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In the Supreme Court of Ohio

CITY OF CLEVELAND, Plaintiff-Appellant, v. ERIN MCCARDLE AND LEATRICE TOLLS, Defendants-Appellees.	)))))))))))	Case No. 13-0096 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District

PLAINTIFF-APPELLANT'S BRIEF IN OPPOSITION TO DEFENDANTS-APPELLEES' MOTION FOR RECONSIDERATION

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I. Introduction

On June 6, 2014, Defendants-Appellees McCardle and Tolls (collectively "McCardle") filed a Motion for Reconsideration of this Honorable Court's decision upholding the constitutionality of Cleveland Codified Ordinance 559.541. The Motion for Reconsideration should be denied for multiple reasons. Any reconsideration begins with the basic holding of this Court:

> [T]he ordinance is content-neutral, narrowly tailored to advance a significant government interest, and allows alternative channels of speech, we hold that it is constitutional under the First and Fourteenth Amendments to the United States Constitution.

Cleveland v. McCardle, 2014 -Ohio- 2140, --- N.E.3d ----, ¶ 24. McCardle is unsatisfied with this Honorable Court's holding and seeks by way of reconsideration to again argue issues that were previously addressed in their earlier merit brief. While S.Ct.Prac.R 18.02(B) specifically provides that "[a] motion for reconsideration shall not constitute a reargument of the case," McCardle's motion is otherwise without merit because the City's ordinance properly constrains the discretion of the licensing official and provides adequate opportunity for judicial review. McCardle's motion should not be well taken and should be denied.

II. Law and Argument

A. Cleveland Codified Ordinance 559.541 contains adequate standards that constrain the discretion of the licensing official and provides a mechanism for judicial review.

Cleveland Codified ordinance 559.541 provides constitutionally adequate standards upon which to grant or deny a permit application, and that the City provides a reasonable mechanism for judicial review of any permits denied. This Court well recognized in upholding the City's ordinance that:

> "...[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"; therefore, even

> expression "protected by the First Amendment [is] subject to reasonable time, place, and manner restrictions." *Heffron v. Internatl. Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

McCardle, at ¶ 10. The City's ordinance ensures the application of adequate constitutional protections and standards in the consideration of such "reasonable time, place and manner restrictions."

1. Cleveland Codified Ordinance 559.541 Contains Adequate Standards that Constrain the Discretion of the Licensing Official.

Cleveland Codified Ordinance 559.541 states, "Such permits shall be issued when the Director finds:

> (a) That the proposed activity and use will not unreasonably interfere with or detract from the promotion of public health, welfare and safety;
> (b) That the proposed activity or use is not reasonably anticipated to incite violence, crime or disorderly conduct;
> (c) That the proposed activity will not entail unusual, extraordinary or burdensome expense or police operation by the City; and
> (d) That the facilities desired have not been reserved for other use at the day and hour required in the application.

The ordinance expressly lists these criteria upon which the licensing official is to base his decision. This Court well understood that such standards were presented in conducting its constitutional analysis:

> Specifically, the ordinance authorizes the issuance of a permit unless doing so would (1) unreasonably threaten public health, welfare, or safety, (2) be unreasonably likely to incite violence or other unlawful activity, (3) impose excessive financial or operational costs on the city, or (4) interfere with another reservation of the same facility. Cleveland Codified Ordinances 559.541. These stated exceptions to the curfew explain the original reason for the curfew—to safeguard public health, to protect against violence and criminal activity, to conserve city resources, and to preserve property. Furthermore, the First Amendment does not require the government to demonstrate the significance of its interest by presenting detailed evidence; it " ' "is entitled to advance its interests by arguments based on appeals to common sense and logic." ' " *Coalition for the Abolition of Marijuana Prohibition v. Atlanta,* 219 F.3d 1301, 1318 (11th Cir.2000), quoting *Internatl. Caucus of Labor Comm. v. Montgomery,* 111 F.3d 1548, 1551 (11th Cir.1997), quoting *Multimedia*

Publishing Co. of South Carolina v. Greenville–Spartanburg Airport, 991 F.2d 154, 160 (4th Cir.1993).

McCardle, at ¶ 15.

Notwithstanding this Court's clear recognition and consideration of the standards incorporated in C.C.O. 559.541, McCardle seeks to re-argue that the criteria in C.C.O. 559.541 are unconstitutional. However, similar standards language was upheld and found to be constitutional in *Thomas v. Chicago Park Dist.* 534 U.S. 316, 323. In *Thomas*, the ordinance in question allowed a licensing official to deny a permit application pursuant to certain criteria, such as if "the proposed use or activity is prohibited by or inconsistent with the classifications of the park or part thereof…"; or "the use or activity intended by the application would present an unreasonable danger to the health or safety of the applicant or other users of the park…"; and "the use or activity intended by the application is prohibited by law." *Id.* The U.S. Supreme Court held that this language "sufficiently limited the licensing officials' discretion to satisfy First Amendment concerns" because they are "reasonably specific and objective, and do not leave the decision to the whim of the administrator." *Id.* The criteria in the City of Cleveland's ordinance are substantially similar to those upheld in *Thomas.*

Despite this, McCardle contends that the ordinance's criteria must necessarily call on the licensing official to look at the applicant's expressive message and make a determination based upon the public's reaction to the content. McCardle's arguments disregard the recognition that "[t]here is no statute or regulation imaginable that does not require some degree of interpretation by the agency charged with its enforcement. The First Amendment requires only that the regulation give the agency sufficient standards to apply in determining whether to issue a permit." *Parks v. Finan*, 385 F.3d 694, 699 (6th Cir. 2004). In *Parks*, the Sixth Circuit Court

evaluated whether there were sufficient standards to be applied within the identified criteria for granting or denying use permits. *Id.* In considering the regulation at issue the Sixth Circuit concluded that standards that were "appropriate to the physical context of the capitol", and whether there was a "hazard to the safety of the public", and whether there was "expos[ure of] the state to the likelihood of unrecoverable expenses" were "not so vague as to engender content-based favoritism." *Id.* While the Court recognized that these terms required the government to evaluate whether an activity conflicts with one of these provisions, such terms provided "sufficient guidance to determine whether it would be appropriate to deny a permit, and allow for effective judicial review." *Id.*

The constitutional standards found by the courts in *Thomas* and *Parks* are substantially similar to the language of the City of Cleveland's ordinance. As such, the City's ordinance provides sufficient standards upon which to constrain a licensing official's discretion. Thus, Defendants-Appellees' argument is without merit and the Motion for Reconsideration should be denied.

2. Cleveland Codified Ordinance 559.541 Provides a Mechanism for Effective Judicial Review.

McCardle also mistakenly asserts that C.C.O. 559.541 provides no opportunity for judicial review of denied permit applications. McCardle's narrow view of Cleveland's ordinance misses the recognition that the right of review is conferred through the City of Cleveland's Charter at § 76-6(b), which states:

> It shall be the duty of the Board of Zoning Appeals to hear and decide appeals made for exceptions to and variations in the application of ordinances governing zoning in the City of Cleveland in conformity with the purpose and intent thereof, **and to hear and decide all appeals made for exceptions to and variations in the application of ordinances, or orders or regulations of administrative officials or agencies.** (Emphasis Added).

McCardle incorrectly argues that the Board of Zoning Appeals does not have jurisdiction to conduct quasi-judicial hearings. McCardle is wrong, however, as section 76-6(b) of the Cleveland City Charter expressly confers upon the Board of Zoning Appeals the right "to hear and decide all appeals made for exceptions to and variations in the application of ordinances." With respect to C.C.O. 559.541, the Board of Zoning is explicitly charged with the duty of hearing any appeal relating to the application of the ordinance and the orders of the responsible administrative official and agency. The Board of Zoning Appeals is duly authorized to hear and decide appeals regarding the implementation of the Cleveland's Codified Ordinances and any exceptions made to their rules, to include the application for permits seeking authority to exceed the time restrictions of C.C.O. 559.541.

McCardle also claims that there are no time limits established for submitting a permit application and appealing one that is denied. However, the Department of Public Works Special Use Application, which is part of the record, plainly provides that "permit applications must be received at least ten (10) business days prior to event date and the applicant must read the rules and regulations for property/facility use and sign/date the agreement. Failure to sign the agreement may be cause for denying permit request." Exhibits in the record also document that if an applicant is denied a permit by a city official, the applicant is then sent a notice from the official's agency describing why they were denied, and expressly informed of their right to appeal to the Board of Zoning Appeals. The notice that an applicant would receive from the Public Works Department expressly identifies that the applicant may appeal the denial to the Board of Zoning Appeals within ten (10) days of the date of the letter. As such, appropriate timelines and procedures are in place in order to seek review of a denied permit application.

In addition, R.C. 2506.01 confers a special right of appeal from any decisions of administrative agencies of political subdivision to the Common Pleas Court. That right would include decisions by the Board of Zoning Appeals. That right is reiterated in C.C.O. 329.02(e), which states that "Final orders, adjudications or decisions of the Board of Zoning Appeals may be appealed by the City or any proper party, as provided in appropriate provisions of R.C. Chapters 2505 and 2506." A permit applicant who was denied by the initial agency and by the Board of Zoning Appeals then may follow the statutory appellate procedures in requesting judicial review through the Common Pleas Court.

When all of these ordinances, statutes, and administrative regulations are viewed in their full context, they clearly show that the City's ordinance is subject to effective judicial review as required by *Thomas v. Chicago Park District*. 534 U.S. 316, 323 (2002) at 323. In fact, this Honorable Court has previously held that such administrative appeals are an effective form of judicial review that satisfies constitutional concerns. *State ex rel. Village of Chagrin Falls v. Geauga County Bd. Of Com'ners*, 96 Ohio St.3d 400, 403 (2002). Thus, McCardle's claim that there is no method of effective judicial review for a denial of a permit application under C.C.O. 559.541 is without merit.

III. Conclusion

Defendants-Appellees motion seeks to re-argue points that were previously placed before this Court and provide no recognized grounds for reconsideration of this Court's earlier decision. The standards incorporated in C.C.O. 559.541 were reviewed by this Court in the course of its consideration of the constitutionality of the ordinance. This Honorable Court correctly concluded that the ordinance is "constitutional under the First and Fourteenth Amendments to the United States Constitution." The City requests that Defendants-Appellees' Motion for Reconsideration be denied.

Respectfully submitted,

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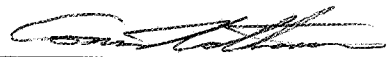
By: 

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Plaintiff-Appellant's Brief in Opposition to Defendants-Appellees' Motion for Reconsideration was sent by ordinary U.S. Mail to J. Michael Murray, attorney for Defendants-Appellees, at 55 Public Square, Suite 2200 Cleveland OH 44113; to Michael J. Hendershot, Chief Deputy Solicitor and Samuel C. Peterson, Deputy Solicitor, counsel for *Amicus Curiae* State of Ohio, at Ohio Attorney General 30 East Broad St. 17th Floor, Columbus, Ohio 43215; and to Philip Hartmann, Ice Miller LLP, counsel of record for *Amicus Curiae* Ohio Municipal League, at 250 West Street Columbus, Ohio 43215, on this 12th day of June, 2014.

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