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[3]Saia involved a city ordinance which prohibited the use of a sound amplification device without the permission of the police chief. Other licensing systems which are similar have been held unconstitutional prior restraints on speech because they vest broad discretion in granting or withholding a permit upon broad criteria unrelated to proper regulation of public places. See Shuttlesworth v. City of Birmingham, 394 U.S. at 153; See also, Kuntz, 340 U.S. 290.

health and safety reasons.[4] The district court ruled the City's evidence of such a standard was inadmissible. Second, if health and safety or other legitimate concerns are what the City seeks to address, the language of the ordinance should be limited accordingly. See Wulp v. Corcoran, 454 F.2d 826, 834 (1st Cir. 1972). An ordinance providing for unguided governmental discretion is inherently inconsistent with a valid time, place and manner regulation because it provides for potential suppression of a particular point of view. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

The district court held that application and appeal procedures pursuant to Section 901.181(e) and Ohio Revised Code Chapter 2506 provide an adequate remedy for any wrong alleged by Plain Dealer.[5] The "adequate state remedies" include the application for a permit, appeal to City Council and appeal to the court of common pleas under Chapter 2506 of the Ohio Revised Code. However, these procedures require Plain Dealer to apply for a permit and appeal any denial prior to placing newsracks on the sidewalks and subject acquisition of the permit to standardless administrative discretion. The fact that the ordinance provides an appeal process does not cure the unconstitutionally broad discretion it accords the Mayor to impose prior restraints on First Amendment rights. Consequently, the district court erred in concluding that these remedies are adequate.

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[4]Section 901.181(b) states that in determining the location of the newsracks the Mayor should not cause an undue health or safety hazard. However, the language does not state that the Mayor can only refuse a permit for health and safety reasons.

[5]The district court relied upon Parratt v. Taylor, 451 U.S. 527 (1981), and Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), cert. denied, ____ U.S. ____, 105 S.Ct. 125 (1984), which hold that actions for money damages cannot be brought under 42 U.S.C. Section 1983 if there are adequate remedies at state law. However, these cases are distinguishable to the instant case in that this case is not an action for money damages under Section 1983. It is an action for declaratory and injunctive relief from an ordinance which allegedly abrogates First Amendment rights.

The City argues that under the holdings of Greer v. Spock, 424 U.S. 828 (1976), and Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984), Plain Dealer cannot attack the ordinance because the newspaper has never applied for a permit. We are not persuaded by this argument. In Greer, the Supreme Court upheld Fort Dix regulations banning partisan political speeches and demonstrations and prohibiting the distribution of any literature without the prior written approval of a commanding officer. An Army regulation specified that the commander could only disapprove publications presenting an apparent danger to military morale, loyalty or discipline. Id. at 840. The Court in Greer specifically considered the facial validity issue and held that the regulations at issue were constitutional on their face because they applied to a federal military reservation, not a traditional public forum. Greer, 424 U.S. at 838. Having found the regulations facially valid, the Court held that it would not reach the question of unconstitutional application because no approval had been sought from the appropriate authorities. In the instant case, Plain Dealer challenges the facial validity of Lakewood's ordinances and does not rely on a claim of unconstitutional application. Accordingly, Greer is not contrary to Plain Dealer's position.

In Gannett Satellite Information Network, Inc., supra, after holding that the Metropolitan Transportation Authority's ("MTA") unregulated licensing scheme for the placement of newspaper vending machines in MTA commuter stations violated the First and Fourteenth Amendments, the district court ordered the adoption of reasonable standards governing the issuance and terms of licenses. The Second Circuit reversed, holding, in part, that MTA need not adopt such guidelines at that time. The court of appeals questioned whether the Gannett company could require the MTA to establish standards governing the issuance of licenses stating:

(cont.)

> But there is no evidence or finding that MTA has arbitrarily denied licenses or imposed unreasonably discriminatory terms on anyone, or that there is any threat of such conduct. It is doubtful that this record presents a justiciable controversy with respect to the reasonableness of the licensing terms. Therefore, while guidelines might be helpful, we will not require them at this time.

Id. at 776. However, in this case, the City has issued regulations the validity of which is directly challenged by Plain Dealer. Moreover, subsection (c)(7) of those regulations permits, on its face, unbridled discretion and therefore an inherent threat of arbitrary decision making. Since Gannett did not involve a facial challenge to adopted licensing requirements, it is inapplicable to this instant case.

B. Provision Granting the Architechural Board of Review With Standardless Distretion Is Unconstitutional

We believe the architectural provision found in Section 901.181(a) is similarly flawed because it provides the Board with standardless discretion to approve the design of newsracks. The City claims that Section 1325.03 of the Lakewood Codified Ordinance provides the Board with adequate standards. However, Section 1325.03 allows the Board to regulate the construction or alteration of buildings according to "accepted and recognized architectural principles". A newsrack is not a building, but even if this standard could apply to newsracks, it is not specific enough to withstand constitutional scrutiny.[6] Since the ordinance contains no standards to guide the Board in approving

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(cont.)

[6]The Chairman of the Architectural Board stated at trial that the Board had no standards for approving or disapproving the design of newsracks.

or rejecting newsrack designs, we hold that provision unconstitutional under the First Amendment.[7]

C. Provision Requiring Indemnification Before Access to Public Streets and Sidewalks Is Unconstitutional

On appeal Plain Dealer also challenges the constitutionality of Section 901.181(c)(5) of the Lakewood Codified Ordinance requiring that "permittees" indemnify and insure the City as a condition to gaining access to its public streets and sidewalks.[8] We believe this provision also violates the First Amendment.

The district court held that since the City is liable under Ohio Revised Code Section 723.01 for the failure to maintain the streets, sidewalks, and publicways, it should not be exposed to additional liability without indemnification by any private commercial use on such City owned property. The district court cites Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E. 2d 749 (1982) (holding that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in a negligence action); Dickerhoof v. City of Canton, 6 Ohio St. 3d 128, 451 N.E. 2d 1193 (1983) (holding that a municipal corporation may be liable for injuries resulting from its failure to keep the shoulder of a highway in repair); and Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937) (holding that the National Labor Relations Act does not unconstitutionally abridge the freedom of the press in that it does not interfere with the right to discharge any employee for

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[7]The Architectural provision would also be constitutional under a time, place and manner analysis because the ordinance is not narrowly tailored to serve a significant government interest. See Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37, 45 (1983).

[8]Section 901.181(c)(5) provides that a newspaper box "permittee" must indemnify the City for all liability "for any reason whatsoever occasioned upon the installation and use" of a newspaper box. Furthermore, the ordinance requires the permittee to provide property damage and personal injury insurance in the amount of $100,000, naming the City as an insured.

any proper cause) as authority for the above proposition. However, these cases are inapposite in that none of them discusses insurance or indemnification. They stand only for the general propositions that **1)** local governments retain power to indemnify themselves, Haverlack, 2 Ohio St. 3d at 30; **2)** local governments may be liable for negligence in maintaining the streets, Dickerhoof, 6 Ohio St. 3d at 131; and **3)** news organizations are subject to overall regulations and laws and are not entitled to special privileges. Associated Press, 301 U.S. at 132-133. The City does not require other permittees to provide insurance. For example, neither the bus nor telephone company is required to insure or indemnify bus shelters or telephone equipment. Since the City cannot impose more stringent requirements on First Amendment rights than it does in others, we believe the indemnification aspect of the ordinance places an undue burden on Plain Dealer.

D. Ban Of All Newsracks In Residential Areas Is Constitutional

The state may enforce time, place and manner regulations which are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37, 45 (1983).

We find that the City's total ban of newsracks in residential areas is a constitutional time, place and manner regulation. First, the ordinance is content-neutral because it bans all newracks in residential areas of the City. Second, the ordinance is narrowly tailored to serve a significant government interest. We agree with the district court's holding that "traffic safety, proper functioning of a city's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial government interests and the subject ordinances reach no further than necessary to accomplish the City's objectives." See Metromedia, Inc. v. San Diego, 453 U.S. 490, 508 (1981). Finally, the ordinance leaves open ample alternative channels of communication. For example, the City admits that a person may sell

newspapers by mail or by direct home delivery in residential areas free from governmental interference. Moreover, there are eleven sites within the City, and two sites immediately adjacent to the City, where newsracks are located on private property within commercial zones. In fact, all residences in the City are within one quarter of a mile from an existing newsrack. Furthermore, there are eleven "all-night" businesses within the City and two "all-night" businesses adjacent to the City which sell the Plain Dealer 24 hours a day, seven days a week. Thus, the City's total ban of newsracks in residential districts is a constitutional time, place and manner regulation.

III.

SEVERABILITY

The Supreme Court has held that invalid portions of a statute should be severed unless it is clear that the Legislature would not have enacted those provisions which are constitutional, independent of those provisions which are not. INS v. Chada, 462 U.S. 919, 931 (1983); Buckley v. Valeo, 424 U.S. 1, 108 (1976). Moreover, a provision is presumed severable if what remains after severance is fully operative as a law. Chada, 462 U.S. at 934. Since prior ordinances under the existing regulatory scheme sought to ban all newsracks under all circumstances, we believe this indicates clear legislative intent to ban newsracks in residential areas. When the unconstitutional portion of the ordinance dealing with the Mayor's unlimited discretion in denying permits, the Architectural Board's standardless discretion in approving newsrack designs, and the insurance requirements for proposed applicants is deleted, what is left is not dependent on the invalid portions. Since the remaining portions of the statute are fully operable as a law, we find that the Mayoral discretion and insurance requirement sections are severable. We, therefore, hold that the remaining portions of Section 901.181 survive as a workable ordinance.

IV.

CROSS APPEAL FOR COSTS

The final issue is whether the district court abused its discretion in awarding costs to appellant Plain Dealer. The City argues that the district court committed reversible error by denying its requests for costs without stating reasons. However, to prevail on cross-appeal, Lakewood must show more than error. We reveiw decisions awarding costs under an abuse of discretion standard. Owen v. Modern Diversified Industries, Inc., 643 F.2d 441 (6th Cir. 1981); see also, Missouri Pacific Railroad Company v. Star City Gravel Company, Inc., 592 F.2d 455 (8th Cir. 1979). Under the abuse of discretion standard, an appellate court may overturn a lower court's ruling only if it finds that the ruling was arbitrary, unjustifiable or clearly unreasonable. See NLRB v. Guernsey-Muskingum Electric Cooperative, 285 F.2d 8, 11 (6th Cir. 1960). In the instant case, the City amended the ordinance twice in response to a lawsuit by Plain Dealer. Specifically, the district court granted the Plain Dealer's motion for summary judgment on its initial complaint. No appeal was taken from that decision. Since the City has failed to show that the ruling in this case was arbitrary or unreasonable, the district court did not abuse its discretion in awarding costs to Plain Dealer.

Accordingly, the decision of the district court is affirmed in part and reversed in part consistent with the analysis of this opinion.

page 11 – Title "B" – Discretion

page 12 – foot note 7 – should read
"unconstitutional" rather than "constitutional"

Chambers of
G. Wix Unthank
Judge
Pikeville, Kentucky 41501

United States District Court
FOR THE
Eastern District of Kentucky

April 17, 1986

Honorable Damon J. Keith
United States Court of Appeals
for the Sixth Circuit
Detroit, Michigan 48226

Dear Judge Keith:

In the case of Plain Dealer Publishing Co. v. City of Lakewood, Nos. 84-3683/84-3722, I concur in your opinion that the City of Lakewood's ordinance grants the mayor unbridled discretion in the issuance of permits, and that such discretion violates the First Amendment. I agree with Judge Kennedy that the Architectural Board of Review provisions are impermissible for the same reason. On the issue of severance, I conclude that the ban on newspaper boxes in residential areas should be severed from the invalid portions of the ordinance.

I do not concur in that portion of the decision holding the insurance or indemnity requirements in violation of the First Amendment. I consider them legitimate and reasonable provisions for the protection of the city from liability. The fact that the city does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services.

I concur in your decision in the case of New York Times Co. v. City of Lakewood, No. 84-3675. I believe, however, that Judges Kennedy and Lively correctly point out that abstention should be ordered at the trial level.

Finally, in Sisk v. Commissioner of Internal Revenue, I concur in your decision as modified by Judge Kennedy's suggestions. I too, however, see no reason to delete the reference to installments.

Very truly yours,

G. Wix Unthank

cc: Honorable Cornelia G. Kennedy

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

April 28, 1986

Honorable Cornelia G. Kennedy
744 Federal Building
Detroit, MI 48226

Re: **Nos. 84-3683/84-3722**
Plain Dealer Publishing Co. v. City of Lakewood
Heard: 12/5/85

Dear Judge Kennedy:

In your letter dated April 3, 1986, you suggested that we sever portions of the Lakewood ordinance and that the architectural provisions are impermissible. Attached hereto is the revised opinion incorporating your suggestions. As you will see in the revised opinion, I have incorporated a different heading system. I have also changed and/or added new sections to the opinion analyzing the Architectural Board's power of review (page 11); the ban of newsracks in residential areas (page 13); the severability of the ordinance (page 14); and the cross appeal for costs (page 15). Consequently, the proposed opinion reflects the above concerns.

Your comments and/or suggestions will be appreciated.

Very truly yours,

Damon J. Keith

DJK/cw
Attach.

cc: J. Unthank

4-7-86

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

COPY

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

April 3, 1986

Honorable Damon J. Keith
United States Court of Appeals
for the Sixth Circuit
Detroit, MI 48226

Re: Nos. 84-3683/84-3722
Plain Dealer Publishing Co. v. City of Lakewood
heard 12/5/86

Dear Judge Keith:

It seems to me that INS v. Chadha, 462 U.S. 919, 931 (1983), as well as Buckley v. Valeo, 424 U.S. 1, 108 (1976), which you cite in footnote 3, require severance of the Lakewood ordinance provision totally banning newspaper vending boxes in residential areas. Admittedly, there is no severability clause in the ordinance. However, as the court stated in Buckley:

> But we have no difficulty in concluding that Subtitle H is severable. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932). Our discussion of "what is left" leaves no doubt that the value of public financing is not dependent on the existence of a generally applicable expenditure limit.

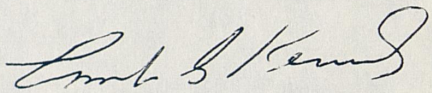
424 U.S. at 108-109. When the unconstitutional portion of the ordinance, dealing with newspaper vending boxes in areas not zoned residential, is deleted, what is left is not dependent on the invalid portions.

I think that it is evident that the City of Lakewood would enact the ban in residential neighborhoods even if they cannot restrict newspaper vending boxes in other areas. We do not have a legislative history in the usual sense but we do have the prior ordinances which sought to ban all newspaper vending boxes on public property under all circumstances.

Although some of the older cases, such as Carter v. Carter Coal Company, 298 U.S. 238, 312 (1936), seem to indicate that in the absence of a severability clause there was a presumption against severability, even in those cases the Supreme Court attempted to determine whether the legislature would have enacted the legislation without the invalid portion. The later cases appear to adopt a presumption in favor of severability. See Regan v. Time, Inc., 104 S. Ct. 3262, 3269 (1984) (plurality opinion); Buckley v. Valeo, supra; Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550, 1559-65 (D.C. Cir. 1985), cert. granted, 54 U.S.L.W. 3575, 3582 (March 4, 1986). See also Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794, 2801 (1985) ("a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it" even in a first amendment case).

If you and Judge Unthank do not agree on severability, I will write a separate concurrence and partial dissent. I agree with you that the ordinance is unconstitutional because of the unfettered discretion of the mayor in issuing permits and the insurance requirement. I also think the architectural provisions are impermissible.

Very truly yours,



Cornelia G. Kennedy

CGK:cm

cc: Honorable G. Wix Unthank

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

March 14, 1986

Honorable Cornelia G. Kennedy
744 Federal Building
Detroit, MI 48226

Honorable G. Wix Unthank
P.O. Box 278
Pikeville, Kentucky 41501

Re: **Plain Dealer Publishing Co., v. City of Lakewood**
Case Nos. 84-3683/84-3722 - Case Heard: 12/5/85

Dear Judges:

Enclosed is an opinion, designated for publication, in the above-captioned case for the special attention of Judges Kennedy and Unthank. In checking my file, I note that I inadvertently failed to send you a Panel Report. I am enclosing it with the proposed opinion.

As you will note from the Panel Report, we tentatively agreed that this case was not right for appellate review because Plain Dealer had not complied with the City's permit requirement.

Judge Kennedy was kind enough to send me a memo on December 18, 1985, indicating that it was not necessary that the application for permit be made for it to be right for appellate review. I agree and the proposed opinion reverses the district court on the grounds that the ordinance is unconstitutional inasmuch as it gives the Mayor unlimited discretion in denying permits. The opinion further holds that the insurance provision also violates the First Amendment. Your comments and/or suggestions would be greatly appreciated.

Very truly yours,

Damon J. Keith

DJK/cw
Encl.

cc: All Judges
William Eggemeier (Transmittal Only)

FOR PUBLICATION

84-3683
84-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING CO.,	)	
	)	
Plaintiff-Appellant Cross-Appellee,	)	
v.	)	**On Appeal from the United States District Court for the Northern District of Ohio.**
	)	
CITY OF LAKEWOOD,	)	
	)	
Defendant-Appellee, Cross Appellant.	)	

Decided and Filed _____

BEFORE: KEITH and KENNEDY, Circuit Judges and UNTHANK*, District Judge

KEITH, Circuit Judge. Appellant Plain Dealer Publishing Company challenges the constitutionality of a municipal ordinance that regulates the placement of newsracks on the city streets of Lakewood, Ohio. Plain Dealer filed the instant action against the City of Lakewood ("City") after being denied permission to place its newsracks on City property pursuant to Section 901.181 of the Lakewood Codified Ordinance as amended. On July 12, 1984, the district court entered judgment for the City with court costs assessed to the City. We reverse.

I.

The Plain Dealer daily newspaper is distributed as a publication of general circulation throughout the Cleveland Metropolitan area and Ohio. Generally, Plain Dealer newspaper sales are 77 percent by home delivery through carriers and 80 percent on Sundays by home delivery. The balance of the sales are by single copy through retail outlets and coin-operated vending boxes, the latter constituting 23 percent of the single copy sales, or 4.6 to 5.27 percent of total sales.

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*Honorable G. Wix Unthank, U.S. District Court, Eastern District of Kentucky, sitting by designation.

The City of Lakewood is approximately 5.5 square miles. It is an older residential community located in Cuyahoga County, Ohio, west of Cleveland. In 1980, the population of the City was 61,963. Lakewood has historically been a city of homes. The commercial areas of the City are located essentially along Madison and Detroit Avenues, conveniently close to all residential areas of the City. There is no area within the City more than one-quarter mile from an all night newspaper outlet.

In May 1982, Plain Dealer sought permission from the City Law Director to place coin-operated newsracks at sites within the City. The various sites included the commercial areas along Madison and Detroit Avenues and the residential areas along Clifton Boulevard. The City Law Director denied citing Section 901.18 of the Lakewood Codified Ordinance which provided at that time:

> **901.18** ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.
>
> No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

Plain Dealer filed suit eight months later on January 5, 1983, attacking the constitutionality of Section 901.18. On August 18, 1983, the district court granted plaintiff's motion for summary judgment ruling the ordinance provision was an unconstitutional exercise of police power, and that it banned a reasonable means of newspaper distribution. The court ordered a permanent injunction for sixty (60) days in order to give the City an opportunity to enact constitutional provisions regulating placement of newsracks on public property.

On October 17, 1983, the City amended Section 901.18 to permit erection of a structure on public property with the consent of the City where permitted by city or state law. Under the amended ordinance, Plain Dealer would have to apply to the Mayor for a rental agreement or permit. After initial enactment of the amended ordinances, the City re-examined Plain Dealer's objections to the ordinance and on

January 3, 1984, issued the amended ordinance. Section 901.181[1] as amended provides that the Mayor may grant a newsrack application upon payment of a $10.00 rental fee

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[1]Lakewood's Ordinance provides in relevant part:

901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION. The Mayor, upon application on forms approved by the Mayor may permit the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City by rental permit subject to the following terms: . . .

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6) inches distant therefrom or near and parallel to the curb not less than eighteen (18) inches and not more than twenty-four inches distant from the curb at such locations applied for and determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01. . .

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be the fair market rental value for the property used as determined by the Mayor, but not less than Ten Dollars ($10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) The permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars ($100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance

for each site, submission of a certificate of insurance and compliance with the appearance and architectural standards set by the Architectural Board of Review. Under subsection (c)(7) of the amended ordinance, however, the Mayor may subject an application to any additional conditions he or she deems necessary. The amended code would permit Plain Dealer to place newsracks at locations it requested on Madison and Detroit Avenues in the commercial district, but not along Clifton Boulevard in the residential use districts.

After the City had amended the ordinance twice, Plain Dealer filed its amended complaint challenging the constitutionality of the amended ordinance. Trial was scheduled on April 11, 1984, to hear Plain Dealer's request for preliminary and permanent injunction.

Plain Dealer testified at trial that although it made no application for a permit, it had intended to place newsracks at eighteen locations in Lakewood, eight of which were located in residential districts on Clifton Boulevard. The district court concluded the amended ordinance was constitutional and entered judgment for the City. On appeal,

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(cont.)

> carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;
>
> (6) rental permits shall be for a term of one year and shall not be assignable; and
>
> (7) such other terms and conditions deemed necessary and reasonable by the Mayor . . . .

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified herein above. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

Plain Dealer raises nine issues concerning the constitutionality of the City's ordinances.[2] Specifically, Plain Dealer argues that Sections 901.18 and 901.181 should be declared unconstitutional because they impose prior restraints on the freedom of press by requiring permits and the payment of rental fees, absolutely ban newspaper boxes in residential districts, and impose unduly burdensome procedures for compliance. We reverse the district court decision because Sections 901.18 and 901.181 unconstitutionally gives the mayor unlimited discretion in denying permits and unconstitutionally requires applicants to provide insurance to the City.[3]

II.

ABUSE OF DISCRETION

The right to distribute newspapers by means of newsracks is protected by the First Amendment to the United States Constitution. Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 673 (11th Cir. 1984); See Lovell v. Griffin, 303 U.S. 444 (1938); See also Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971). Laws which vest municipal officials with unguided discretion to grant or deny a newsrack license or permit "do not regulate with the narrow specificity" required by the First Amendment. Association of Community Organizations for Reform Now, (ACORN) v. Municipality of Golden, Colorado, 744 F.2d 739, 746 (10th Cir. 1984). The Supreme Court in Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, (1984) stated:

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[2]However, we do not specifically address requirement of payment of rental fees, the total ban of newsracks in residential areas and the discretion of the Archetectural Board of Review in approving or rejecting newsrack designs because these issues are not dispositive of the ultimate determination of this case.

[3]We concede that portions of the ordinance which Plain Dealer challenges withstand constitutional muster. For example, we believe the imposition of a rental fee and the total ban of newsboxes in residential areas are constitutional. However, we do not believe the ordinance meets the requirements for severability. See, e.g., Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972); See also Buckley v. Valeo, 424 U.S. 1 (1976).

> But even if the Secretary were correct and the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech. . . Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for a licensing scheme that if it is available to them at all, is available only at the unguided discretion of the Secretary of State.

104 S.Ct. at 2851 n.12 (citations omitted); See also Fernandes v. Limmer, 663 F.2d 619, 631 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982) (holding unconstitutional ordinance that gave executive director excessive discretion in deciding whether the grant of a permit would be detrimental to the public). Thus, in order to qualify as narrowly tailored, a content neutral ordinance must avoid vesting city officials with discretion to grant or deny licenses, for

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 151, (1969); Staub v. City of Baxley, 355 U.S. 313, 322, (1958).

In Staub, the Supreme Court struck down an ordinance under which the Mayor and the City Council had the discretion to grant or deny a permit. Id. at 321. The Court held that the ordinance on its face imposed an unconstitutional prior restraint because it authoritzed the Mayor and the Council to refuse or to grant a permit in their uncontrolled discretion. Id. at 325. Similarly, in Shuttlesworth, the Supreme Court refused to uphold a conviction for demonstrating without a permit because the City Commission had virtually unbridled discretion to grant or deny the permit.

We find that the City of Lakewood's ordinance unconstitutionally permits the granting of permits to be contingent upon the Mayor's unbridled discretion. Section 901.181(c)(7) provides that a rental permit is granted upon "terms and conditions deemed necessary by the Mayor." It is clear from subsection (c)(7) that the Mayor is vested with unlimited discretion to grant or deny a permit and make it subject to any conditions he may choose. Furthermore, although the language of the ordinance limits the conditions under which the Mayor may grant a permit, it does not contain any standards for the Mayor to use when denying a permit. Consequently, the ordinance's restriction is not narrowly tailored to serve a significant government interest. See Shuttlesworth, 394 U.S. 147.

The Supreme Court has repeatedly struck down ordinances which condition the exercise of First Amendment activities on the broad discretion of local officials, resulting in virtually unreviewable prior restraints on First Amendment rights. Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948). When a city allows an official to ban a means of communication through uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. Saia, 334 U.S. at 562.[4] The constitutional problem here lies in the very existence of such unfettered discretion.

The City argues that the Mayor can refuse a permit only "upon health and safety reasons". Although municipalities may enact laws in furtherance of the public health and safety, the City is incorrect in its argument for two reasons. First, no language appears in the ordinance specifically limiting the Mayor's power to refuse a permit for

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[4]Saia involved a city ordinance which prohibited the use of a sound amplification device without the permission of the police chief. Other licensing systems which are similar have been held unconstitutional prior restraints on speech because they vest broad discretion in granting or withholding a permit upon broad criteria unrelated to proper regulation of public places. See Shuttlesworth v. City of Birmingham, 394 U.S. at 153; See also Kuntz, 340 U.S. 290.

health and safety reasons.[5] The district court ruled the City's evidence of such a standard was inadmissible. Second, if health and safety or other legitimate concerns are what the City seeks to address, the language of the ordinance should be limited accordingly. See Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972). An ordinance providing for unguided governmental discretion is inherently inconsistent with a valid time, place and manner regulation because it provides for potential suppression of a particular point of view. See Heffron v. International Society of Krishna Consciousness, Inc., 452 U.S. 640 (1981).

The district court held that application and appeal procedures pursuant to Section 901.181 and Ohio Revised Code Chapter 2506 provide an adequate remedy for any wrong alleged by Plain Dealer.[6] The "adequate state remedies" include the application for a permit, appeal to City Council and appeal to the court of common pleas under Chapter 2506 of the Ohio Revised Code. However, these procedures require Plain Dealer to apply for a permit and appeal any denial prior to placing newsracks on the sidewalks and subject acquisition of the permit to standardless administrative discretion. The fact that the ordinance provides an appeal process does not cure the unconstitutionally broad discretion it accords the mayor to impose prior restraints on First Amendment rights. Consequently, the district court erred in concluding that these remedies are adequate.

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[5]Section 901.181(b) states that in determining the location of the newsracks the Mayor should not cause an undue health or safety hazard. However, the language does not state that the Mayor can only refuse a permit for health and safety reasons.

[6]The district court relied upon Parratt v. Taylor, 451 U.S. 527 (1981) and Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), cert. denied, ____ U.S. ____, 105 S.Ct. 125 (1984) which hold that actions for money damages cannot be brought under 42 U.S.C. Section 1983 if there are adequate remedies at state law. However, these cases are distinguishable to the instant case in that this case is not an action for money damages under Section 1983. It is an action for declaratory and injunctive relief from an ordinance which allegedly abrogates First Amendment rights.

The City argues that under the holdings of Greer v. Spock, 424 U.S. 828 (1976), and Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984), Plain Dealer cannot attack the ordinance because the newspaper has never applied for a permit. We are not persuaded by this argument. In Greer, the Supreme Court upheld Fort Dix regulations banning partisan political speeches and demonstrations and prohibiting the distribution of any literature without the prior written approval of a commanding officer. An Army regulation specified that the commander could only disapprove publications presenting "a clear danger to [military] loyalty, discipline, or morale." Id. at 840. The Court in Greer specifically considered the facial validity issue and held that the regulations at issue were constitutional on their face because they applied to a federal military reservation, not a traditional public forum. Greer, 424 U.S. at 838. Having found the regulations facially valid, the Court held that it would not reach the question of unconstitutional application because no approval had been sought from the appropriate authorities. In the instant case, Plain Dealer challenges the facial validity of Lakewood's ordinances and does not rely on a claim of unconstitutional application. Accordingly, Greer is not contrary to Plain Dealer's position.

In Gannett Satellite Information Network, Inc., supra, after holding that the Metropolitan Transportation Authority's ("MTA") unregulated licensing scheme for the placement of newspaper vending machines in MTA commuter stations violated the First and Fourteenth Amendments, the district court ordered the adoption of reasonable standards governing the issuance and terms of licenses. The Second Circuit reversed, holding, in part, that MTA need not adopt such guidelines at that time. The court of appeals questioned whether the Gannett company could require the MTA to establish standards governing the issuance of licenses stating:

> But there is no evidence or finding that MTA has arbitrarily denied licenses or imposed unreasonably discriminatory terms on anyone, or that there is any threat of such conduct. It is doubtful that this record presents a justiciable controversy with respect to the reasonableness of the licensing terms. Therefore, while guidelines might be helpful, we will not require them at this time.

Id. at 776. However, in this case, the City has issued regulations the validity of which is directly challenged by Plain Dealer. Moreover, subsection (c)(7) of those regulations permits, on its face, unbridled discretion and therefore an inherent threat of arbitrary decision making. Since Gannett did not involve a facial challenge to adopted licensing requirements, it is inapplicable to this instant case.

INSURANCE PROVISION

On Appeal Plain Dealer also challenges the constitutionality of Section 901.181 of the Lakewood Codified Ordinance requiring that "permittees" indemnify and insure the City as a condition to gaining access to its public streets and sidewalks.[7] We believe this provision also violates the First Amendment.

The district court held that since the City is liable under Ohio Revised Code Section 723.01 for the failure to maintain the streets, sidewalks, and publicways, it should not be exposed to additional liability without indemnification by any private comercial use on such City owned property. The district court cites Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E. 2d 749 (1982) (holding that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to

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[7]Section 901.181(c)(s) provides that a newspaper box "permittee" must indemnify the City for all liability "for any reason whatsoever occasioned upon the installation and use" of a newspaper box. Furthermore, the ordinance requires the permittee to provide property damage and personal injury insurance in the amount of $100,000, naming the City as an insured.

a municipal corporation in a negligence action); Dickerhoof v. Canton, 6 Ohio St. 3d 128, 451 N.E. 2d 1193 (1983) (holding that a municipal corporation may be liable for injuries resulting from its failure to keep the shoulder of a highway in repair); and Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937) (holding that the National Labor Relations Act does not unconstitutionally abridge the freedom of the press in that it does not interfere with the right to discharge any employee for any proper cause) as authority for the above proposition. However, these cases are inapposite in that none of them discusses insurance or indemnification. They stand only for the general propositions that **1)** local governments retain power to indemnify themselves, Haverlack, 2 Ohio St. 3d at 30; **2)** local governments may be liable for negligence in maintaining the streets, Dickerhoof, 6 Ohio St. 3d at 131; and **3)** news organizations are subject to overall regulations and laws and are not entitled to special privileges. Associated Press, 301 U.S. at 132, 133. We fail to see how subjecting newspaper publishers seeking coin-operated newsracks to extensive regulations accords them special privileges, or how limiting those regulations to legitimate concerns impinges on local sovereignty. The City does not require other permittees to provide insurance. For example, neither the bus nor telephone company is required to insure or indemnify bus shelters or telephone equipment. Since the City cannot impose more stringent requirements on First Amendment rights than it does in others, we believe the indemnification aspect of the ordinance places an undue burden on Plain Dealer.

CROSS APPEAL FOR COSTS

The final issue is whether the district court abused its discretion in awarding costs to the losing party appellant Plain Dealer. The City argues that the district court committed reversible error by denying its requests for costs without stating reasons. Since Plain Dealer has prevailed on appeal, the City's cross-appeal is moot. Fed. R. Civ. P. 54(d).

Accordingly, the decision of the district court is REVERSED.

Character-ization
Verbal - Non Verbal Conduct - de test dispute?
Incontrolled discretion

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

December 18, 1985

Stuber
Verbal
non Verbal

Honorable Damon J. Keith
United States Court of Appeals
for the Sixth Circuit
Detroit, MI 48226

Re: Nos. 84-3683 and 84-3722,
Plain Dealer Publishing Co. v. City of Lakewood,
argued 12/5/85

Dear Judge Keith:

You will recall that at conference you suggested that since the Plain Dealer has never applied for a permit, the Plain Dealer did not have standing to raise several of the objections it made to the ordinance. I tentatively agreed with that proposition since in most instances the failure to apply for a permit defeats standing. I had not researched the question in first amendment cases. After our discussion at conference, my clerk and I did some research but have been unable to find support for the tentative conclusion that the Plain Dealer cannot challenge the ordinance without applying for a permit.

The City cites two cases in its brief, Greer v. Spock, 424 U.S. 828 (1976), and Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984), to support its position that the Plain Dealer cannot attack the ordinance because the newspaper has never applied for a permit. In Greer, the Supreme Court upheld Fort Dix regulations banning partisan political speechs and demonstrations and prohibiting the distribution of any literature without the prior written approval of commanding officer. An Army regulation specified that the commander

could only disapprove publications presenting "'a clear danger to [military] loyalty, discipline, or morale.'" Id. at 840. In discussing the fort regulation prohibiting the distribution of literature without prior permission, the Supreme Court wrote:

> It is possible, of course, that Reg. 210-27 might in the future be applied irrationally, invidiously, or arbitrarily. But none of the respondents in the present case even submitted any material for review. The noncandidate respondents were excluded from Fort Dix because they had previously distributed literature there without even attempting to obtain approval for the distribution. This case, therefore, simply does not raise any question of unconstitutional application of the regulation to any specific situation. Cf. Rescue Army v. Municipal Court, 331 U.S. 549.

424 U.S. at 840. The Court had previously determined that the regulations "were not constitutionally invalid on their face." Id. at 838. Consequently, the Court considered respondents' facial challenge to the regulations' constitutionality even though respondents had not sought the commanding officer's approval. Furthermore, Greer arose in a military context, where the Court has not extended first amendment protections to their fullest reach. The Court specifically commented that: "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false." Id. at 838.

In Gannett Satellite Information Network, Inc., supra, after holding that the Metropolitan Transportation Authority's ("MTA") licensing scheme and fees for the placement of newspaper vending machines in MTA commuter stations violated the first and fourteenth amendments, the district court ordered the adoption of reasonable standards governing the issuance and terms of licenses. The Eleventh Circuit reversed, holding, in part, that MTA need not adopt such guidelines at that time. The court of appeals questioned whether the Gannett company could require MTA to establish standards governing the issuance of licenses stating:

> But there is no evidence or finding that MTA has arbitrarily denied licenses or imposed unreasonably discriminatory terms on anyone, or that there is any threat of such conduct. It is doubtful that this record presents a justiciable controversy with respect to the reasonableness of the licensing terms. Therefore, while guidelines might be helpful, we will not require them at this time.

Id. at 776. The Eleventh Circuit, however, did not cite any authority for the proposition that the Gannett company could not challenge the reasonableness of the licensing terms until the MTA had acted arbitrarily or discriminatorily. Futhermore, that case did not involve a facial challenge since MTA had not adopted licensing requirements.

The Supreme Court has allowed criminal defendants to challenge ordinances requiring them to obtain a permit before exercising their first amendment rights even though they did not apply for a permit. See, e.g., Staub v. City of Baxley, 355 U.S. 313 (1958); Lovell v. City of Griffin, 303 U.S. 444, 452-53 (1938) ("As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her."). In Staub v. City of Baxley, the Supreme Court specifically rejected the city's claim that appellant lacked standing to attack the challenged ordinance because appellant had not attempted to secure the permit that the ordinance required. The Court repeated its prior holdings that "the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance." 355 U.S. at 319 (citations omitted). The Court further held that since the challenged ordinance gave the Mayor and the Council of the City the uncontrolled discretion to grant or "refuse to grant" the required permit the ordinance violated the first and fourteenth amendments.

Even though the Plain Dealer is not a criminal defendant, I believe we should hold that the Plain Dealer still has standing to facially challenge the Lakewood ordinance. In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Supreme Court stated that allowing

criminal defendants to challenge ordinances or statutes does not, by itself, assure adequate vindication of first amendment rights. The Court observed that:

> Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

Id. at 486-87. See also NCAAP v. Button, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."). Although the Lousiana statutes involved in Dombrowski did not require permits, I think the principle that an individual or organization may facially challenge a statute outside a criminal prosecution also applies to this case. See also International Society for Krishna Consciousness v. Eaves, 601 F.2d 809, 822-23 (5th Cir. 1979).

Perhaps, you are relying on a case or cases that I have not found. Unless there is some other authority, however, I am of the opinion that since the Plain Dealer is facially challenging several portions of the ordinance, the Plain Dealer does have standing to raise the first amendment issues. Accordingly, I would hold that the ordinance unconstitutionally gives the Mayor unlimited discretion in denying permits and unconstitutionally requires applicants to provide insurance for the City. I am sorry that I had not explored this standing question before our conference, but I did so as soon as I could afterwards.

Sincerely yours,

Cornelia G. Kennedy

CGK:cm

cc: Honorable G. Wix Unthank

PANEL REPORT

DATE: **Thursday, December 5, 1985 - Courtroom No. 1**

PANEL: **KEITH, KENNEDY and UNTHANK**

No. 84-3683 and 84-3722
Plain Dealer Publishing Co. v. City of Lakewood
N. D. Ohio - White, J.

This is an appeal by Plain Dealer Publishing Company from a judgment of the United States District Court for the Northern District of Ohio dismissing its civil rights action alleging restrictions on coin operated newsracks. The City of Lakewood appeals from that part of the judgment ordering it to pay the costs of this action.

Plain Dealer made the following arguments: **(1)** the first amendment protects the distribution of newspapers by newsstands on public streets and sidewalks; **(2)** Lakewood's ordinances impose prior restrains coupled with unbridled administrative discretion; **(3)** Lakewood's ordinance unconstitutionally bans the use of newsstands in residential districts; **(4)** Lakewood's ordinances on time, place and manner of restricts are unreasonable; **(5)** Lakewood's indemnification and insurance requirements are unconstitutional; and **(6)** Plain Dealer does not have adequate statute remedies.

The City of Lakewood argued that the district court's findings are not clearly erroneous. Moreover, the City argued: **(1)** no property interest in city owned property is created by the U.S. Constitution; **(2)** the loan applicable to billboards, signs and bookstores is applicable to newsracks; **(3)** the Lakewood ordinances are reasonable and constitutional regulations enacted pursuant to the City's police powers; and **(5)** the City should not have been awarded costs without explanation.

The panel agreed that the case was not ripe for appellate review because Plain Dealer had not complied with the City's permit requirement. Judge Keith has agreed to take this case for study and opinion.

DAMON J. KEITH

cc: All Judges
B. Eggemeier