



August 21, 2002

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I am writing to you on behalf of Go Go Media, LLC, which publishes the local arts and entertainment bi-weekly, Go-Go Magazine, regarding the News Rack Ordinance passed by the City Council of Denver October 29, 2001 (aka Ord. No. 918-01, 10-29-01). It is the position of Go Go Media, LLC that this News Rack Ordinance and the manner in which it is enforced violates our rights under Amendments 1, 4, 5 and 14 of the U.S. Constitution as well as Article 2, Sections 10 and 25 of the Colorado Constitution, and thus that the News Rack Ordinance is both facially invalid and invalid as applied to Go Go Media, LLC, and our property. This letter includes the facts, our legal arguments and what the City and County of Denver needs to do to avoid litigation on this matter.

Go Go Media, LLC, has been harmed by the enforcement of this News Rack Ordinance in the following manner:

1. One of our news racks which had formerly been located at 16th and Glenarm was seized in June 2002. We had received no notice of violation prior to the seizure and received no notice afterwards the rack had been seized. We were given no opportunity to cure any alleged violations, nor any opportunity for a hearing. According to Christina at Permit Operations, the rack was destroyed on July 3, 2002. We were informed of all this on July 31, 2002. The rack cost Go Go Media, LLC, \$65.00. Go Go Media, LLC, had to pay \$1 to get a copy of the notice of violation. (Exhibit 1) Furthermore, Go Go Media, LLC, was without the use of this rack from sometime in June through July 31 without knowledge that it was the City that had it. Go Go Media, LLC, has been permanently deprived of the news rack since its destruction (according to City officials) on July 3, 2002. The rack was purported to have been impounded because the label with our phone number had been removed.

2. On July 27, 2002 more of our racks were seized. We found this out when one of our advertisers called us when he saw it happening. We made repeated attempts to get information from the City by phone (I called Sherri Ivy at 303-446-3759 repeatedly between Noon and 12:55 pm; She finally answered about 12:55; Sherri Ivy would give no details about what racks had been impounded but said that information was available in the permits office; I spoke to Maria in the Permits Office who knew nothing about impoundments and referred me to Christina who was out of the office and should be back at 1 p.m.; I spoke to Maria at 1:18 pm who said she still had no information and Christina was still out but took my message requesting that Christina call me when she got in. Christina never returned my call.). Finally, after repeated calls, our circulation manager, Fred Abrams, was told over the phone that 6 of our racks had been seized and was given the locations that they were seized from. We could not match all the addresses given to notices of violation which had been received previously. We received no written notice that the racks had been seized after the seizure. On July 31, 2002, I personally went to the Permits Office and Christina at the Permits Office told me that only two of our racks had been seized on July 27: one from 16th and Lawrence and one from 16th and Champa. We paid the \$100 fee to retrieve those two racks. According to Christina the racks were seized because the labels with our phone number had been removed. According to our records, contact information labels were attached to these racks on June 3 after receipt of a notice of violation from the City and the labels were inspected and intact when the rack was bolted by our contractor on July 24, 2002. We had paid \$20.00 per rack to bolt down each of these racks as required by the Ordinance and will have to pay to have them rebolted.

3. While Christina said that only 2 of our racks were seized on July 27 and one in June, over a dozen of our racks are missing including the others that our circulation manager was told had been seized in July. Those racks are still unaccounted for.

4. On August 12, 2002, Go Go Media, LLC, received an Invoice (Exhibit 2) dated August 9, 2002 purporting to bill us for the \$50 impound fee for the news rack seized in June and destroyed July 3, 2002. (The invoice claims that the news rack was impounded on July 3, 2002. Thus the information we have been given by the City is in conflict. We do not know which is correct.)

5. On August 12, 2002, another news rack belonging to Go Go Media, LLC, was seized. This one was cited for being too close to a bus stop or light rail station. We will have to pay another \$50 within ten working days of that date to prevent the news rack from being destroyed.

6. We have been informed by employees of the Permits Operations Section of the Department of Public Works of the City and County of Denver that if we place the previously impounded racks at any location within the City limits (whether the original location or another location for which we have a permit) that we must pay

a \$25 "re-inspection" fee regardless of the nature of the violation. This fee is excessive.

7. The City has issued permits to us (for \$7 per year each, plus \$250 bond against costs of impoundment) for locations where it is impossible under the News Rack Ordinance to place a rack. City officials were careful to collect the non-refundable permit renewal fees prior to issuing any violation notices under the new News Rack Ordinance. They did not notify any permittees that some racks would have to be removed at some locations because there was not room enough for all racks with permits at that location under the current News Rack Ordinance. In some cases it is not possible to put ANY racks at a permitted location while complying with the News Rack Ordinance. Many permittees relied on the fact that they had a valid permits for locations in placing their news racks. Go Go Media, LLC, had to remove some of its news racks from permitted locations where it was impossible to bolt them down in full compliance with the News Rack Ordinance.

8. City officials have stated that once it begins enforcing the graffiti provisions of the News Rack Ordinance, that "any graffiti" is grounds for impoundment regardless of whether the rack has been cleaned since the notice of violation based on previous graffiti was issued. Besides being patently unfair, these are two different violations and the City cannot impound for failure to cure the first violation if entirely new graffiti is applied to our boxes after we clean them. The City's interpretation gives the City officials unbridled discretion to seize news racks.

There is a very strong likelihood that that Go Go Media, LLC, will be further harmed if enforcement of this of this ordinance continues. To avoid further damage and in the hopes of avoiding litigation, we are setting out our legal arguments in this document.

Introduction

Go Go Media, LLC, which is located on Colfax Avenue in Denver and is entirely owned by Colorado residents, publishes "Go-Go Magazine." "Go-Go Magazine" is a bi-weekly arts and entertainment magazine aimed primarily at people between the ages of 20 and 35 which often focuses on "alternative" and "underground" entertainment that may be passed over by the more "mainstream" publications in Denver.

All of our news racks clearly are labeled as belonging to "Go-Go Magazine". "Go-Go Magazine" is registered as a DBA or tradename for "Go Go Media, LLC" with the Colorado Secretary of State. Therefore, it is a legal name for our company. However, at the time the racks were manufactured in late 2000, there was no City Ordinance requiring that the racks also contain our phone number. We have had some problem getting labels to adhere to the racks and remain on the racks in part due to the graffiti

resistant nature of the racks. We are continuing to experiment with new labels. However, since the racks do identify the publication, even when they are empty no one should have any trouble contacting us with a complaint about one of our racks.

Our black plastic news racks were specifically designed to stay attractive longer than other news racks. The black plastic does not show dirt as easily as lighter colors do. The black color also does not show graffiti or "tagging" with dark colors as easily as light colored racks and even light colored spray paint shows up less well on the black plastic. The plastic used for the racks is graffiti "resistant" -- meaning that markers and spray paint are easier to remove from them than from older models of news racks. However, keeping the racks completely free from "tagging" would require us to post a 24 hour guard over each rack and that would be unreasonable. We have had some problems with the doors of a few of the racks being smashed in and we ordered replacement doors from the manufacturer over six weeks ago and are still waiting for their arrival.

Go Go Media, LLC, its owners and employees, all live and work in the Denver metro area. We live, work, shop and seek entertainment within the City and County of Denver. Therefore, we have a common interest with the City and County of Denver in maintaining the safety and quality of life in the City and County of Denver. We also have an interest in maintaining our news racks in a safe and aesthetically pleasing condition because to do so reflects positively upon our publication and increases circulation. However, we can only do what is practical with a six person staff and affordable within the limits of our budget and cannot be expected to spend 24 hours a day, seven days a week, protecting our news racks from taggers, vandals, or employees of the City and County of Denver.

We believe that the Denver News Rack Ordinance is oppressive and violates our freedom to distribute our publication guaranteed to us under the 1st Amendment of the U.S. Constitution and Article 2, Section 10 of the Colorado Constitution. We believe the ordinance is both facially defective in its content-based discrimination between publications which impermissibly burdens free speech and free press, and is an unreasonable time, place and manner restriction both facially, and as applied to Go Go Media, LLC. In addition the ordinance also facially violates due process by failing to provide for pre-seizure or post-seizure notice and hearing before depriving persons of their property, and specifically the City and County of Denver violated Go Go Media's rights under the 4th, 5th, and 14th Amendments of the U.S. Constitution, and Art. 2, Secs. 10 and 25 of the Colorado Constitution, by seizing, under the authority of the News Rack Ordinance, one of our news racks in June 2002 and destroying it without any notice to us whatsoever, and repeatedly have unreasonably seized our racks without notice and threatened to destroy them without payment of excessive impoundment fees and "re-inspection fees."

Legal Analysis

A. Content-Based Discrimination Between Publications Under the Denver News Rack Ordinance

The freedom of the press has been interpreted to mean the right to circulate and distribute as well as the right to receive and read. *Metromedia Inc. v City of San Diego*, 453 U.S. 490 (1981). *Ex Parte Jackson*, 96 U.S. 727 (1877).

"It is well settled that the right to distribute newspapers through news racks is protected under the First Amendment." *Atlanta Journal v. City of Atlanta Dep't of Aviation* __ F.3d __ (11th Cir. 2002) quoting *Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994) cert. denied, 116 S. Ct. 337 (1995); *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir.1984); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir.1991); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Lovell v. Griffin*, 303 U.S. 444 (1938).

Streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496 (1939); *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306 (Colo. 1995); *Bock v. Westminster Mall Co.*, 819 P. 2d 55 (Colo. 1991)

Ordinances that flatly prohibit news racks in public places are generally found to be unconstitutional on their face. *Schneider v State*, 308 U.S. 147 (1939); *California Newspaper Publishers Assoc. v. Burbank*, 51 Cal. App. 3d 50, (1975).

The News Rack Ordinance passed by the Denver City Council in October 2001 begins with a number of "findings." To the best of our knowledge these "findings" were not the result of any study done by the City Council. Some of these "findings" make little sense; others show a clear intent by the City Council to discriminate between different publications distributed in Denver.

Finding #6 clearly indicates a bias against publications published less than 5 days per week:

"Sec. 49-501. Findings. (6) Since representatives of newspapers and other periodicals ("publishers") are required to visit their news racks at least each day of the week that a new edition is published and staff or independent contractors who make these visits are also required to repair or get repaired any news rack that is not operating correctly, to maintain news racks, and to see that trash is cleared from inside and around news racks, therefore, the publishers who issue a new edition at least five (5) days a week are more likely to advance significant government interests in

cleanliness and good maintenance than publishers who issue a new edition less frequently."

But offers no evidence that the news racks of publications published "at least 5 days per week" are in fact any better maintained than those of publications published less frequently.

It is also interesting that the Ordinance says "at least 5 days per week" rather than "daily" to allow the Denver Post and Rocky Mountain News to benefit from this bias despite the fact that neither one has published 7 days per week since the Joint Operating Agreement between them.

In truth, the racks belonging to Go Go Media, LLC, are probably in a better state of maintenance and repair than the average rack of the Denver Post or the Rocky Mountain News because Go Go Media's racks are newer (made in December 2000) and have been on the streets only one year. As stated earlier, the black graffiti resistant racks also show less dirt and markings and resist the application of random stickers and flyers.

"Sec. 49-501. Findings. (7) Readers of newspapers and other periodicals come to rely on the availability of publications at certain places on the street and at certain kinds of places. The public interest is served when the positions of publications match reader expectations."

"Sec. 49-501. Findings. (8) Publishers are entitled to content neutral regulations that allocate newsrack space on the basis of reasonable inferences as to turnover or "shelf life" based on the frequency of publication. It is reasonable to make those publications with the fastest turnover most accessible to the public."

While the meaning and purpose of Finding #7 is unclear, Finding #8 further emphasizes the City Council's bias against less frequently published publications which is also reflected in the priority system established for the issuance of permits for news racks:

Sec. 49-511. Number of news racks allowed.

"(3) Where news racks are in place at the time this division is enacted or where the manager receives applications simultaneously, the manager will use the following in determining which news rack will be permitted at any location.

(a) A news rack that is in place will have priority to its location if the location meets the criteria established in this division. If a news rack, which is in place at the time this division is enacted, must be moved it shall have priority at the nearest location.

(b) Second priority will be given to news racks containing publications published daily or five (5) or more days per week, and shared news racks that contain multiple publications.

(c) Third priority will be given to news racks containing publications published one (1) to four (4) days per week.

(d) Fourth priority will be given to news racks containing publications published less frequently than once a week.

(4) The spaces in a condominium news rack shall be allocated in accordance with the priority system specified in 49-511(3), above."

While Section 49-512(6)'s requirement that racks be inspected at least weekly is not as clear a statement of bias as the foregoing, it does create a heavier burden on publications such as Go-Go Magazine which are published bi-weekly, monthly, or quarterly:

"Sec. 49-512. (6) . . .To that end, news racks shall be inspected by the permittee no less often than once per week and all trash removed therefrom;"

Furthermore, the section on "Abandonment" creates an additional threat of seizure to news racks of periodicals that are published less frequently:

"Sec. 49-515.3. Abandonment. Any news rack located on the right-of-way which remains empty for a period of thirty (30) continuous days after service of notice to the permittee shall be deemed abandoned. The manager may remove any abandoned news rack from the right-of-way and, unless claimed within ten (10) days, may sell the abandoned news rack at an auction as unclaimed property."

While the section says "empty for a period of 30 continuous days" it is unlikely that the City of Denver will send out an inspector to view a news rack suspected of being abandoned EVERY DAY for 30 days. It is more likely that in practice they will only make periodic sweeps every few weeks and conclude that it was abandoned if they do not find papers in it when they come by. The news racks of periodicals which are published less frequently and are of lower circulation are more likely to be empty on any particular day and thus more likely to seem abandoned on random inspections even when in regular use. Furthermore, since it is the policy of the Permits Department to NOT provide any notice when news racks have been seized, periodicals of less frequent publication are more likely to have their racks seized and sold without notice before they even know they are gone.

The City Council in its Findings #6-8 (above) attempt to claim that the bias is "content neutral," but the fact that the bias is in favor of the two largest newspapers in the state and against all the smaller "alternative" publications makes this difficult to believe.

"Alternative" publications have a smaller flow of income from advertising than the large circulation newspapers. "Alternative" publications are also usually distributed for free rather than for sale and are entirely dependant on advertising sales for income. As a result they tend to publish less frequently. In addition, costs of distribution make up a larger percentage of the expenses of most "alternative" publications and increases in expenses for additional inspections, etc., have a larger impact on "alternative" publications. Most "alternative" publications also cannot afford to offer home delivery and thus loss of their news racks on the street has a much larger impact on their circulation.

This information combined with the words from the Ordinance above suggest that the City Council intended to drive some smaller publications that they found "undesirable" off the streets of Denver, and possibly out of business.

This stated bias in favor of publications published "at least 5 times a week" seems no more than a veiled attempt to discriminate based on content. In *City of Cincinnati v. Discovery Network, Inc.*, the U.S. Supreme Court ruled that Cincinnati could not discriminate against some periodicals by called them "commercial handbills" and disallowing them permits to distribute by news racks, while determining that publications that "published daily and or weekly and 'primarily presen[t] coverage of, and commentary on, current events' qualified as newspapers and therefore can be distributed by news rack. Because the ordinance differentiated between acceptable news racks and unacceptable news racks based on the material inside the news rack, the Court concluded that the regulation was not content neutral. *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993). The Colorado Supreme Court has stated that regulations are content neutral if they make no distinction with respect to the type of solicitation, nor focus on particular publications. *Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266 (Colo. 1997); *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306 (Colo. 1995). But this News Rack Ordinance clearly distinguishes between publications and gives preferential treatment to particular publications and therefore cannot be considered "content-neutral." *Ward v. Rock Against Racism*, 491 U.S. 781 105 (1989).

Such content-based discrimination in a traditional public forum is presumptively invalid under the 1st Amendment of the U.S. Constitution and subject to "strict" scrutiny. *Ackerly Communications of Mass., Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996); *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995). For a governmental entity to enforce a content-based restriction in a public forum it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Turner Broadcasting Sys. Inc., v. FCC*, 114 S. Ct. 2445 (1994); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

A precision in drafting and enforcement is necessary to avoid infringing these fundamental rights when regulating the press, and that precision is lacking here. Instead we find evidence of intentional impermissible discrimination based on content. While the City Council claimed that the purpose for preferred treatment was that the

publications which circulate more frequently are more likely to keep their racks clean and in good repair, the Council did not do any study to determine whether this was true or whether such preferred treatment would in fact advance their interests other than by decreasing the total number of news racks on the street by a few. This News Rack Ordinance was certainly not "narrowly drawn" to achieve the interests stated in the Ordinance itself.

B. Reasonableness of "Time, Place and Manner" Restrictions of Freedom of Speech and Press by the Denver News Rack Ordinance

Even if the Denver News Rack Ordinance did not contain the content-based discrimination discussed above, it would be an unreasonable "time, place and manner" restriction on free press and free speech as protected by the 1st Amendment of the U.S. Constitution and Article 2 Section 10 of the Colorado Constitution.

A "content-neutral" regulation of freedom of expression must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306 (Colo. 1995); *Williams v. Denver*, 622 P.2d 542 (Colo. 1981). While we do not deny that safety and aesthetics are significant government interests, we do deny that the News Rack Ordinance is "narrowly tailored" to achieve those ends. *City of Denver* must show that the Ordinance is "not substantially broader than necessary" (*Ward v. Rock Against Racism*, 491 U.S. 781 105 (1989)) and a substantial government interest would be "achieved less effectively" under a different regulation. (*Denver Pub. Co. v. City of Aurora*, 896 P.2d 306 (Colo. 1995)).

The truth is that even a simple reading of the News Rack Ordinance shows that the Ordinance was poorly thought out and poorly drafted. Even the Right of Way Inspectors whose job it is to enforce the Ordinance can tell you of the difficulty they face in interpreting and enforcing the regulation as written.

Denver must also demonstrate that the ordinance does not burden substantially more speech than necessary by failing to leave open ample alternative methods of dissemination of the same information. "Historically, alternative channels of communication have related to the availability of different media of expression for substantially the same costs." *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306 (Colo. 1995). Some members of the Public Works Department have stated that the "solution" to having to deal with the Denver News Rack Ordinance is to not place our news racks in the public right of way. ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 146 (1939)).

While Go-Go Magazine is also distributed in stores, restaurants, theaters, bars, and clubs in the City of Denver, most of these locations are small and only have a limited

amount of space and thus can distribute a limited number of copies. Since Go-Go is distributed for free, these stores must give priority to merchandise that they can profit from. In addition, the news racks have the distinct advantage for a publication such as Go-Go which emphasizes "night life" in that they are available 24 hours a day and allow passersby to pick up a copy and direct them to venues and events taking place on the other side of downtown when the stores have already started closing for the night. In that way the news racks are extremely important to both Go-Go Magazine and the economic prosperity of its advertisers. Short of hiring hawkers on street corners, which would be much more expensive, there is no substitute for those news racks on the street. However, the ordinance seeks to make the continued use of the street racks so expensive and burdensome as to make them impossible to afford to maintain. "[W]hile the privilege to use the public forum 'may be regulated in the interest of all . . . it must not, in the guise of regulation be abridged or denied.'" Denver Pub. Co. v. City of Aurora, 896 P.2d 306; (Colo. 1995) quoting Hague v. CIO, 307 U.S. 496 (1939).

The Denver News Rack Ordinance provides in Sec. 49-507 that: "Permits shall be valid for one (1) year, shall not be transferable, and shall be renewable pursuant to the procedure for original applications and upon payment of the applicable nonrefundable permit fee." The U.S. Supreme Court has questioned the appropriateness of a news rack regulatory scheme that requires that a publication to apply annually for news rack licenses. When such a system is applied to freedom of speech or press it can act as a subtle and insidious form of prior restraint. "Licensed" speech may affect the ability to continue speaking in the future. Yet demonstrating the link between "licensed" expression and the denial of a later license might well prove impossible. "While perhaps not as direct a threat to speech as a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted . . . a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern. " Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).

Section 49-509 of the News Rack Ordinance is entitled "Public safety criteria for placement of news racks" and includes the expected distances required from curbs, parking meters, handicapped ramps, etc., but goes on to prohibit placing news racks within five feet of "public works of art," "trees," or on "any portion of a tree grate," or "any granite or other decorative sidewalk." Obviously, these provisions were intended for aesthetic purposes, not safety purposes, and their placement here primarily was due to sloppiness on the part of the drafter. However, if one studies the cumulative effect of all the restrictions, and makes the required measurements on site, some locations are "over permitted" -- more permits for news racks have been issued and paid for the location than there is room for if the ordinance is complied with. We have had to remove several Go Go news racks because it was impossible to meet the placement requirements of the current News Rack Ordinance at the permitted location without moving other news racks. We had to find this out for ourselves because the Department of Public Works provided no warning after the Ordinance was passed that all permitted news racks would not fit at all permitted locations. They even renewed permits and accepted non-refundable permit fees for the locations without providing any indication that the location could not accommodate all the permitted boxes under the new News Rack Ordinance.

In fact there seemed to be a fair amount of confusion in the Department of Public Works between November 2001 and this summer over exactly how this News Rack Ordinance was to be enforced. This suggests that the News Rack Ordinance was written with little or no consultation with the people who were most familiar with the subject and who would be charged with enforcing the ordinance. Together all these factors point to an Ordinance that was poorly planned and written with little thought to total impact of the scheme of regulation and was not narrowly tailored to accomplish the objectives listed.

Section 49-512(5) requires the name and telephone number of the owner of the news rack to be affixed to the news rack. The stated purpose of this to allow "anyone using the news rack... to call to report a malfunction, to secure a refund, or to give the notices provided for." This requirement is quite reasonable. However, it was not required prior to the passage of the News Rack Ordinance, so that the graphic design of news racks such as ours that were manufactured prior to the passage of the Ordinance did not contemplate this requirement, and the same features that make news racks resistant to graffiti and adherence of random stickers to the news racks also make it difficult to attach new labels. This has made it challenging to comply with this provision of the News Rack Ordinance.

However, paragraph 2 of Sec. 49-515.1 accelerates the time period for news racks violating Sec. 49-512(5):

"(2) Whenever the manager finds a news rack without having affixed to it the name and telephone number of the permittee, the manager shall make reasonable efforts to ascertain who the permittee is and notify the permittee of the violation. Any such violation shall be cured within 72 hours. If the violation is not cured within 72 hours the news rack shall be removed and impounded. An impound fee of fifty dollars (\$50.00) shall be assessed against each news rack so removed."

Such an accelerated cure period followed by seizure of property is only appropriate in emergency situations which endanger health or safety. What is the emergency that justifies this in this case? When, as is the case with Go Go Media's boxes which have been seized, the label with the phone number came off (or was removed), but the name of the publication was still clearly marked on the box, the regulation reaches from excessive to absurd. While a small fine might be appropriate for non-compliance with Section 49-512(5), the accelerated cure period and impoundment with the risk of total forfeiture, or the payment of the \$50 impoundment fee and \$25 re-inspection fee for loss of a label with a phone number, is clearly excessive and cannot be considered "narrowly tailored" by any stretch of the imagination.

Administrative fees for distribution of newspapers through news racks must be shown by the government to reflect no more than the actual administrative costs of the scheme. *Atlanta Journal v. City of Atlanta Dep't of Aviation* ___ F.2d ___ (11th Cir. 2002) *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991). While

the \$7 per news rack per year permit does not seem unreasonable, the \$50.00 impoundment fee and most especially the \$25 "re-inspection fee" seem excessive and out of proportion with the expected administrative cost of the particular agency action.

Sec. 49-512(6) requires that "Each news rack shall be maintained in neat and clean condition and in good repair at all times" including "reasonably free of dirt and grease," "reasonably free of chipped, faded, peeling and cracked paint," "reasonably free of rust and corrosion," "clear plastic or glass parts ... are unbroken and reasonably free of cracks, dents, blemishes and discoloration," "paper ... parts ... are reasonably free of tears, peeling or fading," etc. While the section requires that the news racks be maintained "reasonably free" of dirt, grease, cracks, etc., it requires that the news racks be completely "free from graffiti, unwanted paint or other unwanted markings" and "free from trash" and requires that all news racks "be inspected by the permittee no less often than once per week." For these items no leeway is allowed for reasonableness.

As stated previously, Go Go Media, and all other owners of news racks have an interest in maintaining their news racks in good condition because a dirty, broken news rack is inconvenient and distasteful for readers, and reflects poorly on the publication. However, requiring all news racks to be free of graffiti at all times is unreasonable and only could be accomplished by posting a 24 hour guard over all the news racks. While our news racks are "graffiti resistant" and their black color makes graffiti less visible, it is not possible to keep them constantly completely clear of graffiti.

Employees of the Department of Public Works have made clear their interpretation of the News Rack Ordinance with respect to graffiti: "Unless the graffiti part of the ordinance is changed, sorry, this can still be a reality. Graffiti is graffiti, whether it was the same on the day it was cited (and supposedly has since been cleaned) or has changed during the interim leading up to impoundment." Sherri Ivy, Senior City Inspector, in letter to Fred Abrams dated July 18, 2002. "[C]onstruction of a statute by administrative officials charged with its enforcement must be given deference by courts." *Flores v. Dept. of Revenue*, 802 P.2d 1175 (Colo. App. 1990).

The graffiti portions of the ordinance combined with the interpretation of the enforcement officials is over-broad and unreasonable and not narrowly tailored to improve the appearance of the city in a reasonable manner.

In fact, the City and County of Denver discriminates in the enforcement of the provisions of its regulation and control of graffiti. Section 10-176 is the more general regulation related to graffiti. It provides real property owners with 10 days to cure the violation by removing the graffiti, but real property owners may authorize the Public Works Department of the City and County of Denver to remove graffiti for them AT NO CHARGE. (Exhibit 3) This option is not offered to owners of news racks. The solution offered to us by the Department of Public Works is to move our boxes: "While you are victims of graffiti, you do not have to have your property out on the public rights-of-way." and "The police advise us that if boxes are cleaned frequently and continuously, the graffiti-ers eventually move on to other territory. Unfortunately, buildings cannot be

moved to better locations like the boxes can. And buildings do not have alternative sources of advertisement for their products than placement out on public rights-of-way." Sherri Ivy, Senior City Inspector, in a letter to Fred Abrams dated July 18, 2002.

In reality, owners of real property face less of a burden keeping their property clean from graffiti than owners of news racks. Presumably, owners of real property either live or work in their property or have a tenant or manager who lives or works in the property. (Obviously vacant property is at greater risk.) Therefore, someone will usually be at the property for at least some portion of the day pretty regularly. That allows them greater opportunity to observe the graffiti and remove it promptly as part of their daily routine. On the other hand, news racks are distributed about the city, sometimes miles apart, and with a bi-weekly publication like ours the news rack would normally be visited about once every two weeks. That puts the racks at much greater risk of being "tagged" and makes it more likely that a week or two may pass before someone working for us sees the "tag" and delivery drivers are not usually equipped or paid to clean graffiti off news racks. So this requires hiring someone else to tour the racks for the purpose of cleaning and repair. This is a greater burden and expense than the average property owner has and yet Denver has not offered to clean our racks for us.

While hiring a person specifically to repair and to clear news racks might be a reasonable cost of doing business, it is unreasonable to expect the news racks to be cleaned and repaired every day and it is unfair for the City to offer to clean buildings free of charge and yet seize and destroy our news racks.

The impoundment procedures in Section 49-515.1 (1) are overbroad and seem more a method of removing news racks of disfavored publications and generating revenue than a means of effectively accomplishing the stated objectives listed in the "Findings" portion of the Ordinance. A more detailed discussion of the notice provisions (or lack thereof) can be found in the section under due process. Surely impoundments of news racks that run afoul of due process cannot be considered reasonable under the 1st Amendment.

The impoundment fee of \$50 and the "re-inspection fee" seem excessive to the administrative cost of those actions and there is no evidence that the City Council studied the true administrative costs associated with impoundment and re-inspection before choosing those numbers. In fact, a summary of the June 27, 2001 (four months before the ordinance was passed) meeting of the Public Works Committee of the City Council which is available on the City's website indicates that the Department of Public Works told the committee that the City did not know how many news racks were on the streets of Denver (estimates were between 2900 and 7000) and that members of the publishing industry insisted that the City was unable to make reasonable assumptions concerning the cost of inspection and enforcement and the revenue generated by fees without knowing how many news racks there were out there. The response to this was: "Traffic Engineering will have a more thorough inventory after a year of better inspection, and fees can be adjusted at that time." Clearly the City Council had insufficient information

on which to base all of the fees contained in the News Rack Ordinance and it is not even possible for these portions of the News Rack Ordinance to be "narrowly tailored."

Paragraph 2 of Sec. 49-515.1 accelerates the cure time period for news racks violating Sec. 49-512(5) requiring the name and telephone number of the owner of the news rack to be affixed to the news rack from 10 days to 72 hours without any rationale as to why this violation should be treated more seriously than if someone had chained a news rack to a fire hydrant.

Section 49-515.3 allows for news racks to be declared "abandoned" and seized if they are empty more than 30 consecutive days even though inspectors do not make daily visits to each rack and therefore would have insufficient evidence that the rack was empty continuously for 30 days. The section also provides that they will be SOLD if not claimed within 10 days even though no notice is provided for the seizure. This is not narrowly tailored to meet safety or aesthetic goals but rather allows the City officials unbridled discretion to seize news racks and sell them to generate revenue for the City.

The procedure for an "appeal" is vague and seems unsuited to the ordinance. This is not surprising since it (Sec. 56-106) is an older appeals procedure from the "Sewage" section of the municipal code. There is no right to a hearing, but merely a right to petition the Manager of Public Works for a review of a "determination." There seems to be no provision for appealing an "action" such as impoundment and no procedure to stay the destruction of a news rack (short of paying the impoundment fee) if the owner disagrees with the impoundment. The Manager of Public Works cannot be expected to be impartial nor cognizant of all the constitutional issues. There is no timeline provided for any appeal, and the Manager of Public Works probably has quite a busy schedule and little time for hearings on the hundreds of news racks that have been impounded by the City in the last few months.

C. Unreasonable Seizure Under the 4th Amendment of the United States Constitution

"the right of the people to be secure. . .against unreasonable searches and seizures, shall not be violated. . . ."

We were informed in late July that our news rack which had been formerly located at 16th and Glenarm had been seized in late June for failure to have Go Go Media's phone number posted on it and was destroyed on July 3.

The U.S. Supreme Court has said: "A 'seizure' of property...occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" Soldal v. Cook County, 506 U.S. 56 (1992), quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984). See also United States v. Place, 462 U.S. 696 (1983) and made clear that the 4th Amendment protects against unreasonable seizures even when there is no search involved and no privacy or liberty issues are raised or criminal activity claimed. Soldal v. Cook County, 506 U.S. 56 (1992), Katz v. United States, 389 U.S. 347 (1967)

**D. Deprivation of Property Without Due Process
Required By 5th and 14th Amendments
of the United States Constitution and
Article 2, Section 25 of the Colorado Constitution**

On July 29, 2002, we were informed that the news rack which had formerly located at 16th and Glenarm had been seized in late June for failure to have Go Go Media's phone number posted on it and that the news rack was destroyed on July 3, 2002. The Permits Operations Section of the Department of Public Works claimed that we had been sent a violation notice on June 11 and June 12th. But we had received no such notice and thus were given no opportunity to cure. We were given no pre-seizure, nor post-seizure notice and had no knowledge that the rack had been seized until after it was destroyed. We were given no opportunity for a hearing before the rack was destroyed. On August 12, 2002, we also received an invoice for \$50 for the impoundment fee for the seizure of this rack.

On June 28, 2002 we received a notice of violation on news racks located at 16th and Lawrence, and 16th and Champa. The notices stated that one of our news racks was located within 50 feet of the 16th Street Mall, it was not bolted down, and lacked the phone number, the second stated that the news rack was too close to a parking meter, was not secured, and lacked the phone number.

According to our records, labels containing our phone number were placed on both of these news racks on June 3rd, 2002. On June 24, 2002, these news racks were both weighted down with 150 lbs of concrete (a temporary solution approved by the City) and on July 24 the placement of each of the news racks was measured from all necessary obstacles and the news racks were bolted down. The labels were still attached to both news racks at the time the racks were bolted. On July 27, 2002 both these news racks were seized. According to the Permits Operations Section they were seized because they lacked the phone number label on the box.

The Denver News Rack Ordinance provides:

"Sec. 49-515.1. Violations. (1) Upon determination by the manager that a news rack has been installed, used or maintained in violation of the provisions of this division, an order to correct the offending condition will be issued to the permittee by registered mail, return receipt requested, and by telephone or facsimile transmission. The order shall describe the offending condition, suggest actions necessary to correct the condition, establish a date for compliance that shall not be less than ten (10) days from the date the order is sent by registered mail, return receipt requested, and telephone or facsimile transmission. The order shall inform the permittee of the right to appeal."

This section provides for providing notice to owners of a violation in the form of an "order" from the manager of the Department of Public Works to correct the violation with a "cure" period of no less than ten days. It requires that the "order" inform the rack owner of the right to appeal the "order." A copy of the form of the "order" used by the Department of Public Works is attached as Exhibit 1. City Officials do not seem to have any additional form on which they record impoundment information.

Section 49-515.1 (1) continues with a provision for impounding the news rack if the violation does not seem to have been "cured" by the date set for compliance. No provision is made for notice to the owner of the news rack either before or after seizure of the news rack:

The offending news rack may be removed by the manager if the offending condition is not cured by the date set for compliance in the order. An impound fee of fifty dollars (\$50.00) shall be assessed against each removed news rack. The manager shall cause an inspection to be made of the corrected condition of a news rack or of a news rack that is reinstalled after removal under this section. The permittee of said news racks shall be charged a twenty-five dollar (\$25.00) inspection fee for each news rack so inspected. This charge shall be in addition to all other fees and charges required under this division.

Paragraph 2 of Sec. 49-515.1 accelerates the time period for news racks violating Sec. 49-512(5) requiring the name and telephone number of the owner of the news rack to be affixed to the news rack:

(2) Whenever the manager finds a news rack without having affixed to it the name and telephone number of the permittee, the manager shall make reasonable efforts to ascertain who the permittee is and notify the permittee of the violation. Any such violation shall be cured within 72 hours. If the violation is not cured within 72 hours the news rack shall be removed and impounded. An impound fee of fifty dollars (\$50.00) shall be assessed against each news rack so removed.

Again no notice or hearing is provided before or after seizure of the rack. An accelerated cure period followed by seizure of property without any pre-seizure notice or hearing is only appropriate in emergency situations which endanger health or safety.

As a matter of practice, inspectors of the Public Works Department do not re-inspect racks on the "cure" deadline but rather make random "sweeps" over periods of weeks. Therefore, neither the Department of Public Works nor the owner of the rack can usually prove that the violation was or was not "cured" on the day of the deadline if the

violation (such as graffiti, damage or removal of labels with contact information) reoccurs before the next inspection.

The ordinance seems to require the re-inspection of "cured" news racks, but makes no provision for notification of "cure" by the owner of the news rack or scheduling of re-inspections, and charges an excessive fee for re-inspection if the owner of a news rack requests one.

Despite the lack of notice that a news rack has been seized, the next paragraph states that racks unclaimed will be disposed of ten working days after seizure:

Sec. 49-515.1. (3) Any news rack impounded shall be treated as unclaimed property and disposed of by the city if not claimed within ten (10) working days. "

Section 49-515.3 also provides for seizure of news racks without any pre-seizure or post-seizure notice or hearing in the case of alleged abandonment:

Any news rack located on the right-of-way which remains empty for a period of thirty (30) continuous days after service of notice to the permittee shall be deemed abandoned. The manager may remove any abandoned news rack from the right-of-way and, unless claimed within ten (10) days, may sell the abandoned news rack at an auction as unclaimed property."

Sec. 49-515.2 states that any person or entity aggrieved by a finding, determination, notice, order or action taken under the provisions of this "division" (ordinance?) may appeal as provided in section 56-106. Oddly enough, Section 56-106 is listed under "Sewage" in the City Ordinances and seems to be much older than the News Rack Ordinance. At first glance does not seem to be applicable as paragraph (a) talks about a dispute concerning "the amount of a charge or rate of charge against his property" but the second paragraph refers to disputing "determination made by or on behalf of the city" not the "determination, notice, order or action taken" as stated in Sec. 49-515.2:

Sec. 56-106. Administrative review and court proceedings.

(b) Any person who disputes any determination made by or on behalf of the city pursuant to the authority of the manager, which determination adversely affects such person, may petition the manager for a hearing concerning such determination no later than thirty (30) days after having been notified of any such determination. Compliance with the provisions of this subsection shall be a jurisdictional prerequisite to any action brought under the provisions of this section, and failure of compliance shall forever bar any such action.

This section does not even seem to require a hearing but provides for the opportunity to file a petition for one within 30 days of the "determination." No indication is given as to when the Manager of Public Works may rule upon the petition.

Thus, this ordinance totally fails to provide the safeguards required by due process. There are no clear guidelines as to how to prove that a violation has been "cured" other than by paying an excessively expensive re-inspection fee. (Are the administrative costs of a re-inspection really half that of an impoundment? Does each one really cost the Department of Public Works \$25?) The ten days allowed for claiming seized property is worthless if one does not know the property has been seized. Without any provision for even post-seizure notice, that ten days is meaningless. Beyond the fact that news racks of periodicals published bi-weekly or monthly may only be visited once or twice a month, news racks are also stolen. (Over 20% of all Go Go Media's news racks on the streets of Denver were stolen in the first year.) Expecting every owner of every news rack to call the Denver Permits Office every time any news rack is missing (or daily, just to make sure) is an unreasonable burden on both the owners of the news racks and the Permits Office itself -- especially in light of our experience of having to make numerous calls to get any information even when we knew one or more had been impounded. And during that time period between seizure and the end of the ten days, the only means of preventing the destruction or sale of the news rack seems to be by payment of the impound fee. No provision is made for staying the destruction or sale of the news rack or reclaiming the news rack without paying the fee pending a hearing. The provisions for "appeal" do not provide for a timely hearing on whether the seizure is appropriate, but rather allow one to petition the Manager of Public Works and request a hearing, which may or may not be granted. As the boss of the very people who impounded the news rack, the Manager of Public Works is unlikely to be impartial and unlikely to be familiar with the legal and constitutional issues involved. She also is unlikely to have the time in her schedule to hold hearing on all the racks that have been seized in the last two months in a timely fashion. Due process requires more. It requires notice and hearing before an impartial person before property is seized.

"The United States and Colorado Constitutions require that a person must be afforded procedural due process, including both adequate notice and an opportunity to be heard, before he or she may be deprived of property." *Ortiz v. Valdez*, 971 P.2d 1076 (Colo. App. 1998) The primary purpose of the notice is to ensure that the opportunity for a hearing is meaningful. Parties whose rights are to be affected are entitled to be heard and in order that they may enjoy that right they must first be notified. Notice that the property has been taken is necessary in situations like this where the property owner would have no other reasonable means of ascertaining who was responsible for the loss. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950); *Schroeder v. City of New York*, 371 U. S. 208, 214 (1962).

The right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *First Bank v. State*, 852 P.2d 1345 (Colo. App. 1993). Only in a few limited situations has the U.S. Supreme Court allowed seizure of property without opportunity for a prior hearing. In each case, the seizure has been

directly necessary to secure an important governmental or general public interest, and there has been a special need for very prompt action and the seizure has been initiated by a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Accordingly, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

But there is no special need for haste in this instance. In fact, the greatest risk is that a news rack might be removed from the public right of way by the owner of the rack prior to its seizure by City officials. It seems that this act would in be in keeping with the objectives stated by the city rather than opposed to them.

Temporary, non-final deprivations of property are nonetheless "deprivations" in the terms of the Fourteenth Amendment, even when the law in question allows the posting of a bond to regain the property after seizure. The U.S. Supreme Court has firmly held that such a provision was not adequate and that the deprivations must be preceded by a fair hearing. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Note that in the case of the Denver News Rack Ordinance the posting of a bond is required before the permits are issued and yet it cannot be used to recover racks that have been seized.) A "recovery provision" that allows property to be regained after seizure in exchange of other property (money) is not enough to satisfy "due process." If the right to notice and a hearing is to serve any purpose then it must be granted at a time when the deprivation can still be prevented. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the U.S. Supreme Court said:

"At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "

The purpose of a hearing is to protect the use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property.

The absurdity and the unfairness of the scheme of regulation under the News Rack Ordinance is especially emphasized by the seizure of our news rack in June and its destruction in July. The violation? The label with our phone number had been peeled off. And for that we lose a news rack that cost us \$65, the loss of the use of the news rack and --to add insult to injury-- the City is billing us for a \$50 impoundment fee! This is clearly unreasonable.

Officials with the City of Denver have also specifically stated that when the graffiti portion of the ordinance is enforced any graffiti is as good as any other: "Unless the graffiti part of the ordinance is changed, sorry, this can still be a reality. Graffiti is graffiti, whether it was the same on the day it was cited (and supposedly has since been cleaned) or has changed during the interim leading up to impoundment." (Sherri Ivy, Senior Inspector.) In other words, the inspectors feel no obligation to prove that the violation they are impounding on is the same violation that the notice to cure was provided for! If the City provides no notice, the owner of the news rack must either be psychic or must call the Permits office daily to know that a news rack has been impounded!

The total lack of provisions for notice and hearing before (or even after) the seizure of news racks and their destruction or sale makes this whole ordinance facially invalid due to its failure to meet even the most fundamental requirements of due process. And the seizure of several of our news racks without notice, and the seizure and destruction of at least one of our news racks without even a prior notice of violation clearly violates our rights.

Go Go Media, LLC, hereby demands the following relief from the City and County of Denver:

1. Immediate suspension of enforcement of the News Rack Ordinance until such time as the City Council can amend the Ordinance and repair its constitutional defects;
2. Voiding of Invoice 024366 from the Department of Public Works for the \$50 impoundment fee for the rack destroyed July 3, 2002;
3. Return of any news racks or other property belonging to Go Go Media, LLC;
4. Payment of damages of \$500 to Go Go Media, LLC, for the rack destroyed, the impoundment fees paid, cost of copies of notices, cost of re-bolting racks impounded and loss of use of racks impounded.

If these actions are not taken by September 21, 2002, then Go Go Media, LLC, intends to file suit in District Court under 42 U.S.C. Sec. 1983 seeking injunctions and damages against the City and County of Denver and appropriate employees of the City and County of Denver. Several other publishers in the Denver area have expressed interest in joining us in such a lawsuit.

Sincerely,

Darlene Cypser, Esq.

cc:

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