

Rothfelder and Falick on Permit Disputes

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At the fall 2022 IBO show, Chris Rothfelder and Mike Falick talked about [strategies for out of home permit disputes](#). We've asked them to expand their comments for our reader's benefit.

Lawsuits challenging permit denials are frequently thrown out on sovereign immunity grounds unless the legislature grants permission to sue.



Christopher Rothfelder, Rothfelder Falick

Everyone's heard of sovereign or governmental immunity—generally speaking, governmental entities can't be sued. In the context of a permit dispute, government agencies, including those that decide whether to grant or deny a permit application, enjoy "discretion" when interpreting and applying sign regulations. That means it's hard to sue when a government agency makes the wrong decision and incorrectly denies a permit application. Ordinarily, you'd submit an application and if it's denied, then you have one shot at an appeal, which is frequently decided by another employee of the same agency that denied the original application—judge, jury and executioner are all working under the same roof. If and when the appeal is denied, that's the end of the road.

There are a few exceptions, however, to the government's immunity from suit. One is when a government employee acts *ultra vires*. That means that a government agent failed to perform a ministerial duty or carry out a task with which the agent has no discretion. This route is often a dead end. Typically an agent's actions have to be particularly egregious in order to fall within the *ultra vires* exception, since government employees are granted discretion (by default) when processing applications.

Administrative procedures acts provide another viable road to suing the government, but don't get too excited. Ordinarily you may only sue a government agency to challenge the *validity* or *applicability* of a rule, and not the *application* of a rule. For a sign operator, that means you may sue the government to establish whether a particular sign regulation applies to a certain permit application or whether the sign regulation is legal in the first place.

Conference attendees may remember the story of the Texas "Guidance" policy, which was held invalid and unenforceable because TxDOT failed to following the notice and rule making procedures necessary to implement a regulation. One point for the good guys.

At the end of the day the text of the code, not the statements of staff or even the permit, are what matters.

To carry on the theme of my last answer, one more exception to keep in mind is that government agencies may be barred from taking a certain position when "substantial injustice" would result. Many hands went up when Mike asked the audience in Charlotte last week whether a permitting official ever said "this City doesn't have a sign code" or "you don't need a permit to build a sign." Those same hand-raisers were then faced with the all-too-familiar scenario of commencing plans to construct a sign only to be told that the City indeed did have a sign code that restricted billboards. In fact, we've represented several clients who have actually received a permit to construct a sign, then later been shocked to come face-to-face with a STOP WORK ORDER slapped to a newly planted sign pole.

Most of our clients think that if they have an email or even a permit that the City can't go back on it's word. Unfortunately, a municipality also enjoys sovereign immunity from these types of reliance-based defenses. It's only when "substantial injustice" would result that a

City may be stopped from enforcing regulations that conflict with the statement of city officials. It's a high bar to make such a showing, but this exception provides a disappointed sign builder an argument that may lead to a compromise with a City and a sign in the air. **The carrot is almost always more cost effective but sometimes the stick is only the way.**



Michael Falick,
Rothfelder Falick

Once again, my last comment dovetails into my next one. The theme of Mike and I's presentation was that not one size fits all when dealing with government entities. Not every IBO member has the resources or inclination to sue the government every time a bad decision is made. And, it's always a judgment call that's specific to the situation when deciding the level of aggression to take with the government. Who are the individuals on the other side, how valuable is the sign or permit, how much time, effort, and money are you willing to spend to get what you want, and what's your tolerance for risk? All of these are questions you have to ask yourself when determining whether to take on the government.

More often than not we've found that it's most efficient for an operator, especially a small one, to try to work with the government through a permitting dispute. Try to talk to the individual decision maker and see if you can agree on the proper interpretation of a regulation. If you are dealing with a municipality, maybe you're willing to give up some free ad space on your sign or dress up the sign with masonry or the town logo. Though these tactics require concessions, they often prove to be less costly than taking the litigation route.

However, if playing nice proves unsuccessful, then you're left with no choice but to take the government to court. Don't be scared, though. In our experience, most cases with municipalities often result in a settlement. Cities don't like to be sued, they don't like the attention, they don't like the attorney's fees, and they don't like the risk of loss. They don't like it. The same isn't always true for state agencies, who have unlimited resources and

thousands of other disputes handled by hundreds of state attorneys. Nevertheless, if you are confident in your position and represented by competent counsel, then there may be light at the end of the tunnel if you're willing to ditch the carrot and replace it with the stick.

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