SIGN WALKER CONTROLS – PREEMPTED OR NOT?

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I. Introduction

For many years the City of Scottsdale had in place an ordinance, S.R.C. § 16-353(c), that prohibited persons generally known as "sign walkers" from using the City's sidewalks for their commercial activities. The ordinance reads as follows:

> No person shall have, bear, wear or carry upon any street, any advertising banner, flag, board, sign, transparency, wearing apparel or other device advertising, publicly announcing or calling attention to any goods, wares, merchandise, or commodities, or to any place of business, occupation, show, exhibition, event or entertainment. The provisions of this subsection do not apply to the wearing of apparel without remuneration for doing so or business identification on wearing apparel.

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The City is currently engaged in litigation with the State of Arizona, and with Sign King, a company that engages in this kind of activity and which intervened in the case, to determine if a state law passed for the apparent purpose of negating this ordinance can be applied to the City of Scottsdale in light of the City's status as a charter city. The City lost on this issue in the trial court, and the matter is now pending before the Court of Appeals.

II. The state statute

In 2008 the state passed A.R.S. § 9-499.13, which states:

> A. From and after December 31, 2008, notwithstanding the authority to regulate signs pursuant to section 9-462.01, and as a matter of statewide concern, all municipalities shall allow the posting, display and use of sign walkers. Municipalities may adopt reasonable time, place and manner regulations relating to sign walkers.
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> B. For the purposes of this section, "sign walker" means a person who wears, holds or balances a sign.

The City believed its ban on sign walkers on its sidewalks was a "reasonable time, place and manner regulation," so it continued to enforce its ordinance, which resulted in its litigating the issue with Sign King, first in City Court, and then on appeal to the Maricopa County Superior Court. The Superior Court, Judge Downie presiding, determined that the City had presented sufficient proof to establish that sign walkers presented a hazard to passing motorists and that it was a reasonable regulation to ban them from the sidewalks, although they can still practice their trade on private property and elsewhere in the City. She held that the ordinance met the standards of the First Amendment to the United States constitution, and of the state statute.

In 2014 the state legislature amended A.R.S. § 9-499.13 to add the following:

> A municipality that adopts reasonable time, place and manner regulations relating to sign walkers may not restrict a sign walker from using a public sidewalk, walkway or pedestrian thoroughfare.

The legislative intent statement said that it is the public policy of the state that equal access to public sidewalks is fundamental to the exercise of free speech, and that, notwithstanding reasonable time, place and manner regulations, the use of public sidewalks must be uniform as between sign walkers and other individuals.

III. The City's argument

As the City sees it, here is the fundamental dispute in this case. A charter city has the right to control its own property, and that right is an inherent attribute of governance, and is not delegated to the city by the state. Under the Arizona constitution charter cities can exercise that power free of any interference by the state unless there is a demonstrated purpose of statewide importance that is infringed by the city's actions. If so, then the court has to decide which purpose is paramount.

IV. The most important fact in this case

The most important fact in the City's dispute with the defendants in the pending litigation is that the citizens of Scottsdale own its sidewalks, just as much as they own City Hall or the City's water treatment plant or police headquarters. The state has no right to control the City's property. If the state wanted to make some use of the City's property, say by putting a DMV station in a City building, it would have to get the City to agree to allow it to do so.

The courts have long recognized that control of City property is an inherent right of charter cities that can be exercised free of state control.

In *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 195 P.2d 562 (1948), the state had passed a law directing procedures for cities to sell real estate they owned. Tucson disposed of some of its real estate without following the procedure and litigation ensued in which it was claimed the disposition was invalid for having failed to comply with the state statute. The court held that, as a charter city, Tucson did not have to follow the state statute, noting that the people of Arizona " . . . should not be concerned with the legislation looking to the intricacies of management of a large city." *Id.* at 336, 195 P.2d at 566.

Fifty-four years later the Court of Appeals again addressed the rights of charter cities in the management of their own property in *McMann v. City of Tucson*, 202 Ariz. 468, 47 P.3d 672 (App. 2002) the court held that a state statute prohibiting cities from requiring background checks when firearms were sold did not apply to the City of Tucson when it required them of gun shows taking place at its convention center. The court stated that a city's power to manage its own property " . . . must necessarily include the fundamental decision as to how the property will be used." *Id.* at ¶ 12.

V. Conflicting interests

So the right of charter cities to manage their own real estate free of state interference is well established. However, that does not end the inquiry, because if the city's actions conflict with a statewide interest then a determination has to be made as to which is paramount. This conflict, and how it should be resolved, is best analyzed by applying the principles of City of Tucson v. State, 191 Ariz. 436, 957 P.2d 341 (App. 1997).

In that case the issue was whether the City of Tucson had to follow the state's consolidated election law. Just as with the management of a city's real estate, it was well established that an area of purely local concern was how city elections were to be held. Tucson relied upon that fact, and upon its charter, to say that it did not have to follow the state law. The Court of Appeals acknowledged that the City was correct in believing that it had inherent power to manage its own elections, but it also recognized that the state had brought forward substantial arguments that there was a genuine statewide interest in requiring consolidated election dates. The court stated, "Where, as here, an issue involves both local and statewide interests, a balancing test evaluating the issues and determining which is paramount is also appropriate." *Id.* at 439, 957 P.2d at 344.

The court then looked at the state's evidence to determine if it had truly shown that there was a statewide interest, recognizing that the mere assertion of such an interest by the state, absent more, was not controlling. The court found that there had been a two year pilot program indicating that a consolidated election schedule resulted in significantly increased voter turnout and reduced election costs. The court also noted that there had been extensive testimony before legislative committees regarding voter confusion and fatigue and the administration of consolidated elections. Based upon the evidence in the case the court determined that there had in fact been demonstrated a statewide interest and held that the City had to follow the consolidated election law. *Id.*

VI. The lack of evidence in this case

As noted above, the state legislature's rationale for trying to restrict the City's right to manage its own property is an assertion that there is a statewide interest in having sign walkers treated uniformly with other citizens in the use of sidewalks. Of course, the statute that conclusion supposedly justifies requires that sign walkers not be treated uniformly with other citizens because only sign walkers can use the sidewalks unrestricted by reasonable time, place and manner regulations. But in any event there is not one fact anywhere in the record that shows why it is important for everyone to have uniform access to sidewalks.

The City does not take the position that the state can never interfere with the City's management of its own sidewalks. Nor does the City claim that the state cannot give speech greater protection than that mandated by the constitution. However, if it is going to do so then it has to provide some facts from which the court reviewing its actions can determine that there really is a statewide interest that is paramount. If the legislature can eliminate the rights of a charter city simply by declaring there is a statewide interest then that portion of the state's constitution becomes a nullity.

VII. The criminalization argument

The other issue the state has raised in support of its position is that, because this is a criminal ordinance, it cannot conflict with what the state has declared is not criminal. There are numerous cases stating that a charter city's criminal ordinances cannot conflict with the state's criminal statutes, but the statute at issue here is not a criminal statute. And a charter city when it is criminalizing behavior that the state has not criminalized can do so using power given to it by its charter, and not relying upon power delegated to it by the state. *See* *State ex rel. Baumert v. Municipal Court of the City of Phoenix*, 124 Ariz. 159, 162, 602 P.2d 827, 830 (App. 1979).

The briefs of the parties in this case can be found at
http://www.scottsdaleaz.gov/departments/attorney/civil/AppealBriefs

The Arizona constitutional provision can be found at:
http://www.azleg.gov/FormatDocument.asp?inDoc=/const/13/2.htm

Hyperlink to Documents

Briefs

S.R.C. § 16-353(c)

Ordinance 2738

A.R.S. § 9-499.13

Legislative intent statement

City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330 (1948)

McMann v. City of Tucson, 202 Ariz. 468 (App. 2002)

City of Tucson v. State, 191 Ariz. 436 (App. 1997)

State ex rel. Baumert v. Municipal Court of the City of Phoenix, 124 Ariz. 159 (App. 1979)

Arizona Constitution, Art. 13, § 2