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Article 10

# Municipal Corporations - Validity of Parking Meter Ordinances

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the other spouse, or offspring; tuberculosis, *Davis* v. *Davis,* 90 N.J.E. 158, 106 Atl. 644 (1919); *Sobol* v. *Sobol,* 80 Misc. 277, 150 N.Y. Supp. 248 (1914); epilepsy; *Richardson* v. *Richardson,* 246 Mass. 353, 140 N.E. 73 (1923), but see *Busch* v. *Gruber,* 98 N.J.E. 1, 131 Atl. 101 (1925); insanity, *McGill* v. *McGill,* 179 App. Div. 343, 166 N.Y. Supp. 397 (1917), apparently overruled by *Lapides* v. *Lapides,* 254 N.Y. 73, 171 N.E. 911 (1936).

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**Municipal Corporations—Validity of Parking Meter Ordinances.**—Complaint was made in the police court of Providence, R. I., against the defendants for parking an automobile in a parking meter zone without depositing a coin as required by traffic regulation 36 Sec. 3(e). An ordinance was passed under the authority of Public Laws, 1935, c. 2275, sec. 8, which provided that the Police Bureau "shall have authority to make all needful rules and regulations for control of traffic." Before trial in the lower court the defendants filed identical motions to quash the warrants and these motions raised the question of the constitutionality of the ordinance as a violation of the "due process" clause of the State Constitution, Art. I, sec. 10, and of the Federal Constitution, 14th Amendment, Sec. 1.

The constitutional question was certified to the appellate court, which refused to discuss or determine the constitutionality of such an ordinance until its constitutionality was first proved to be necessarily involved in the decision of the case. To determine that question the case was remanded. *State* v. *Goldberg* (R.I. 1938) 1 Atl. (2d) 101.

Attacks upon the legality of parking meters have been made on widely diversified grounds. In *State ex rel Harkow* v. *McCarthy,* 126 Fla. 433, 171 So. 314 (1936), the defendant had parked his car in a parking meter zone, and had refused to deposit the required coin. After his arrest he petitioned for a writ of habeas corpus on the ground that the ordinance was unconstitutional, because it was a means of raising revenue through the exercise of the police power. The appellate court held that the parking meters were acting as mechanical police, and therefore constituted a *bona fide* exercise of the police power. The court also stated that those who received the extra benefit of being able to park for thirty minutes instead of the ten minutes previously allowed, should pay the five cents to meet the cost of added convenience.

In *Harper* v. *City of Wichita Falls* (Tex. Civ. App. 1937) 105 S.W. (2d) 743, the petitioner sought an injunction against the use of parking meters on these grounds: 1) the placing of the parking meters at the curb exceeded the authority of the city to maintain the streets; 2) that it was an attempt to zone the particular section, and since there was no notice given, it was invalid; 3) that the meters caused a loss in business, which resulted in a depreciation of property value; 4) that the ordinance constituted a revenue raising scheme; 5) that such placing of meters was unreasonable and arbitrary, in that it unlawfully interfered with the rights of ingress and egress to and from private property, and therefore, violated the "due process" clauses of the state and federal constitutions.

The court denied the application for an injunction. In answer to the contentions of the petitioner the court stated that the fee charged was not a tax measure and therefore not forbidden by the city charter. The plaintiff had only one vested right in the use of the streets and this right was not violated. The public

streets of Wichita Falls were dedicated to the use of the public at large, so no notice was needed before the ordinance was passed. The loss of one person's business will not invalidate a police measure. Any fee charged must be made clearly to appear beyond what is needed for the purpose intended, before an ordinance will be declared void as a revenue raising scheme. The fee was intended only to cover necessary expenses of installation and operation, and therefore was not a "tax" but a "license fee" for a privilege not possessed by the citizens of the city. Likewise, the court stated that the primary right of ingress and egress does not constitute the right to store a vehicle in the street for business convenience. The municipality can control this use of the streets by reasonable regulations.

In *Harper* v. *City of Wichita Falls, supra* it was held that all property is held subject to the exercise of the police power, and regulations will not be declared unconstitutional because of restraint on private rights of persons or property or that it will result in a loss to individuals.

But under similar circumstances it has been held that the use of parking meters is invalid as a violation of the "due process" clause of both the State and Federal Constitution. The petitioners sought an injunction against the use of the meters on the ground that they hindered his customers in their ingress and egress to and from his store. The court, on appeal, held that this was a deprivation of property without "due process," and also unconstitutional as an unauthorized exercise of the taxing power. However, the facts of this case revealed that a deed from the Elyton Land Company to the City of Birmingham granted them the use of the streets in a limited manner. The provision in the deed stated that the Mayor was "to have and to hold the described streets, avenues and alleys with appurtenances for the benefit and use of the public, and they shall not be used for any private or individual purposes, except with the consent of the donor." *City of Birmingham* v. *Hood McPherson Realty Company,* 233 Ala. 352, 172 So. 114 (1937).

In *Ex parte Duncan,* 179 Okla. 355, 65 P. (2d) 1015 (1937) the defendant was arrested for violating a parking meter ordinance. There was an express provision in the statutes that the city "shall have no power to pass, enforce or maintain ordinances . . . requiring from any automobile owner, any tax, fee, license or permit for the free use of the highways . . ." Section 10290, O. S. 1931, (47 Okla. St. Ann § 12). The defendant was placed in the city jail and then applied to the district court of Oklahoma for a writ of habeas corpus. The writ was denied. Thereafter he applied to the Supreme Court for a like writ on the ground that the ordinance imposes a fee for the free use of the streets, and that there had been no such delegation of police power warranting this act. The appellate court refused to grant the writ, declaring that a parking meter ordinance was valid where it appeared on its face to be a bona fide police regulation and where there was no indication that the meters had been installed on streets where traffic did not justify parking regulations. The court in defining the "free use of highways" stated that it was to include the use of the highways together with such incidents of travel as the right to unload passengers or freight at the curb, but not to include the right to park. *Village of Wonewoc* v. *Taubert,* 203 Wis. 73, 233 N.W. 755 (1930).

In contemplation of passing ordinances permitting the use of parking meters, the opinion of the Massachusetts Supreme Court as to their validity was asked by a committee of the Massachusetts legislature. The court replied that, within the limits of public travel, a fee system, intended to hasten departure of parked

cars, and to help defray the cost of installation and supervision, may be used. Since such things as telephone posts and telegraph poles were permitted, parking meters should also be permitted, since they facilitate the use of public ways for purposes of transportation or passage, and promote the safety and comfort of those who travel. *In re Opinion of the Justices* (Mass. 1937) 8 N.E. (2d) 179.

*In Frost & Frost Trucking Co.* v. *Railroad Commission of California,* 271 U.S. 583, 46 Sup. Ct. 605, 70 L.ed. 1101 (1926) Mr. Justice McReynolds in a concurring opinion expressed the general idea of liberality that the courts should take in construing regulations concerning transportation on public highways as follows: "The states are now struggling with new and enormously difficult problems incident to the growth of automotive traffic, and we should carefully refrain from interference unless and until there is some real, direct, and material infraction of rights guaranteed by the Federal Constitution."

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**Municipal Corporations—Schools and School Districts—Mandamus—When "May" Means "Must."**—Mandamus to compel defendant, a common school district, to furnish free transportation to and from school to an eight year old boy living about four and a half miles from school. The Statute provided that a school board "may" provide for the free transportation of pupils to and from school at the expense of the school district, provided funds for such purposes are available. Defendant denied plaintiff's request. Plaintiff contended that the statute imposed a duty to furnish the transportation. The trial court quashed the alternative writ and plaintiffs appealed. On appeal, *held,* judgment affirmed. The statute merely authorized the school board to act. Mandamus will not be granted to control discretion by directing its exercise in a particular way. *State ex rel. Klimek* v. *School Dist. No. 70, Otter Tail County* (Minn. 1939) 283 N.W. 397.

When administrative officers refuse to perform a mere ministerial duty imposed upon them by law, mandamus may issue to compel them to perform such duty; but, when such official act requires the exercise of judgment or discretion mandamus will not be granted. *State ex rel. Gericke* v. *The Mayor and Common Council of Ahnapee,* 99 Wis. 322, 74 N.W. 783 (1898); *State ex rel. Drew* v. *Shaughnessy,* 212 Wis. 322, 249 N.W. 522 (1933); *State ex rel. Atty. Gen.* v. *Cunningham,* 81 Wis. 440, 51 N.W. 724 (1892); *United States ex rel. Baynton* v. *Blaine,* 139 U.S. 306, 11 Sup. Ct. 607, 35 L.ed. 183 (1891). However, an officer may be required by mandamus to exercise his discretion in one way or the other. *Browning* v. *Daw,* 60 Cal. App. 680, 213 Pac. 707 (1923); *People* v. *Russell,* 294 Ill. 283, 128 N.E. 495 (1926); *Beem* v. *Davis,* 31 Idaho 730, 175 Pac. 959 (1918).

The word "may," according to its ordinary construction, is permissive, and should receive that interpretation, unless such construction would be obviously repugnant to the intention of the Legislature, or would lead to some other inconvenience or absurdity. *Medbury* v. *Swan,* 46 N.Y. 200 (1871); *Barber Asphalt Paving Co.* v. *City of Oshkosh,* 140 Wis. 58, 121 N.W. 603 (1909). Whether the word "may" in a statute is to be construed as mandatory and imposing a duty, or merely as permissive and conferring discretion, is to be determined in each case from the apparent intention of the statute as gathered from the context. *Colby University* v. *Village of Cavandaigna,* 69 Fed. 671 (1895); *Kemble* v. *McPhaill,* 128 Cal. 444, 60 Pac. 1092 (1900); *People ex rel. Chiperfield* v. *Sani-*