LEGAL INSIGHTS
FOR LOCAL GOVERNMENTS
OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

*Volume 26, No. 3 -- Fall 2019*

## Unconstitutional: Tire chalking

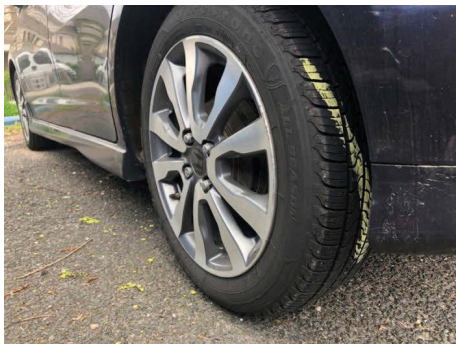
by Karl R. Ottosen and Chloe Cummings

A recent federal court decision suggests the emergence of a new standard of law surrounding the practice of chalking tires. Specifically, a federal appeals court found that "tire chalking" is a violation of the Fourth Amendment and is unconstitutional in *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019).

Chalking tires is a practice commonly used by local governments in an effort to mark cars in time-limited parking spaces. A parking enforcement official will first place a chalk mark on the tire. The officer will then leave and later return to the parking spot to reveal if the chalk mark is still in the same place. If the chalk mark is in place, then the parking official knows that the car has been parked in one area over the proscribed time period and can issue a parking ticket.

Alice Taylor, a Michigan resident who received 15 traffic citations in two years as a result of the City of Saginaw tire chalking practices, brought suit in federal court challenging the constitutionality of the practice. Each traffic citation was issued by the same parking enforcement official. Taylor argued that the act of chalking her tires was unconstitutional because it constituted a trespass onto privately owned property. In other words, because the vehicle is privately owned, Taylor argued it is unconstitutional to place a chalk mark on the vehicle for purposes of information gathering without a valid search warrant. She brought a Section 1983 claim against the City.

The Sixth Circuit Court of Appeals ultimately agreed with Taylor and wrote that chalking tires is indeed a kind of trespass on to an individual's property and, therefore, requires a warrant. More specifically, the trespass infringes on the Fourth Amendment search and seizure rights of citizens. The Fourth Amendment protects citizens from unreasonable searches and seizures.



In considering potential Fourth Amendment violations, a court will generally ask two questions: (1) if the conduct constitutes a government search; and (2) if the search was reasonable.

The Sixth Circuit found that chalking tires *is a search* under the Fourth Amendment. The court reasoned that when the government official chalked the tire, it was trespassing onto private property and made intentional physical contact with the car. Furthermore, the

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## Minutes of a board that meets once: the dilemma

by Michael B. Weinstein

Section 2.06 of the Illinois Open Meetings Act (5 ILCS 120/2.06) mandates that a public body approve the minutes of an open meeting "within 30 days after the meeting or at the public body's second subsequent regular meeting, whichever is later." But what happens if the public body only meets once?

For example, the City Council of Aurora creates an ad hoc committee to investigate the need for an Economic Development Director. The committee meets once and concludes that there is no need for the creation of the position at the present time since current city staff are able to perform the desired job skills that would be performed by the proposed new position. Moreover, the cost to hire and train such a person is deemed to be excessive in view of the city's current budget constraints.

One of the members of the ad hoc committee volunteered to take minutes and otherwise act as a secretary. Minutes were taken; however, in view of the committee's recommendation, the members voted to dissolve at the end of its one, and only, meeting.

Wait! What about the minutes? When can they be approved and published as required by the Open Meetings Act?

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## Government officials, personal social media accounts, and public forums

**by Meganne Trela**

The phenomenon of social media has become a function of the everyday American. The news is full of Twitter, Facebook, and Instagram quotes from local, state, and national officials. As a result, the definition of what constitutes a public forum subject to the protections of the First Amendment has become blurred. Certainly, a concept the founding fathers never imagined. Similarly, the prominence of social media creates issues related to open meeting and public record requirements.

The Second Circuit recently addressed President Trump's use of Twitter and provided perspective on when government officials create a public forum under the First Amendment. In *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), a group of individuals who were blocked from President Trump's @realDonaldTrump Twitter account because of their criticism of the President sued the President and his aides. The plaintiffs alleged that the blocking violated the First Amendment because his account was a public forum. According to the plaintiffs, exclusion from that public forum based on their criticism of the President and his policies would be unconstitutional viewpoint discrimination.

The plaintiffs contended that their "inability to view, retweet, and reply to the President's tweets limited their ability to participate with other members of the public in the comment threads. While "workarounds" existed for engaging with the President's account, the plaintiffs found the "workarounds" burdensome.

The account at issue was created in 2009, and President Trump argued that the @realDonaldTrump Twitter account was a personal private account. As a result the President argued the action of blocking the plaintiffs was not a state action – although, admittedly, the account was used "to announce, describe, and defend his policies." The President further argued that the Twitter account was not owned or operated by the government and was the way in which he participated in sharing his own viewpoints.

He also argued that there were other ways the plaintiffs could access the Twitter account and participate in the conversation despite being blocked. Furthermore, President Trump noted that to the extent the account is government controlled, its posts are government speech and the First Amendment does not apply. Both the district court and Second Circuit Court of Appeals disagreed, holding that blocking the plaintiffs violated the First Amendment.

On appeal, the Second Circuit reasoned that the official nature of the account was "overwhelming" and held that once the President chose a platform and opened it to millions of users, he could not selectively exclude those individuals with whom he disagreed. The court reasoned that the Twitter account established by President Trump contained "all the trappings of an official, state-run account." The President was described as the "45th President of the United States of America" and the header photos included pictures of the President doing his official duties.

Further, and by his own admission, President Trump frequently utilized his account "to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair." Additionally, his Twitter page was operated by the White House Director of Social Media and Assistant to the President, and the National Archives have determined that President Trump's "tweets" are official records.

The President recently requested an *en banc* rehearing in front of a full panel of the Second Circuit. Thus, the Second Circuit's decision could be altered. However, this case serves as a reminder that state and local officials should be mindful of their use of social media concerning public matters. While the social media accounts of local officials do not garner the attention that the President's does, those officials may be creating a "public forum" under the First Amendment if they are using personal accounts in a manner that indicates it is an official platform to address the business of the public.

When public officials post pictures of themselves performing their public duties, promote the agenda of the public body, and defend decisions made by the public body they are likely creating a public forum under the First Amendment and must be weary of blocking users based on their disagreement with the policies and decisions.

To avoid issues, it is advisable to make sure statements made by a public official regarding public business on social

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## Tire chalking

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trespass was combined with an effort to obtain information in an attempt to issue citations. The court compared this decision to a 2012 court ruling that found affixing GPS trackers constituted a "search."

In addition to finding that tire chalking is a search, the court also found that tire chalking *is an unreasonable search* under the Fourth Amendment. Tire chalking occurs when cars are legally parked on the street. Furthermore, the chalk is intended to deduce whether the cars have moved within a certain period of time and can be ticketed for their failure to change spots. The court reasoned that the search is unreasonable because the cars are marked when they are "parked legally, without probable cause, or even so much as 'individualized suspicion of wrongdoing' – the touchstone of the reasonableness standard."

The municipality argued that chalking should instead be upheld as constitutional because chalking protects the public through "community caretaking" which is an exception to the warrant requirement. This exception applies when the function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

The Sixth Circuit determined that the community caretaking exception is narrowly applied by the courts and typically applies when public safety is at risk. In this case, however, the Sixth Circuit found that tire chalking did not bear a relationship to public safety. There was no evidence that being parked in one location for an extended period of time posed any hazard or public risk. The court found that the parking citations were instead directed at raising revenue. In fact, Taylor's attorney estimated that chalking tires, and the resulting citations that were issued, generated approximately $200,000 per year in traffic tickets.

After such a strong ruling, many units of local government stopped the practice. A professor at University of Southern California Law suggests that local government officials may be able to avoid liability for Fourth Amendment infringement by taking a picture of the car instead of chalking.[1] Under this approach, enforcement officials can obtain information regarding the placement of the car without physically marking or touching the vehicle. However, such photos should be time stamped, and this solution does not account for people who may move their vehicle and then return to the same parking space. In any event, officials seeking to enforce time-based parking restrictions will need to seek alternative enforcement measures moving forward. ■

[1]Alex Johnson, Chalking tires to enforce parking rules is unconstitutional, court finds, NBC News, April 22, 2019 https://www.nbcnews.com/news/us-news/chalking-tires-enforce-parking-rules-unconstitutional-court-finds-n997326

## Public forums

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media are limited to a dedicated account for public discourse and separate from the personal account for the public official. Officials who mix their personal accounts and information with information related to the public business may no longer be able to block individual users who respond with differing viewpoints. And while the public discourse may be mostly cordial and unassuming, all it takes is one controversy to incite heated social media rhetoric.

Likewise, public officials should be mindful that the conversations that they engage in on social media may become a "meeting" under the Illinois Open Meetings Act ("OMA"). Under the OMA, a meeting is "any gathering . . . (such as, without limitation, electronic mail, electronic chat, and instant messaging) or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business . . ." In addition, comments and posts by public officials on social media may qualify as a "public record" subject to disclosure under the Illinois Freedom of Information Act ("FOIA").

The world of social media has become the leading way many Americans communicate in today's world. However, public officials must be mindful of the legal pitfalls and requirements that come along with engaging the public in these new settings. For questions regarding public discourse on social media, open meetings, and public records contact an attorney at Ottosen Britz. ■

## Meeting minutes

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Unfortunately, there is no easy answer. For those public bodies that have adopted Robert's Rules of Order, Revised, here is what the Fourth Edition[1] says:

> Where the regular meetings are held weekly, monthly, or quarterly, the minutes are read at the opening of each day's meeting, and, after correction should be approved. Where the meetings are held several days in succession with recesses during the day, the minutes are read at the opening of business each day. If the next meeting of the organization will not be held for a long period, as six months or a year, the minutes that have not been read previously should be read and approved before final adjournment. If this is impracticable, then the executive committee, or a special committee, should be authorized to correct and approve them. In this case the record should be signed as usual, and after the signatures the word "Approved," with the date and the signature of the chairman of the committee authorized to approve them. At the next meeting, six months later, they need not be read, unless it is desired for information as it is too late to correct them intelligently.[2]

For public bodies that have not adopted Robert's Rules there are other possible solutions to this dilemma. For example, the next version of an ad hoc committee could approve the minutes for publication. But our hypothetical posits that the ad hoc committee was dissolved. Does that matter? Theoretically yes, but just who is going to complain? The Public Access Counselor (PAC)?

Another possibility might be to have the committee vote on draft minutes before they dissolve. This is similar to one solution suggested by Robert's Rules (see above). Or better yet, send copies of the minutes to each of the committee members and have them sign, approve and return their copy within 30 days of the adjournment of the one committee meeting. Technically, that might not be kosher, but again, who is going to complain?

Perhaps the minutes could be published without formal approval? However, since an official action was taken at the committee meeting (the decision to recommend that the Economic Director position not be created), it would seem that approval and publication of the minutes is required.

Conceivably, the minutes could be drafted at the single meeting with the stipulation that they would be approved and published in 30 days unless the committee were to meet again within that time frame.

Finally, what about having the full city council approve and publish the committee minutes? Perhaps that is the best alternative?

There does not appear to be any Illinois caselaw on this question. However, the above suggestions, at the very least, should provide a starting point for further discussion.

If you have questions about the drafting and approving of minutes of a public meeting, contact an attorney at Ottosen Britz. ■

[1]The Fourth Edition is the most recent edition that is in the public domain. The current edition of Robert's Rules is the "Newly Revised, Eleventh Edition." Presumably, the current language is similar, if not identical.

[2]Robert's Rules of Order, 4th Ed. (Scott, Foresman, and Company, 1915).

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