NOTICE
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2017 IL App (5th) 160308-U

NO. 5-16-0308

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

KOREN EARLIN, on Behalf of Herself and All Others Similarly Situated,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiffs-Appellants,	)	
v.	)	No. 11-L-665
THE CITY OF FAIRVIEW HEIGHTS,	)	Honorable Vincent J. Lopinot,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Barberis and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting summary judgment in favor of the defendant where the City of Fairview Heights' impoundment ordinance, which required violators to pay an administrative tow release charge when their vehicle was used in the commission of certain offenses, established a fee. Thus, we reverse the court's decision and remand for further proceedings for a determination as to whether the fee violated the plaintiff's substantive due process rights.

¶ 2 The plaintiff, Koren Earlin, filed a class action complaint against the defendant, the City of Fairview Heights (City), challenging the constitutionality of the City's impoundment ordinance, which requires violators to pay an administrative tow and release penalty when their vehicle is used in the commission of certain offenses

delineated in the ordinance. The City filed a motion for summary judgment, which the trial court granted. The plaintiff appeals, arguing that the penalty is a fee and that there is a genuine issue of material fact as to whether the ordinance is rationally related to the purpose of reimbursing the City for charges associated with the impoundment and release of vehicles used in the commission of certain offenses. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 In February 2009, the City passed ordinance No. 1430-2009, which subjects vehicle owners to an administrative "penalty" when their vehicle is towed and impounded as a result of its being used in connection with various offenses, including driving under the influence (DUI). The penalty is in addition to the fees imposed for the vehicle's towing and storage and for any penalties imposed for the underlying offense.

¶ 4 The purpose behind the ordinance is set forth in the preamble as follows:

> "WHEREAS, the Police Department of the City of Fairview Heights is spending considerable time involved in the impoundment of vehicles for violations of various state statutes and local ordinances and in the exercise of its community caretaker function; and
>
> WHEREAS, the City Council of the City of Fairview Heights has determined that it is appropriate to attempt to recover the cost of the time and effort of the Police Department personnel in dealing with the impoundment and release of vehicles related to violations of state statutes and local ordinances and the exercise of its community caretaker function; and

WHEREAS, the City Council of the City of Fairview Heights has determined that the time and effort of the Police Department in dealing with the impoundment and release of vehicles related to violations of law takes away time and therefore the ability of the Police Department to serve and protect the citizens and visitors of the [C]ity of Fairview Heights and tends to inhibit the ability of the Police Department to promote the general health, safety, and welfare of the community."

The penalty provision states as follows:

"[(b)](3) A motor vehicle used in the commission of the offense of driving under the influence of alcohol, drugs and/or intoxicating compounds shall be subject to seizure and impoundment under the subsection. The owner of record of such vehicle shall be liable to the city for a penalty of $400.00 in addition to fees for the towing and storage of the vehicle."

¶ 5 The ordinance allows the vehicle owner to challenge the penalty at an administrative hearing before a hearing officer, who is a licensed attorney. Specifically, the ordinance provides as follows:

"(8) Whenever the owner of a vehicle seized pursuant to this section requests, in writing, hand delivered to the Fairview Heights Police Department, a preliminary hearing on probable cause in person and in writing at the police department within 12 hours after the seizure, a hearing officer shall conduct such preliminary hearing within 72 hours after the seizure ***. All interested persons shall be given a reasonable opportunity to be heard at the preliminary hearing.

*** If, after the hearing, the hearing officer determines that there is probable cause to believe that the vehicle was used in the commission of any crime described in paragraphs (a)(1) through (a)(7) [(paragraph (a)(4) discusses DUI)], the hearing officer shall order the continued impoundment of the vehicle as provided in this section unless the owner of the vehicle posts with the city a cash bond in the amount of $400.00 plus fees for towing and storing the vehicle. If the hearing officer determines that there is no such probable cause, the vehicle will be returned without penalty or other fees.

(9) Within ten days after a vehicle is seized and impounded pursuant to this section, the city shall notify by certified mail, return receipt requested, the owner of record *** of his or her right to request a hearing before the hearing officer that will be conducted to determine whether the subject vehicle is eligible for impoundment pursuant to this section. *** The owner of record seeking a hearing must file a written request for a hearing with the city legal department no later than 15 days after the notice was mailed or otherwise given under this subsection. The hearing shall be scheduled and held, unless continued by order of the hearing officer, no later than 45 days after the request for a hearing has been filed. *** If, after the hearing, the hearing officer determines by a preponderance of evidence that the vehicle was used in the commission of any of the violations described in paragraph (a), the hearing officer shall enter an order requiring the vehicle to continue to be impounded until the owner pays a penalty of $400.00 plus fees for towing and storage of the vehicle. The penalty and fees shall be a

debt due and owing the city. *** If the hearing officer determines that the vehicle was not used in commission of such a violation, he or she shall order the return of the vehicle or cash bond."

¶ 6 On March 5, 2012, the plaintiff filed a one-count amended class action complaint, asserting that she was arrested for DUI, that her vehicle was towed and impounded, and that she was required to pay the $400 administrative penalty mandated by the above impoundment ordinance. After she paid the $400 penalty, the City issued her a tow release receipt, which she had to present to the towing company before the vehicle could be released. She was also required to pay the towing company towing and storage costs before she could retrieve her impounded vehicle. She alleged that the administrative penalty was a fee and, therefore, must be rationally related to a legitimate governmental purpose to comport with substantive due process requirements. She argued that the fee violated her substantive due process rights in that it was not rationally related to the ordinance's purpose of recovering costs associated with the impoundment and release of vehicles because the issuance of the tow release receipt required minimal time and cost to the City. She further argued that the $400 fee is not related to the reimbursement of either the towing services or the arresting officer's services.

¶ 7 On May 24, 2016, the City filed a motion for summary judgment, arguing that the ordinance is constitutional in that it is related to the legitimate governmental purpose of deterring crime and that the penalty amount is not grossly disproportionate to the underlying offense. On June 29, 2016, the trial court entered an order granting summary

judgment in favor of the City. The plaintiff appeals, asserting a substantive due process challenge to the impoundment ordinance.

¶ 8 Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). The reviewing court must construe the evidence strictly against the movant and liberally in favor of the nonmoving party. *Siegel v. Village of Wilmette*, 324 Ill. App. 3d 903, 907 (2001). Although summary judgment can aid in the expeditious disposition of a lawsuit, it is a drastic means of disposing of the litigation and should be allowed only where the right of the moving party is clear and free from doubt. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995). This court reviews summary judgment orders *de novo*. *Id.*

¶ 9 Whether an ordinance violates the constitution is a question of law. *Carter v. City of Alton*, 2015 IL App (5th) 130544, ¶ 18. Ordinances are presumed constitutional, and the challenging party has the burden of establishing a clear constitutional violation. *Id.* A court will affirm the constitutionality of an ordinance where it is reasonably capable of such a determination, and any doubt as to the ordinance's construction will be resolved in favor of its validity. *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 20.

¶ 10 The plaintiff alleges that the impoundment ordinance is facially unconstitutional as it violates her substantive due process rights. A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully because an enactment is facially invalid only if no set of circumstances exists under which it would

be valid. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305-06 (2008). The fact that the enactment could be found unconstitutional under one particular set of circumstances is insufficient to prove its facial invalidity. *Id*. at 306. Thus, a facial challenge must fail where there exists a situation in which the enactment could be validly applied. *In re M.T.*, 221 Ill. 2d 517, 533 (2006). Facial invalidation is an extreme measure and has been employed by the court sparingly and only as a last resort. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009).

¶ 11 In general, legislation does not violate substantive due process if it bears a rational relationship to a legitimate governmental purpose and is neither arbitrary nor discriminatory. *Jackson*, 2012 IL App (1st) 111044, ¶ 34. The rational basis test is met where the challenged legislation tends to prevent some offense or evil or to preserve public health, morals, safety, and welfare. *Id.* Rational basis review is limited and highly deferential. *Byrd v. Hamer*, 408 Ill. App. 3d 467, 488 (2011).

¶ 12 In determining whether to apply the rational basis test to an ordinance imposing a monetary charge, a court must identify whether the charge was intended to be a fine or a fee. *People v. Gildart*, 377 Ill. App. 3d 39, 41 (2007). "Municipalities can assess fines and fees; however, local governments have broader authority in imposing fines than in charging fees." *McGrath v. City of Kankakee*, 2016 IL App (3d) 140523, ¶ 20. "Fees and fines serve different purposes." (Internal quotation marks omitted.) *Id.*

¶ 13 A fee is intended to recoup costs incurred in providing a service whereas a fine is part of the punishment for a conviction. *Id.*; *Gildart*, 377 Ill. App. 3d at 41. The label used to describe the monetary charge is strong evidence of the legislature's intent,

especially where the legislature repeatedly refers to the charge as a "penalty," which connotes a fine, not a fee. *People v. Jones*, 223 Ill. 2d 569, 583 (2006). However, although the label is strong evidence, it is not necessarily definitive, and it cannot overcome the actual attributes of the monetary charge. *Id.* at 599. An ordinance that imposes a fee must survive rational-basis scrutiny to comport with due process. *Gildart*, 377 Ill. App. 3d at 41. A fee is rationally related to the governmental purpose if the amount charged bears some reasonable relationship to the actual costs it is intended to recoup. *Carter*, 2015 IL App (5th) 130544, ¶ 19. The fee does not have to represent the precise cost incurred by the municipality, but it must at least relate to the actual costs. *Id.* In contrast, due process requires that a punishment imposed be rationally related to the offense on which the defendant is being sentenced. *Jones*, 223 Ill. 2d at 605. Thus, in regard to a fine, the inquiry is whether the amount of the fine is grossly disproportionate to the offense. *Id.*

¶ 14 The question of whether an imposed charge is a fine or fee requires us to interpret the language of the ordinance. The principles that govern statutory construction also apply in construing ordinances. *DTCT, Inc. v. City of Chicago Department of Revenue*, 407 Ill. App. 3d 945, 949 (2011). In interpreting a municipal ordinance, the court gives effect to the intent of the municipality as shown by the ordinance's plain and ordinary language. *McGrath*, 2016 IL App (3d) 140523, ¶ 21. Where the ordinance's language is clear and unambiguous, the court will not resort to extrinsic aids of construction. *DTCT, Inc.*, 407 Ill. App. 3d at 949.

¶ 15 Here, the City argues that the ordinance imposed a fine where it repeatedly referred to the charge as a penalty; the charge was punitive in nature in that it punished vehicle owners when they used their vehicle, or allowed their vehicle to be used, in the commission of certain offenses; the amount varied based on the severity of the offense; the monies collected were not earmarked for a particular City fund; and the charge did not compensate the City for prosecuting the vehicle owner. In support, the City cites *McGrath v. City of Kankakee*, 2016 IL App (3d) 140523, arguing that it is directly on point and controlling.

¶ 16 In *McGrath*, the City of Kankakee (Kankakee) enacted an ordinance that imposed a $500 "administrative penalty" on vehicle owners when they allowed their vehicles to be used in the commission of certain offenses. *Id.* ¶ 3. The plaintiff filed a class action complaint against Kankakee, asserting a procedural due process claim alleging that she was not given notice that her vehicle could be impounded if she was arrested for engaging in criminal activity. *Id.* ¶ 13. Kankakee filed a motion to dismiss the plaintiff's complaint, which the trial court granted in part because she had failed to sufficiently allege facts showing whether signs warning of impoundment were posted when her vehicle was impounded. *Id.* ¶ 7. On appeal, she argued that the impoundment ordinance was unconstitutional because it violated her procedural due process rights and was an unlawful attempt to use police powers to produce revenue. *Id.* ¶ 1.

¶ 17 With regard to the procedural due process argument, the appellate court agreed with the trial court that the plaintiff had failed to allege when her vehicle was impounded or assert that her vehicle was impounded before any warning signs were posted. *Id.* ¶ 15.

The court concluded that the plaintiff had failed to allege an injury based on lack of notice and, thus, had no standing to raise a class action claim for a due process violation. *Id.* ¶ 16. As for the police powers argument, the court found that the use of the word "penalty" in the impoundment ordinance showed that the charge was a fine, not a fee. *Id.* ¶ 24. The court further concluded that an impoundment ordinance that charges a $500 fine is reasonably related to the legitimate governmental interest of deterring crime. *Id.* Thus, the court found that the ordinance passed constitutional muster. *Id.*

¶ 18 The plaintiff here argues that *McGrath* is distinguishable in that it involved a procedural due process challenge, not a substantive due process challenge, to an impoundment ordinance. Pointing to the "whereas" clauses, she argues that the ordinance's plain language indicates that the charge is a fee, not a fine. She argues that the "whereas" clauses identify the compensatory purpose behind the ordinance, *i.e.*, the attempt to recoup costs related to the time and effort spent by the City's personnel in dealing with the impoundment and release of vehicles. Relying on *Carter*, 2015 IL App (5th) 130544, she argues that the court erred in granting summary judgment where there is a genuine issue of material fact as to whether the amount of the fees charged is rationally related to the City's legitimate governmental interests.

¶ 19 *Carter* involved similar impoundment ordinances enacted in four Illinois communities in which the vehicle owner plaintiffs were charged an "administrative fee" for the impoundment and release of their vehicles. *Id.* ¶ 1. The plaintiffs had filed complaints against each of the cities, arguing that the impoundment ordinances violated substantive due process principles in that the fees charged did not bear a reasonable

relationship to the cities' actual administrative costs. *Id*. The cities filed motions to dismiss the complaints, which the trial court granted. *Id.* This appellate court reversed the dismissal, finding that resolution of the substantive due process claim at the pleading stage was inappropriate where the vehicle owners had alleged sufficient facts that could potentially lead to a conclusion that the fees imposed by the ordinance violated their substantive due process rights. *Id.* ¶¶ 23-26. In making this decision, this court noted that none of the cities argued that the ordinances imposed fines or served a punitive purpose; instead, they argued that the fees were rationally related to their interest in recouping the costs associated with DUI arrests and the towing and impoundment of vehicles as a result of such arrests. *Id.* ¶ 28. Further, this court expressed no opinion as to the ultimate question of whether the fees charged by the ordinances were rationally related to the costs incurred by the cities. *Id.* ¶ 45.

¶ 20 Unlike *Carter*, the City here argues that the impoundment ordinance imposes a fine in that it serves a punitive purpose, *i.e.*, to punish vehicle owners when they use their vehicle, or allow their vehicle to be used, in the commission of certain offenses. We disagree with this characterization of the ordinance. The ordinance's stated purpose, as set forth in the preamble, is to recoup the actual administrative costs associated with the impoundment and release of vehicles under certain circumstances. We acknowledge that the ordinance does refer to the charge as a "penalty," which is strong evidence as to how the charge should be characterized. However, we note that, in a later provision, the charge is referred to as a fee, not a fine. In particular, the ordinance states that "[t]he fees established by this section are to be paid by the registered owner of the vehicle" and

"[t]he foregoing fees shall be in addition to any fee levied or assessed against the owner or operator of said vehicle by reason of violation of any ordinance or statute." We also note that the label attached by the municipality is not necessarily definitive. In a case involving a similar impoundment ordinance charge, the Second District determined that, although labeled a fine, the charge was, in reality, a fee for double jeopardy purposes. *People v. Ratliff*, 282 Ill. App. 3d 707, 715 (1996).

¶ 21 Also, the attributes of the charge indicate that it is a fee. Under the ordinance, the vehicle owner must either pay the $400 charge or proceed to an administrative hearing to retrieve the impounded vehicle. If the owner elects to pay the charge, the owner receives, in return, a tow release receipt that must be presented to the towing company before the vehicle can be retrieved. The charge is independent of the defendant's being convicted of the underlying offense, which suggests that it is a fee. A fine is punishment imposed as part of a sentence on a person convicted of an offense. The City argues that the charge is only imposed where the owner is found guilty of using the vehicle, or allowing the vehicle to be used, in the commission of an offense. However, the charge is imposed before the defendant is convicted of the underlying offense and is, therefore, not punishment imposed as part of the sentence. See *People v. Price*, 375 Ill. App. 3d 684, 700 (2007) (a factor to consider when determining whether a charge is a fine or a fee is whether the charge is only imposed after conviction). Further, we do not see any mechanism in the ordinance that will automatically reimburse the charge when there is no conviction on the underlying offense. The only way the vehicle owner will be reimbursed the $400 is if she requests an administrative hearing and the hearing officer

determines that the vehicle was not used in the commission of the alleged offense. Thus, this leads us to conclude that the ordinance imposes a fee rather than a fine meant to punish a conviction. Furthermore, we find *McGrath*, the case relied upon by the trial court, inapposite because it did not address the issue presented, *i.e.*, a substantive due process challenge to the impoundment ordinance.

¶ 22 The next issue before us is whether the impoundment fee ($400) is rationally related to the City's legitimate governmental interests. "The rational basis standard is deferential—especially where, as here, the ordinance is challenged on its face. However, it is not toothless." *Carter*, 2015 IL App (5th) 130544, ¶ 20.

¶ 23 The trial court's order did not address this issue because it granted summary judgment on the basis that the ordinance established a fine. The plaintiff argues that she has sufficiently pled that the fee is not rationally related to the costs of writing the tow release receipt and that there is a question as to the reasonableness of the ordinance on its face. She also argues that further discovery is necessary to identify the costs unique to the impoundment and release of vehicles following a DUI arrest, *i.e.*, the cost of processing tow release requests. She further argues that resolution of this issue requires a factual determination as to the extent to which the City is already reimbursed for expenses related to DUI arrests. We agree. Thus, we conclude that the court erred in granting the City's motion for summary judgment.

¶ 24 We express no opinion as to whether the fees charged by the impoundment ordinance are rationally related to a legitimate governmental interest. We hold only that the court erred in granting summary judgment. Accordingly, we reverse the trial court's

order granting summary judgment in favor of the City and remand for further proceedings consistent with this decision.

¶ 25 Reversed and remanded.