

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF LAKEWOOD,

Appellant,

v.

PLAIN DEALER PUBLISHING CO.

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No. 86-1042

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF LAKEWOOD, :
Appellant, :
v. : No. 86-1042
PLAIN DEALER PUBLISHING CO. :

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Washington, D.C.
Wednesday, November 4, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:
HENRY B. FISCHER, ESQUIRE, Special Council to the City of Lakewood, Cleveland, Ohio; on behalf of the appellant.
JAMES P. GARNER, ESQUIRE, Cleveland, Ohio; on behalf of the appellee.

C O N T E N T S

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ON BEHALF OF THE APPELLEE 28

1 not uncontrolled, and that the insurance requirement, being
2 content neutral and otherwise reasonable, is constitutional.

3 Factually, the original Lakewood ordinance banned
4 all structures, not just news boxes, all structures on the
5 city property. Lakewood did not appeal. They wanted to
6 permit the Plain Dealer to put their news boxes in. And they
7 amended their ordinances twice to accommodate the Plain
8 Dealer's placement of news boxes along the streets.

9 The record shows that had the Plain Dealer applied,
10 they would have secured the spaces they desired. The city
11 engineer so testified, and the court also found so. There
12 would have been no discretion of the mayor to have been
13 applied and they could have had the news boxes installed
14 since 1984.

15 QUESTION: There was no discretion?

16 MR. FISCHER: There wouldn't have been any
17 discretion for the mayor to exercise if they had applied,
18 because there was nothing wrong with where they wanted to
19 place their news boxes.

20 QUESTION: Well, what was the authority given to
21 the mayor by the ordinance?

22 MR. FISCHER: To rent the property.

23 QUESTION: Well, but it was subject to his
24 control, wasn't it?

25 MR. FISCHER: It was subject to his determination.

1 It is right in the ordinance. If the location was not
2 causing a health or safety hazard -- it is written right in
3 the ordinance. If it is not a health or safety hazard. Also,
4 if it is not causing a nuisance or not unduly interfering
5 with the rights of the traffic, that the location would be
6 all right. Those were the standards that were set up --

7 QUESTION: And you think then if those were
8 satisfied the mayor had to issue the permit?

9 MR. FISCHER: That's right. He was prepared to
10 issue the permit.

11 QUESTION: Is that what the court below found?

12 MR. FISCHER: Yes, starting with Finding 16.

13 QUESTION: What did he say? What did it say?

14 MR. FISCHER: It said that the city was ready,
15 willing, and able to issue the permits had they applied
16 but the Plain Dealer had not applied for the permits.

17 QUESTION: What did it say about the breadth of
18 the ordinance? What was the court's below view of the
19 mayor's discretion?

20 MR. FISCHER: Well, the District Court found the
21 ordinance to be constitutional all the way down the line.

22 QUESTION: Yes.

23 MR. FISCHER: So they found -- the District Court
24 obviously found that as to everything before it the mayor did
25 not have unbridled discretion, that the discretion was

1 appropriate.

2 QUESTION: Yes, and then how about the -- what did
3 it say about the mayor?

4 MR. FISCHER: That the mayor did not have -- they
5 found that the discretion of the mayor was not unbridled
6 and did not find anything wrong with it.

7 QUESTION: But there was the provision, wasn't there,
8 that the mayor might deny or grant the application imposing
9 conditions deemed necessary and reasonable?

10 MR. FISCHER: That's correct, that he would not --
11 he could not just deny it. If he denied it, he had to state
12 his reasons, and there could only be three reasons that he
13 could deny it. One would be location, that there was a
14 health and safety hazard caused by it. The second reason
15 that he could deny would be because it was not -- they could
16 not harmonize it through architectural review.

17 QUESTION: Is that the limit of necessary and
18 reasonable?

19 MR. FISCHER: Necessary and reasonable? This, we
20 are talking about contract authority, and just like many
21 other contracts that have come before this Court, the
22 legislative authority gives an individual authority to make
23 contracts within certain guidelines. It gives them discretion
24 for the nuts and bolts details. The nuts and bolts detail
25 in this particular case could be what if the city had to do

1 some repairs on the sidewalk or whatever? They would want
2 to make some arrangements for the Plain Dealer to move their
3 news box during that particular time. So that is the
4 necessary and reasonable type of regulations we are talking
5 about.

6 QUESTION: Well, the Court of Appeals thought that
7 the mayor was given too broad discretion.

8 MR. FISCHER: That's correct, and our position
9 is that that is one of the things we are here to --

10 QUESTION: So we have to disagree with them as
11 to the meaning of the ordinance?

12 MR. FISCHER: If you get to that beyond the
13 jurisdiction, because we start with jurisdiction, and our
14 contention is and has been, because of the appeal procedure
15 that we have established, they should have applied for their
16 permit first, and if they didn't like the conditions, which
17 I submit to you I don't see any reason why they wouldn't have
18 liked them, I think they would have had their news boxes out
19 there since 1984, there would have been no problem.

20 QUESTION: Mr. Fischer, did you make a jurisdictional
21 argument in your jurisdictional statement, in your brief on
22 the merits?

23 MR. FISCHER: Yes, you can find it at Page 31 of
24 our brief and essentially we cited the case of Greer versus
25 Spock, that they should have -- that the thing was not ripe

1 for testing. We also asserted a defense in the District
2 Court that they had this administrative remedy and that they
3 should have asserted it.

4 QUESTION: Page 31 of the blue brief?

5 MR. FISCHER: Yes. The brief on the merits. Is it
6 43? Excuse me, it is 43. I'm sorry, Page 43 in our brief.

7 The ordinance was written, I can tell you from
8 firsthand because I wrote it, the ordinance was written so
9 that the City of Lakewood could permit them to place their
10 news boxes without interfering with the constitutional
11 rights of other persons, e.g., Lovell, Schneider, other
12 people that would want to use that property but couldn't,
13 and the reason that they couldn't was because the Plain
14 Dealer wanted to use it exclusively. We used the rental
15 theory to overcome that. Yes?

16 QUESTION: I missed that page.

17 MR. FISCHER: It is Page 43.

18 QUESTION: Forty-three.

19 MR. FISCHER: Yes.

20 QUESTION: Thank you.

21 QUESTION: (Inaudible.) Is that it?

22 MR. FISCHER: Pardon?

23 QUESTION: The discussion of the Gannett
24 satellite case, is that what you are referring to on Page 43?

25 MR. FISCHER: Gannett and also we led up to that

1 with Greer versus Spock on Page 41 -- or 42.

2 QUESTION: I see.

3 MR. FISCHER: So PD did not apply. Instead, they
4 sued to attack the ordinances instead, and I think the
5 essence is that they want free, uninhabited use of the city
6 property. That is where they are coming from.

7 So, as to jurisdiction, as I indicated, the city
8 had drafted this ordinance with the attempt to permit, not
9 to play games with the Plain Dealer. We wrote this ordinance
10 so that the Plain Dealer could place their news boxes, and we
11 felt the appropriate theory for allowing this was a rental
12 theory.

13 And you could find in the finding 16 of the Court
14 and I think it is Page A30 of the jurisdictional statements
15 where that finding is, that they would have been able to
16 get these news box locations, but instead they choose to
17 attack the whole thing.

18 The District Court would not receive any evidence
19 of administrative interpretation. We offered the testimony
20 of the mayor who actually requested the legislation to settle
21 the lawsuit. The District Court, however, would not allow
22 us to use that testimony as to what was intended. There are
23 no applications. There is no real justiciable issue. It is
24 not ripe because they did not apply it.

25 Now, as to the standards --

1 QUESTION: If the ordinance is in fact setting
2 up some kind of unlimited discretion in the mayor to grant
3 or deny the permit, and if the court below was correct about
4 that, then I assume jurisdiction would lie, wouldn't it, to
5 make a facial challenge.

6 MR. FISCHER: I believe -- I hate to compare cases,
7 but I believe that we have set out far more guidelines than
8 the Gannett case or the Greer versus Spock case. We have
9 limited discretion tremendously compared to those. I don't
10 think the statement could even be made.

11 I hope I have answered your question on that.

12 QUESTION: You are just disagreeing with the
13 District Court.

14 MR. FISCHER: Pardon?

15 QUESTION: You are just disagreeing with the
16 courts below.

17 MR. FISCHER: I am disagreeing with the Court of
18 Appeals.

19 QUESTION: On the construction of the ordinance.

20 MR. FSICHER: Right, not the District Court.

21 QUESTION: Yes.

22 MR. FISCHER: We have the provisions right in the
23 ordinance as to, you can't make it any different height, you
24 can't make it any different size, you can't put it next to a
25 fire plug. All these things are spelled out. The only thing

1 that is left for the mayor to do is to check to see if
2 architectural review was done, to be sure that it is a safe
3 location, and to put any other conditions -- for example, the
4 condition to move the box in the case they have to do
5 construction. That is --

6 QUESTION: We do have to disagree with the con-
7 struction of the ordinance with the Court of Appeals?

8 MR. FISCHER: Yes, we do. We also believe that --

9 QUESTION: On your jurisdictional argument.

10 MR. FISCHER: Under jurisdiction I don't believe
11 they should have even reached it.

12 QUESTION: Mr. Fischer, may I go back? You cited
13 us to the findings on Page A30. You said they said they
14 would grant the permission. As I read that, it only said
15 they would grant them in the commercial districts, but not
16 along Clifton Boulevard at the sites requested, all of which
17 lie in the residential district.

18 MR. FISCHER: That's correct, and the Court of
19 Appeals sustained the City of Lakewood on that part of the
20 ordinance that they could limit them to the commercial
21 districts only. They also sustained that the rental charge
22 could be made.

23 QUESTION: So the residential issue is not here.

24 MR. FISCHER: No, the residential issue is not
25 before this Court.

1 As to discretion, the ordinance specified --

2 QUESTION: Let me -- excuse me.

3 MR. FISCHER: Yes, sir.

4 QUESTION: I know you --

5 MR. FISCHER: Yes, Your Honor.

6 QUESTION: You keep trying to go along. I am sorry.

7 You say there was nothing left for the mayor to do,
8 but there is sort of a residual clause in the ordinance which
9 says he can place, you know, whatever other conditions are
10 reasonable, and there is no limitation on what that might
11 happen to be.

12 MR. FISCHER: I think that these are terms of art.
13 I believe probably hundreds of contracts have come before
14 this Court where the legislative body gives authority to
15 somebody to make a contract, they don't spell out every last
16 term, and as long as the intent of the ordinance, which is
17 to allow the placement of the news boxes is affected, I
18 don't see where there would be any problem.

19 QUESTION: Well, they don't all deal with the
20 First Amendment, either. I mean, that is what our case law
21 says, that you have to be particularly careful and particular-
22 ly specific when you are affecting First Amendment rights.
23 That is just a pretty broad --

24 MR. FISCHER: That's correct, and it could be only
25 technical, minor things that would be reasonable and

1 necessary, such as the relocation of the box in the event of
2 construction, as the example that I have cited.

3 QUESTION: How do I know that?

4 MR. FISCHER: How do you know that?

5 QUESTION: How do I know that those are the only
6 things that come within that language? What is the precise
7 language again? I am looking for the ordinance here.

8 MR. FISCHER: Such other conditions -- it is C7,
9 such other conditions as may be deemed reasonable and
10 necessary by the mayor.

11 QUESTION: Such other conditions as may be deemed
12 reasonable and necessary by the mayor.

13 MR. FISCHER: Right.

14 QUESTION: It doesn't say technical conditions.
15 That could mean anything in the world, couldn't it?

16 MR. FISCHER: I don't believe that it does. I
17 think the intent of the legislature was clear that they wanted
18 the news box rental to go on, and it could be only the catch-
19 all type clauses that you would throw into any contract to
20 effectuate it, so that the city wouldn't be hamstrung. For
21 example, with utility polls we have a right to ask them to
22 move it and replace it during construction, and it was
23 anticipated at the time that it was written that it was not
24 going to contain every last nut and bolt, that there was
25 going to be something for the mayor. We knew the Plain

1 Dealer was going to apply, or thought they would apply, at
2 least, and we knew that we could handle those sites. We
3 didn't know what else was going to come down the line, and so
4 we left it open so that the mayor could protect the health and
5 safety. It is a police power residual clause, just to
6 protect the property rights of the city.

7 QUESTION: And there are no standards.

8 MR. FISCHER: Pardon?

9 QUESTION: The board hasn't adopted any standards
10 yet, have they?

11 MR. FISCHER: Are you talking about the architectural
12 review board?

13 QUESTION: Yes.

14 MR. FISCHER: I don't know whether they have
15 adopted them now. This was shortly after the adoption --

16 QUESTION: Well, they hadn't at the time it was
17 filed.

18 MR. FISCHER: They had not at the time it was
19 filed.

20 QUESTION: They admitted they didn't.

21 MR. FISCHER: That's right, because there had been
22 nothing before them to work on so they had not proceeded to
23 that point.

24 The ordinance specifies size, height, location,
25 eliminates considerable discretion. The most efficient

1 procedure is right here as to what we have. If the mayor
2 feels uncomfortable giving something that somebody asks
3 they appeal to the council. The council has a legislative
4 body that gives the contract authority wants to approve it
5 that is the end of it. If they don't like what the council
6 does with it, they go to the courts. And it is clear Ohio
7 law that under Chapter 2506, the decision of that council
8 cannot be arbitrary, it cannot be capricious, it cannot be
9 illegal, it cannot be unconstitutional, and it cannot be
10 unreasonable or unsupported by evidence. The mayor has to
11 say why he does this or that or the other thing, and he has
12 to give his reasons. I don't see what else we could do to
13 make this any better, and certainly it is ten times -- it is
14 100 times better than what you had in Greer versus Spock and
15 also in the Gannett case.

16 As to the mayor, we have the reasonable and necessary
17 provision for relocation, as I indicated, and other things
18 of that nature. The reasonable -- we have the location
19 standard provided, whether the architecture review board was
20 done, the terms of the lease, and then plus the mayor must
21 say if he is going to deny what the reasons are, and it has
22 to be only for the reasons of a health and safety hazard,
23 or there is a nuisance, or that they would interfere with
24 the traffic.

25 A lot has been said about censorship in this thing.

1 These rental agreements are for one year. Now, during that
2 one year term what is the mayor going to do, wait until there
3 is an article in the newspaper and come up with some phony
4 reason to cancel it? I doubt it. And then when they
5 reapply for the next year, assuming that it is profitable to
6 them and they want to continue with it, how would the mayor
7 be able to come up with a good reason for denying when it was
8 there the whole time? Either he has got a good reason for
9 denying it or he doesn't. So I find it very difficult as to
10 the censorship and I would point out that they would have
11 had their permits if they had applied for them.

12 It is clear on this reasonable and necessary and
13 also these locational things that it is difficult to convene
14 a council every time some new point comes up. That is why
15 the mayor was given discretion, and I submit that this contract
16 authority with guidelines plus discretion is very typical for
17 Congress, for state legislatures, for city councils all
18 across the country.

19 As to the architecture review board --

20 QUESTION: Excuse me. Suppose the mayor says one
21 of the conditions I am attaching to this particular one is
22 that it can only be usable by the public from 10:00 p.m. to
23 midnight?

24 MR. FISCHER: Then the person -- if he would put
25 that on there, then I believe the person would have the

1 right to go to the council, and by the way, under 901.1(a) he
2 can go directly to the council.

3 QUESTION: How can you go to the council? As I
4 read this there is an appeal to the council if he refuses to
5 grant or revokes a permit, but here he is granting it
6 subject to this condition. Does that --

7 MR. FISCHER: That's right. We are not talking
8 about a rigid thing. We have -- a negotiated contract is
9 what it is. If they insist on a contract without that
10 provision they want it 24 hours a day.

11 QUESTION: Then he has to deny it.

12 MR. FISCHER: He would have to deny it. Then it
13 would go to the council.

14 QUESTION: I see.

15 MR. FISCHER: However, I don't think that would
16 even come up at all. As to architectural review, we are
17 talking about the accepted and recognized architectural
18 principles. They do have the power to make specific rules
19 and expand their workbook so that there's more specifics.
20 They never reached us at the time of trial because there was
21 nothing before them, and here it is 1987, almost 1988. The
22 Plain Dealer still hasn't applied.

23 We are talking about properties. This has been all
24 over the country. There's competition between these street
25 commercial strips and the big shopping centers. If you had

1 the big shopping center there would be no question, the private
2 owner of that would tell the Plain Dealer where their news
3 boxes are going to be, and that would be the end of it. We
4 have the public streets, and Lakewood has got an aggressive
5 program under HUD. The same thing has been going on across
6 the country to try to make these commercial districts
7 profitable, to make them aesthetically appealing, to make
8 them vital.

9 They spent millions of dollars on it. They are
10 telling the store front owner, you have to fix your place
11 up, your signs have to be reduced in size, and so forth, so
12 we end the blight. The owner pays for that sidewalk in
13 front of the store, and he has to repair it if it is broke.
14 He pays tax to the city also. Here we want to put the news
15 box there. The only thing the city wants to do is to
16 harmonize that design and color with what the people have
17 in the storefront. I think it is only fair and reasonable
18 that this be done.

19 That is the purpose of it, to harmonize the
20 installation. Otherwise, what is the use of fighting all
21 this blight and poor signage that is causing this blight? It
22 will just end up that everybody is going to move to the
23 shopping center, and you can just forget about the fight to
24 save the commercial districts.

25 As to the architecture review, we do have

1 the book of standards, and there are, I submit that the Court
2 has probably not had a chance to look at that, because it
3 defies placement in the appendix, but there are several
4 pages showing the architecture of Lakewood and what would fit
5 in. I don't think that would be any particular problem. I
6 think it would have been extended without any trouble. There
7 are standards. They are not going to be able to say we don't
8 like the article you wrote about our book. Therefore
9 architecturally we are not going to approve anything for you.
10 It just wouldn't happen.

11 As to insurance, the Plain Dealer has stated they
12 never had an accident with any of these boxes. I just find
13 it hard to believe that none of these boxes ever come back
14 dinged up. I would imagine some of them have.

15 QUESTION: Mr. Fischer, does the city require the
16 furnishing of liability insurance and holding harmless for
17 other similar devices that are placed on the streets, or is
18 it just applicable to these news vending boxes?

19 MR. FISCHER: There are no other comparable
20 devices placed on the street.

21 QUESTION: What about telephone booths?

22 MR. FISCHER: The telephone booths --

23 QUESTION: -- and all the rest?

24 MR. FISCHER: The telephone booths are not the
25 telephone booths of the telephone company. These are

1 telephones such as the Supreme Court has right here in the
2 court. The city wants them there. They are a replacement
3 for those little red boxes that you used to have that if you
4 push the button or open the door the only thing that would
5 be reported is the location of something happening. They
6 put these telephone booths, or not booths, they are actually
7 just posts with telephones on them in the right-of-way as
8 part of the emergency communication. That way for free a
9 person can go and make a telephone call to the police
10 department, to the fire department. They don't have to go to
11 somebody's house if they need a tow truck or an ambulance.
12 They don't have to call the police for that if they have
13 their own private --

14 QUESTION: The city doesn't have any of these
15 ordinary pay telephone booths?

16 MR. FISCHER: This is a pay telephone booth. I am
17 not sure if all of them are like it, but the ones that the
18 city has, you just dial 0 -- in fact now I guess it is 911 in
19 Cuyahoga County, and you get the emergency service.

20 So there is no payment.

21 QUESTION: Are those the only numbers you can call?

22 MR. FISCHER: For free.

23 You can call -- if you wanted to call your tow
24 truck, you would have to place your quarter or whatever in
25 there to make that call.

1 QUESTION: Yes, or if you wanted to call your wife
2 and say, I'm going to be late for dinner.

3 MR. FISCHER: Exactly. You would have to place
4 coins in it for that.

5 QUESTION: In any event, no insurance or hold
6 harmless is required from the phone company?

7 MR. FISCHER: No, because these are the city's.
8 This is rented or owned by the city. It is telephone
9 equipment of the city.

10 QUESTION: How about the bus shelters?

11 MR. FISCHER: The bus shelters, I would have to
12 categorize that as the city's property also. They have bus
13 stops all over the city, and where there's not what they call
14 an RTA, Regional Transit Authority shelter, the city has
15 benches that they have installed and pay for themselves.
16 Now, what they have --

17 QUESTION: Well, is your transportation company
18 public or private?

19 MR. FISCHER: It is public, and the people of
20 Lakewood pay sales tax to subsidize the running of that bus
21 service.

22 QUESTION: Owned by whom? You say it is public.
23 The greater Cleveland area or what?

24 MR. FISCHER: Yes, it is the Cuyahoga County
25 Regional Transit Authority. Everybody is taxed for that.

1 Instead of Lakewood paying for the benches and having -- we
2 have the people maintain either one, but instead of them
3 paying for the installation of those benches, RTA puts them
4 in for free. That's the convenience for the residents.
5 Everything else is on the utility polls. I don't believe --

6 QUESTION: (Inaudible) telephone polls? What about
7 the telephone polls?

8 MR. FISCHER: There is no --

9 QUESTION: I mean, a car can run into a telephone
10 poll.

11 MR. FISCHER: There is just one set of polls.
12 Those polls that you see in the photographs are CEI.

13 QUESTION: CEI owns them?

14 MR. FISCHER: Electric Illuminating Company poll,
15 and everything is on those polls. The wires that carry
16 electricity for the street lights, the wires that carry
17 electricity for the traffic lights, the telephone wires, they
18 are all on there.

19 QUESTION: And CEI is a private company?

20 MR. FISCHER: They are a private company subject
21 to regulation under -- I guess it is called PUCO.

22 QUESTION: Right. But they don't have to -- you
23 don't require them to ensure against liability from a poll
24 falling down or --

25 MR. FISCHER: They have an easement, and they do

1 have to make repairs and relocate their --

2 QUESTION: But they don't have to insure the city
3 against suits to the city from the negligent placement of the
4 polls or something like that?

5 MR. FISCHER: No, these easements were granted a
6 long time ago, and they are also there for the purpose of
7 providing the city service, which is the telephone communica-
8 tion.

9 QUESTION: And the wires on the polls, you have
10 cable companies that have wires on those polls?

11 MR. FISCHER: The cable company by other Acts are
12 permitted to have wires on those polls also.

13 QUESTION: And those wires could come down and hurt
14 somebody, but does the cable company have to ensure the
15 municipality against --

16 MR. FISCHER: The cable television company does
17 have to ensure. There is -- this is not in the record, I
18 would point out.

19 QUESTION: I am just curious. What about the
20 telephone company. They have wires up there. Do they have
21 to insure?

22 MR. FISCHER: We do not have a requirement on
23 them for insurance. And that is because they are providing
24 the service to the city for the emergency communications
25 network. They provide the other wires incidentally --

1 QUESTION: Mr. Fischer?

2 MR. FISCHER: Yes, sir?

3 QUESTION: There is presently in effect, is there
4 not, an interim ordinance that replaces the one that we are
5 addressing here?

6 MR. FISCHER: That's correct.

7 QUESTION: And the interim ordinance was adjusted
8 to, what, to omit some of the provisions that were found by
9 the Court of appeals to be --

10 MR. FISCHER: They were temporarily suspended, and
11 temporary measures put into place. We got a call ffrom
12 the Plain Dealer that said, we want to have those boxes, so
13 we passed the ordinance. We are still waiting for their
14 application.

15 QUESTION: I see.

16 MR. FISCHER: But that ordinance will dissolve
17 within a short time after the decision.

18 QUESTION: By its own terms?

19 MR. FISCHER: Yes, the council either -- if the
20 council takes other measures, depending on the decision in
21 this case, or I think it is a 60-day period, it is dissolved.
22 That was to preserve our position in this appeal.

23 QUESTION: Mr. Fischer, I noticed some of the
24 plaintiff's exhibits have in the photographs USA Today units.
25 Did the Gannett people get permits?

1 MR. FISCHER: No.

2 QUESTION: And why -- are they parties to the
3 litigation?

4 MR. FISCHER: They are not. The New York Times tried
5 to join the suit but they were kicked out on an abstention
6 grounds by the Sixth Circuit.

7 QUESTION: You are not objecting to USA units?

8 MR. FISCHER: They have not applied. We don't
9 have anything to do with them. These USA Today units are in
10 somebody else's city. They are not in the City of Lakewood.

11 QUESTION: So that Exhibit 41 is not in the
12 City of Lakewood?

13 MR. FISCHER: Let me check.

14 QUESTION: Or 40?

15 MR. FISCHER: No, that is plaintiff's exhibit,
16 and they put in a whole bunch of exhibits over our objection
17 as to news boxes in other cities.

18 QUESTION: In the city?

19 MR. FISCHER: In other cities. We felt it was
20 irrelevant, but the court let it in.

21 QUESTION: So those boxes in those exhibits are
22 not in your city.

23 MR. FISCHER: No. There are boxes in our city.

24 QUESTION: Yes, yes.

25 MR. FISCHER: I think there were 16 sites where

1 there are boxes. One was the RTA property. There are
2 coffee shops, supermarkets. They are all over the city,
3 within a quarter-mile --

4 QUESTION: Are there any USA Today boxes in the
5 city?

6 MR. FISCHER: Yes. Yes, there are.

7 QUESTION: And what about them? Did they apply
8 for a permit?

9 MR. FISCHER: They have not seen fit to apply for
10 a permit.

11 QUESTION: Well, why don't you throw them out?

12 MR. FISCHER: Well, they are on private property.

13 QUESTION: Oh, private property.

14 MR. FISCHER: Either on private property or public
15 property that is not owned by the City of Lakewood, so we have
16 no jurisdiction. We are not acting as owner as to those. It
17 would just be if a zoning would come up that we would apply
18 apply to that.

19 QUESTION: May I ask on the -- I gather probably
20 the Plain Dealer has some on private property, too, don't
21 they, or do they?

22 MR. FISCHER: They have private property?

23 QUESTION: They have these boxes on private
24 property located within the city?

25 MR. FISCHER: Yes, Your Honor, they have 16.

1 QUESTION: Are those boxes subjected to any kind
2 of architectural design, zoning requirements?

3 MR. FISCHER: No. No, we have not subjected them
4 to any of the requirements. I haven't looked at them as to --
5 I don't think that it would apply to them since -- because
6 of where they are located, but it may be that we slipped up
7 on that. I don't know. I don't think that -- if we have,
8 I think that it's because of their location it would not apply.

9 QUESTION: Mr. Fischer, what about the devices
10 shown, for example, on Plaintiff's Exhibit 34?

11 What is that box?

12 MR. FISCHER: That is the junction box for
13 the telephone company.

14 QUESTION: So it is owned by a private company,
15 the telehpone company?

16 MR. FISCHER: Yes, it is, and it --

17 QUESTION: Do they have to provide insurance?

18 MR. FISCHER: No, they don't. That is there for
19 carrying the lines not only of private but also of the city's
20 communication system. This is part of the tradeoff for the
21 consideration -- actually, the city is getting the service
22 on a lease basis. They may even make some money on some of
23 these phones if people put coins in them. So this is part of
24 the tradeoff that they would permit them because they are
25 carrying emergency communications.

1 There have been no rentals, no rentals of any city
2 property that do not have insurance. As a matter of risk
3 management, every contract that the City of Lakewood makes,
4 unless they slip up, their intention is to have indemnifica-
5 tion and insurance. Otherwise --

6 QUESTION: (Inaudible.)

7 MR. FISCHER: Any contract.

8 QUESTION: Any contract.

9 MR. FISCHER: Any contract, whether it is --

10 QUESTION: But not when you grant an easement.

11 MR. FISCHER: An easement is an interest in real
12 estate, which is done by a deed easement, and these things
13 were done -- they had lighting and electricity probably
14 before the days of the Depression, so there is nothing we
15 can do about it.

16 QUESTION: Right.

17 MR. FISCHER: It is there. As to alternate -- one
18 other point here. The use of the sidewalk and tree lawn
19 area has been exclusively used for the provision of
20 traditional city services and utilities. There has been
21 no structure erected there that does not provide the city
22 with a service, and there is not such a thing there now.

23 The traditional city services that are provided,
24 newspaper and the sale of newspaper are not traditional
25 city services. Therefore, the reason for having a

1 classification. As to alternate channels of communication,
2 the Plain Dealer can have a newsboy selling it their. Their
3 newsboys do go up and down the street, up and down the drive-
4 ways, and deliver newspapers. Their drivers come to the
5 commercial areas. They unload --

6 QUESTION: Mr. Fischer --

7 MR. FISCHER: Sorry.

8 QUESTION: Mr. Garner.

9 ORAL ARGUMENT BY JAMES P. GARNER, ESQUIRE

10 ON BEHALF OF THE APPELLEE

11 MR. GARNER: Justice Brennan, and may it please
12 the Court, I do not agree with too much of what Mr. Fischer
13 said, but I believe he did recognize that we claim, at least,
14 and he is absolutely correct, that this case involves a
15 potential and a very serious potential for censorship.

16 More specifically, the City of Lakewood originally
17 tried an outright ban on the news racks, and the District
18 Court found that to be unconstitutional. The city abandoned
19 that route and enacted the ordinance --

20 QUESTION: (Inaudible) the District Court was
21 wrong about that?

22 MR. GARNER: If the District Court was wrong,
23 the --

24 QUESTION: And the city could have kept --

25 MR. GARNER: Could have appealed, yes -- if I

1 might be precise, Your Honor, we filed our complaint and a
2 motion for summary judgment based on the illegality of the
3 violation of our First Amendment rights with respect to the
4 complete ban. The judge summoned us into chambers, told us
5 what his decision was some time after the motion had been
6 submitted, and said that he was granting the motion but was
7 holding in abeyance for a period of six days the entry of the
8 final order to permit the city if it chose to --

9 QUESTION: Let's assume that the city did have
10 the constitutional right to keep the Plain Dealer from having
11 any boxes on the city streets. Would that make any difference
12 in this case?

13 MR. GARNER: I don't think so, Your Honor. Not to
14 the issues before Your Honor. They do permit us there, and I
15 think the precedents of this Court when you have this
16 unfettered, complete discretion in city officials, not only
17 the mayor but the architectural board, the precedents are
18 clear that it is facially challenged on that ground. It is
19 the potential for censorship which results from that which
20 creates the constitutional confrontation which we feel must
21 be resolved in our favor.

22 So we feel the complete ban is not before Your
23 Honors, and we feel that the discretion in the mayor,
24 unfettered, the architectural board, no standards nor guides
25 whatsoever, and this is not, we suggest --

1 QUESTION: Mr. Garner, before you get all the way
2 into the merits --

3 MR. GARNER: Yes.

4 QUESTION: -- I had missed the fact that the city
5 was really making an independent jurisdictional argument which
6 they have advanced here on the ground as I understand it that
7 all you had to do was apply for these rental units and no
8 doubt you could have had them.

9 MR. GARNER: Well, I don't know whether we could
10 have had them or not, Your Honor.

11 QUESTION: But they say the District Court
12 so found.

13 MR. GARNER: If the mayor found that no reasonable
14 reason to deny us or he found no necessary reason to deny us,
15 presumably we might have had our permit, but it is the
16 potential for censorship here. We are talking for the moment
17 about the City of Lakewood, but if I could make a short
18 excursion outside the record, in the city -- in the County
19 of Cayuga, where Cleveland is located, there are 73 -- 73
20 separate municipalities. Now, whether or not Mayor Sinagra
21 would have readily issued the permit to the Plain Dealer --
22 by the way, he was reelected yesterday, and he serves another
23 term --

24 QUESTION: (Inaudible.)

25 MR. GARNER: Endorsed by the Plain Dealer, I might

1 add, Your Honor.

2 (General laughter.)

3 QUESTION: That is why you are sure you will
4 get your boxes.

5 (General laughter.)

6 MR. GARNER: Sir? I'm sorry?

7 QUESTION: That is why you are sure you will get
8 your boxes.

9 (General laughter.)

10 MR. GARNER: The experience that the Plain Dealer
11 might well anticipate from some of the other municipalities
12 where there have been rather detailed investigations and
13 stories in the Plain Dealer with respect to city affairs,
14 I think there would be serious question if this unfettered
15 discretion, and there was no right by the Plain Dealer really
16 effectively to go anywhere. The mayor says, no, that's it.
17 He says safety, I'm not satisfied, that's the end of it.

18 The architectural board said it's not pretty enough.
19 That's the end of it. We have no place to go.

20 QUESTION: I thought there was an appeal process.

21 MR. GARNER: Yes, Your Honor, but I think the
22 appeals process when we are talking about First Amendment
23 rights is insufficient. I think the -- for example, this
24 case started in 1982. Here we are almost to 1988. I think
25 the precedents of this Court are ample to support the

1 proposition that when First Amendment rights are denied, that
2 some kind of an appellate process is sufficient to rectify
3 it. It probably would be anywhere from two to four years to
4 obtain a complete administrative and judicial review in the
5 State of Ohio through the Ohio Supreme Court, and that we
6 submit just does not square with the notion of First
7 Amendment rights.

8 QUESTION: Mr. Garner --

9 QUESTION: That could happen -- that could happen
10 if you had precise standards and you were denied and you just
11 claimed the mayor made a mistake, and you had to go up on
12 appeal, where you might not hear for two or three years.

13 MR. GARNER: If we -- well, if we had precise
14 standards I don't see there would be much to be arguing
15 about.

16 QUESTION: Well, whatever the standard is, somebody
17 can misapply it.

18 MR. GARNER: I think in this case news racks are
19 capable of very precise legislation. We are not talking
20 about something nebulous about words that might incite
21 somebody to a riot or something. We are talking about a news
22 rack. Everyone knows what they look like. Everyone knows
23 how big they are.

24 If the mayor or the city council feels that five
25 feet is the distance it must be away from a fire hydrant,

1 so be it. Five feet, not four, five or more.

2 QUESTION: Yes, Mr. Garner, but suppose the
3 regulation is no more than one news rack on any corner or
4 whatever it might be, and then there is some dispute about
5 which one of the competing newspapers wants that corner.

6 MR. GARNER: On numbers, Your Honor, the City of
7 Lakewood has a requirement of no more than three abreast at
8 this time or at any one location, three abreast. At this
9 time or at the time this commenced the Plain Dealer did not
10 complain about that, feeling that that is within the one
11 of what is reasonable in the City of Lakewood. Whether that
12 would be true in another city, I don't know, Your Honor. It
13 would depend on, I believe, the application of some of the
14 tests developed by Your Honors in other cases, the Rockford
15 school case, the Grayned test, the test of compatibility. If
16 five is compatible, then that is right.

17 Some cities have a great many more newspapers to
18 be distributed.

19 Coming back to your precise question, I think
20 a limit of one would be suspect for two reasons. One, I think
21 it is too restrictive, and secondly, it does offer perhaps
22 even a pretextual use of --

23 QUESTION: Well, we can't even three do that.
24 The record suggests --

25 MR. GARNER: -- which -- a precise selection of

1 which publisher can occupy that spot.

2 QUESTION: The record suggests U.S. News and World
3 Report gets one, New York Times another, and the Plain
4 Dealer the third. Supposing a fourth paper comes in, and
5 they say, well, we have already used up all the three
6 stand slots?

7 MR. GARNER: Well, they would have to move -- they
8 would have to move down the street a ways. They are not
9 forbidden anywhere else in the city. Just, they can't
10 attach it --

11 QUESTION: Well, supposing they make a map, and on
12 the map they list all the permissible sites, and no more than
13 three at any one of these sites, and you people all get
14 these three, and a fourth paper comes in. I guess they are
15 just out of luck.

16 MR. GARNER: I don't believe, Your Honor --

17 QUESTION: Real precise standard.

18 MR. GARNER: -- the map listed all the permissible
19 sites. I believe what is in that --

20 QUESTION: No, I am giving you a hypothetical.

21 MR. GARNER: Oh.

22 QUESTION: A hypothetical ordinance. You get
23 all the standards you want in, and they are very, very
24 definite, but these are the sites, no more than three at any
25 one of these 30 or 40 sites, they are all taken, and

1 somebody else comes along and said, we would like a site.

2 MR. GARNER: If we are talking about the traditional
3 public forum here, which is, of course, the entire sidewalk,
4 an entire block long, and it is difficult to imagine that
5 three boxes would occupy the whole block. They would occupy
6 that portion of the block, but the rest of that block would be
7 available for other publications.

8 QUESTION: And suppose they then say, well, since
9 we can't accommodate all four without having what we consider
10 visual blight by too many of these, we just decided not to
11 allow any.

12 MR. GARNER: I think that a complete ban on
13 boxes -- is that Your Honor's question --

14 QUESTION: Yes.

15 MR. GARNER: -- anywhere in the jurisdiction?

16 QUESTION: I am just really not sure that
17 isn't some --

18 MR. GARNER: Again, I don't believe it is in the
19 case, Your Honor, but I think it would clearly be unconsti-
20 tutional.

21 QUESTION: What case from this Court do you cite
22 for that conclusion?

23 MR. GARNER: The exercise of First Amendment
24 rights?

25 QUESTION: No, no, that a flat ban on the renting

1 of space for vending machines would come --

2 MR. GARNER: We don't agree that we are renting
3 space. That is the city's characterization of what is
4 occurring here, Justice O'Connor.

5 QUESTION: I am just asking what case you rely upon
6 from this Court that space on the sidewalk must be permanently
7 set aside for the newspaper's vending machines.

8 MR. GARNER: We don't -- I can't quite agree with
9 your characterization of permanently set aside.

10 QUESTION: Stop disagreeing with my characterization
11 and give me a citation, if you would.

12 MR. GARNER: I think any of the cases, Lovell,
13 or any of the cases, Shuttlesworth, Coxby, Louisiana, any
14 of the cases which talk about the exercise of First Amendment
15 rights.

16 QUESTION: I just didn't find any of those directly
17 relevant to the giving up of space on a city sidewalk or
18 otherwise for a permanent device of some kind.

19 MR. GARNER: I don't believe that it is a permanent
20 giving up. I said we --

21 QUESTION: It is not hourly, is it?

22 MR. GARNER: No, no, it is not hourly, Your Honor.

23 QUESTION: It isn't yearly either.

24 MR. GARNER: Well, it could be whatever --

25 QUESTION: Well, if you quit --

1 MR. GARNER: -- whatever is reasonably necessary,
2 Your Honor.

3 QUESTION: If you didn't get enough nickels and
4 dimes in it, you would move it, I suppose.

5 MR. GARNER: I think that's probably correct.

6 QUESTION: Up until that time, it is going to
7 be there.

8 MR. GARNER: Not if there is a legitimate or logical
9 reason for moving it, street repairs, parade going to
10 occupy the property, whatever reason.

11 QUESTION: Could I ask you on the discretion---

12 MR. GARNER: Yes, sir.

13 QUESTION: -- end, take the city -- is it the city
14 architect, architectural board?

15 MR. GARNER: Yes.

16 QUESTION: What if the ordinance said, the
17 design of these 25 by 50 inch boxes shall be the design
18 specified by the architectural board, and the architectural
19 board meets, and it publishes a specific design. If you
20 want a news box, you would have to have it this way, no other
21 way. And there is a -- you wouldn't have any objection if
22 in the ordinance it says 25 by 50 and the design is as follows,
23 colon, and it has a drawing in it of the precise --

24 MR. GARNER: If -- two or three observations, Your
25 Honor. One, if it is a box, if there is a box available that

1 could meet the specifications, obviously.

2 QUESTION: Well, you would have to make one.

3 MR. GARNER: Well, I am not sure that would be
4 possible. You might be coming back to the --

5 QUESTION: Well, then you are back to whether there
6 is a constitutional right to get on the sidewalk. What about
7 my -- what if it were perfectly feasible to make a box
8 precisely to conform with the architectural board's
9 specifications? Would you say that that is uncontrolled
10 disreccion?

11 MR. GARNER: I don't think if it is precise and
12 it is reasonable and it is available, I can't say that it is
13 necessarily wholly unreasonable.

14 QUESTION: But having the architecture board have
15 so little bit of discretion even gives you a little bit more
16 room. It is more favorable to you.

17 MR. GARNER: Having the architectural board with
18 this unlimited discretion permits them to turn down any box
19 that they desire to turn down, no matter what the publisher
20 is, whether it is because of the box or whether it is a
21 pretextual reason.

22 QUESTION: I would think you would rather have it
23 this way and have the architectural board specify in detail
24 what your box has to be.

25 MR. GARNER: We would be pleased and, I think, would

1 have been pleased had we been able to arrive at a complete
2 agreement with the City of Lakewood with respect to speci-
3 ficity in the ordinance from top to bottom. We failed in
4 that --

5 QUESTION: Did you ever ask the architectural board
6 what kind of a box they might approve?

7 MR. GARNER: They had no idea. They had never
8 considered the matter. The testimony in the record says
9 they --

10 QUESTION: Well, did you ask them?

11 MR. GARNER: They were asked at the trial, yes.

12 QUESTION: But you never showed them a box?

13 MR. GARNER: No, no. We are -- as I believe we
14 mentioned earlier, Your Honor, we feel we have the opportunity
15 or the right to test this uncontrolled discretion facially.

16 QUESTION: Mr. Garner, I notice that the Court of
17 Appeals seems to rely very heavily on Staub and City of
18 Baxley. Was there an appellate process in that case?

19 MR. GARNER: I don't recall, Your Honor.

20 QUESTION: Mr. Garner, can I ask you, supposing we
21 were to affirm, I may have the facts a little wrong, but the
22 Court of Appeals enjoined the enforcement of the ordinance
23 in total, didn't they?

24 MR. GARNER: Not entirely. It separated the ban
25 in areas zoned residential, and struck down the rest of it

1 really three -- they found three flaws, three constitutional
2 flaws, and they struck down all of the rest except for the
3 residential ban because it was not separable.

4 QUESTION: Did they strike down the portion of
5 the ordinance that authorizes the city to rent the property
6 for this purpose?

7 MR. GARNER: They struck that down, yes.

8 QUESTION: So if we just were to affirm, there
9 would in effect be no ordinance pertaining to this subject
10 on the books.

11 MR. GARNER: They have enacted a new ordinance.

12 QUESTION: Oh, they have a new ordinance.

13 MR. GARNER: Yes, sir. Yes, Justice Stevens. In
14 1987, earlier this year, I believe, they enacted the new one.

15 QUESTION: What happens through this lawsuit if
16 we get another ordinance in place?

17 QUESTION: I thought the new ordinance was just tempo-
18 rary, pending the resolution of this lawsuit. Is that not right?

19 MR. GARNER: I don't believe so, Your Honor. What it says
20 is that it suspends the operation of the mayor's discretion
21 and the architectural board's discretion. Those are not part
22 of the new ordinance. The unlimited discretion.

23 QUESTION: Suspends? You mean until when?

24 MR. GARNER: Until some 60 days after this Court
25 reaches its decision, or until --

1 QUESTION: So it is just temporary, pending the
2 resolution of the case?

3 MR. GARNER: Well, those particular points are,
4 yes. The rest of it is all in position.

5 QUESTION: Well, Mr. Garner, was the idea
6 that if this Court affirmed, then after 60 days would not the
7 interim ordinance continue in effect?

8 MR. GARNER: Yes. That is my understanding,
9 Your Honor.

10 QUESTION: Could that be interpreted as a threat?

11 MR. GARNER: As a threat?

12 QUESTION: Yes.

13 MR. GARNER: Well, I don't know what would happen,
14 depending on what this Court does, obviously. I think they
15 might very well go back to where they started, the complete
16 ban.

17 QUESTION: Well, they are trying to influence this.

18 MR. GARNER: Yes. Well, I don't know, Your Honor.

19 QUESTION: For what other reason would they pass it?

20 MR. GARNER: Would they pass it? Well --

21 QUESTION: For what other reason?

22 QUESTION: Because the Plain Dealer wanted their
23 boxes on the street.

24 QUESTION: But I am trying to understand, the
25 substitute ordinance is now in effect pending the outcome of

1 this case?

2 MR. GARNER: The substitute ordinance is
3 substantially in toto in effect. The portions that are not
4 in --

5 QUESTION: Without the objectionable feature?

6 MR. GARNER: Excuse me.

7 QUESTION: Without the objectionable features.

8 MR. GARNER: Yes, that's right.

9 QUESTION: Well, then, while that ordinance is in
10 effect, have you gone ahead and installed some boxes?-

11 MR. GARNER: No, we have not, Your Honor.

12 QUESTION:: Why not?

13 MR. GARNER: Because if --

14 QUESTION: Because, you know, time is of the
15 essence in these First Amendment issues, I understand.
16 You can't wait for an appeal.

17 (General laughter.)

18 QUESTION: You had better get those boxes out
19 there.

20 MR. GARNER: Well, Your Honor --

21 QUESTION: Perhaps you don't have enough confidence
22 in your case here.

23 (General laughter.)

24 MR. GARNER: We thought, as I suggested earlier, we
25 think this is a very important case, and from the Plain

1 Dealer's immediate standpoint certainly--

2 QUESTION: In other words, you'd rather win the
3 lawsuit than get the boxes out there.

4 MR. GARNER: Yes, that's correct, Your Honor. We
5 think we are entitled to a decision that we obtain -- that
6 we obtained from the Court of Appeals, and we did not appeal
7 this case. We were satisfied, or we did not seek certiorari
8 from this Court. So what we want is what the Court of Appeals
9 ruled. We think that is satisfactory, and that is satisfac-
10 tory whether we go to the other 73 other municipalities.

11 QUESTION: And that's because you're concerned about
12 the 79 other municipalities, I gather.

13 MR. GARNER: I'm sorry, Your Honor.

14 QUESTION: That's because of your concern about all
15 the other municipalities.

16 MR. GARNER: Yes. The Plain Dealer's concern about
17 all the other --

18 QUESTION: The Plain Dealer operates them all?

19 MR. GARNER: All 73, yes, and more. That's just
20 the one county, now. That's just the one county. There are
21 a number of other municipalities in the surrounding counties.
22 Oh, yes. And that is the reason that we are here, because
23 Mr. Fischer brought us here, but that's the reason that we
24 urge this Court.

25 QUESTION: Are any other news boxes on the street?

1 MR. GARNER: In Lakewood?

2 QUESTION: Yes.

3 MR. GARNER: Not to the best of my knowledge,
4 Your Honor.

5 QUESTION: But no one has taken advantage of this
6 interim ordinance?

7 MR. GARNER: As far as I know, that's correct.

8 QUESTION: Because if there hadn't been this
9 interim ordinance, there wouldn't have been any ordinance
10 in effect at all after the Court of Appeals' judgment.

11 MR. GARNER: That's correct. That is correct.
12 Anybody would have been free to --

13 QUESTION: And then if you had wanted to get on the
14 street, you would have a little problem getting your boxes
15 on the street without an ordinance.

16 MR. GARNER: Without an ordinance.

17 QUESTION: Or would you just say we are going to
18 put them up because we have the constitutional right to be
19 there?

20 MR. GARNER: I think that's -- I can't speak -- yes,
21 it is true, Your Honor. In a number of cities there are no
22 ordinances whatsoever dealing with news racks.

23 QUESTION: Yes, but they don't object to the
24 newspapers being there.

25 MR. GARNER: Right, they acquiesce in it, correct.

1 QUESTION: They acquiesce in the unfettered
2 discretion of the mayor, I presume.

3 (General laughter.)

4 MR. GARNER: Well, if it is unfettered, it is
5 unexercised as well.

6 QUESTION: Well, he exercises it by not objecting.

7 MR. GARNER: Yes, Your Honor.

8 QUESTION: Well, they are out in front of this
9 building. You can buy the -- whatever you want out there,
10 except the Plain Dealer.

11 (General laughter.)

12 MR. GARNER: Well, I think, Your Honor, there is
13 probably more call for different publications in the City of
14 Washington certainly than the City of Lakewood, Ohio. A
15 great many more publishers want their newspaper here in the
16 nation's capital than they do in the City of Cleveland or
17 its suburban areas.

18 QUESTION: Of course, that doesn't mean it wasn't
19 litigated. It was, a few years ago.

20 MR. GARNER: Yes. With respect to the insurance
21 I would say -- make a couple of observation. One has two
22 parts to it. One is the indemnity which, as I read it, is so
23 broad that the Plain Dealer or the press, small "p", is
24 called upon to indemnify the city for things that may even
25 be the city's fault if there is a news rack even

1 collaterally involved one way or another, and I think that
2 kind of provision, without respect to the First Amendment,
3 would be abhorrent. More importantly, the insurance, from
4 the questions of the Court, I believe they were all directed
5 toward the fact that the requirement is solely for insurance
6 to be provided by the newspaper publishers who use these
7 news racks, the other privately owned utilities. Nobody else
8 is called upon for the same thing. We think that quite
9 clearly singles out the press in an unconstitutional --

10 QUESTION: Well, the city takes the position, I
11 guess, that it is renting the space for the vending devices
12 and that it would charge -- require the furnishing of
13 insurance for anyone who rented space from the city.

14 MR. GARNER: Yes. May I state my view of what
15 I think the relationship is of the Plain Dealer or a
16 publisher with its rack on the street and the city? We
17 don't view it as a possessory interest of any sort, nor do
18 we view it as a property right. The word "rental" connotes
19 to me some sort of a passage of an interest in real property,
20 paying money for a right to do something. It is assignable,
21 it is this, it is that.

22 What I conceive or perceive we have is a First
23 Amendment right, the same as it would if we had a news hawker
24 out there. A news hawker can stand there. We have a First --

25 QUESTION: What if we think that it is different,

1 that it is a physical occupation of city property, and that
2 that is distinguishable from allowing people to walk on the
3 sidewalk and sell newspapers.

4 MR. GARNER: Yes. Oh, there is no question about
5 that, that this is a fixed device, it is there, it doesn't get
6 cold, it doesn't go to lunch. It is there to provide news-
7 papers to the public at all hours --

8 QUESTION: Twenty-four hours a day.

9 MR. GARNER: Twenty-four hours a day. We think
10 it is --

11 QUESTION: Week in and week out, month in and
12 month out. Now, what if we think that is different?

13 MR. GARNER: Well, I think it is different, Your
14 Honor. I think it is different in particular in the respect
15 that it far better serves the public that may desire to buy
16 newspapers. It serves them 24 hours a day.

17 QUESTION: But you assert that it is not possible
18 under the First Amendment for the city to require indemnity
19 insurance for those devices? I think that is a remarkable
20 proposition.

21 MR. GARNER: No, I am not suggesting that,
22 Your Honor. No. No, I am not suggesting that. I think
23 the evil was the one that was suggested by the earlier
24 questioning, and that is the singling out of the press.

25 QUESTION: What if they say that for every situation

1 in which they are granting a permit to physically occupy
2 city property they are going to require that type of
3 insurance?

4 MR. GARNER: Do they do the same with the electric
5 utility?

6 QUESTION: Too late, they say. Water over the dam.
7 Before the city ever thought of such things, they had given
8 an easement already.

9 MR. GARNER: Well, I think the city council --
10 certainly that could be rectified, Justice Scalia.

11 QUESTION: Not if the easement has been granted
12 already, no.

13 MR. GARNER: Well, I think that -- I don't know the
14 answer to that, Your Honor. It depends a lot on statutory --
15 state statutes which establish the relationship of some of
16 these municipalities and the utilities, and I am not an
17 authority on that subject, but if there were a demonstrated
18 need that there were safety hazards involved with the tele-
19 phone polls, I am sure one way or another a city would be
20 successful in obtaining insurance coverage to protect it.

21 I might add that the record is barren here to
22 show that there has ever been a safety factor with respect to
23 news racks. It just doesn't exist.

24 QUESTION: Let's assume, carrying Justice O'Connor's
25 question further, that we do think that this is somehow a

1 property interest and that the city can lease these stations
2 in a way. Is it your position that every provision of the
3 lease contract must be spelled out in the ordinance and there
4 can be no variation from one contract to another?

5 MR. GARNER: I think the ordinance could be very
6 specific, Your Honor.

7 QUESTION: I didn't ask whether it could be very
8 specific. I asked a simple question, must every provision of
9 the lease contract be in the city ordinance, including the
10 price, and the mayor would not have the ability to alter the
11 price from year to year. Would that be too much discretion?

12 I mean, I am trying to think of how you could set
13 up a sensible system. It doesn't seem to me the city is
14 being vindictive or coming down on the press which endorses
15 their mayor or anything like that. It seems to me they are
16 trying to do a reasonable thing, and I'd like to know, what
17 do you suggest they could have done differently?

18 For instance, that provision -- such are the terms
19 and conditions deemed necessary and reasonable by the mayor.
20 Well, I can think of a million things that could come up, why
21 in one particular location you have to add an additional
22 condition besides the ones you normally think of, this location
23 is near a school or who knows what?

24 I think it seems to me quite reasonable to put in
25 that residual clause. Now, you don't like it. What would

1 you have said instead?

2 MR. GARNER: Well, I don't like it because of the
3 threat of censorship, Your Honor. What would I have said?
4 It was something considerably less than that. I think
5 that --

6 QUESTION: Such as what?

7 MR. GARNER: Such as the -- if there is in the
8 future there arises a safety factor demonstrated to the
9 satisfaction of whoever, the matter will be brought to the
10 attention of the publisher and it will be discussed with the
11 publisher, whatever. I don't know, Your Honor.

12 QUESTION: I don't know either, and that is part
13 of the problem. I mean, it seems to me that what counsel for
14 the city raises is a reasonable thing. You need a little bit
15 of give if you are writing God knows how many contracts for
16 stations all over the city. They won't necessarily be
17 identical. Now, how can that all be handled and specified in
18 one city ordinance?

19 MR. GARNER: Well, I don't know of anything that
20 the -- in the four or five years that we have been talking
21 about this that the city has suggested they would add,
22 except onething. They said they forgot to put in a prohi-
23 bition against placing a rack in a handicapped -- or a news
24 rack in a handicapped ramp. So the new ordinance has that
25 in.

1 in.

2 One possibility, obviously, Your Honor, is amending
3 the ordinance when something occurs to them. If there is an
4 emergency, if Halloween a prankster moves a box out in the
5 middle of the street, obviously the local police are going to
6 handle the situation. But I think that this is an area where
7 you are dealing with boxes that everybody can identify. They
8 understand them. I think you can be absolutely specific.
9 Except for the direst of emergencies, most anything that turns
10 up subsequently could be very well handled at the next
11 regular or special meeting of the council.

12 QUESTION: May I ask you a question on another
13 subject? Are there any ordinances either in Cuyahoga County
14 that pertain to the retail sale of newspapers, magazines, and
15 the like on public property? I know in a lot of cities there
16 are public newsstands that are operated by human beings
17 rather than these inanimate objects. Are they generally
18 the subject of ordinance?

19 MR. GARNER: So far as I know, there are no public
20 newsstands on public property in Cuyahoga County.

21 QUESTION: In that area. I see.

22 MR. GARNER: I know of none. Unlike Washington.
23 I don't recall ever having seen one.

24 QUESTION: Bus stations. The railroad station.

25 MR. GARNER: Oh, yes, the stations.

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QUESTION: The airports.

MR. GARNER: Bus stations have news racks. The bus stations do. The railroad station does. Any number of the RTA stations, the Rapid Transit stations, all those do. Yes, Your Honor.

I believe, Your Honors, we have covered everything that I desire to bring to the attention of the Court, and it is obvious that we urge affirmance of the decision of the Court of Appeals in its entirety.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Garner.

Thank you, Mr. Fischer.

The case is submitted.

(Whereupon, at 1:58 o'clock p.m., the case in the above-entitled matter was submitted)

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2
3 REPORTER'S CERTIFICATE

4 DOCKET NUMBER: 86-1042

5 CASE TITLE: City of Lakewood vs. Plain Dealer Publishing Co

6 HEARING DATE: November 4, 1987

7 LOCATION: Washington, D.C.

8 I hereby certify that the proceedings and evidence
9 are contained fully and accurately on the tapes and notes
10 reported by me at the hearing in the above case before the
11 Supreme Court of the United States.

12 and that this is a true and accurate transcript of the case.

13 Date: November 12, 1987

14
15
16 *Margaret Daly*
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