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PARK PERMIT FOR COMMERCIAL WEDDING PHOTOS

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The First Amendment prohibits laws "abridging the freedom of speech" and is applicable to the states through the Fourteenth Amendment. Further, the First Amendment is not limited to written or spoken words as mediums of expression but also includes pictures, films, paintings, drawings, and engravings. The U.S. Supreme Court has described First Amendment protection for artistic expression as follows:

> It goes without saying that artistic expression lies within this First Amendment protection. The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our "cultural life," just like our native politics, rests upon the ideal of governmental viewpoint neutrality.

Such freedom of artistic expression is not absolute. As illustrated by the case described herein, the government may impose reasonable time, place and manner restrictions on First Amendment activities. Regulation of First Amendment activities, however, must be content neutral, serve a significant governmental interest, and leave ample alternative channels for communication for artistic expression.

In the case of *Josephine Havlak Photographer, Inc. v. Village of Twin Oaks*, 2016 U.S. Dist. LEXIS 91450,163 F.Supp.3d 592 (E.D. Mo. 7/14/2016), the issue before the federal district court was whether "a municipal ordinance of the Village of Twin Oaks regulating commercial activity within Twin Oaks Park" was "an unconstitutional prior restraint" on expressive activity protected by the First Amendment, specifically "engagement in commercial photography."

In her complaint, plaintiff Josephine Havlak alleged the permit requirement violated her First Amendment freedom of expression. In so doing, Havlak claimed her photography was "artistic expression of ideas such as love, harmony, and humor, both for commercial purposes and as an expression of Josephine Havlak's individual artistic motivation." According to Havlak, "this expressive message is conveyed to an audience, namely the subject/owner and other subsequent viewers of the photographs, which are often posted on social media."

Josephine Havlak has been a professional photographer since 1979, operating as Havlak Photographer, Inc., a business that focused on wedding and portrait photography. For Havlak, Twin Oaks Park was an excellent place to take photos of their clients, such as wedding groups and high school seniors.

Twin Oaks Park is approximately 11 acres in total, including a lake, a playground, a basketball court, and a wooded area. The area that commercial photographers, such as Havlak, tend to use for their work is a small area in which there is a waterfall and a small picturesque wood bridge spanning a creek. This area is also the most popular area for other patrons of the Park.

COMMERCIAL ACTIVITY BAN

Havlak initiated her lawsuit in February 2015. At that time, the Village had an ordinance that prohibited use of the Park for commercial purposes. Two signs were posted in the Park that stated: "No commercial activity, including commercial photographers." In the summer of 2013, when the ban on commercial activity was in place, a commercial photographer approached the Village Board of Trustees and suggested a permitting process rather than a ban, believing such a process would limit amateur photographers whom he believed were the problem. At about the same time, the ACLU contacted the Board and expressed concern that the ban, as it affected commercial photographers, might violate the First Amendment.

The Board began looking at all options for balancing the competing interests at issue, such as a permitting process for commercial photographers only on weekends, or only for larger groups. None of these options, however, addressed all the problems that arose from commercial photographers attempting to take photographs of people within the small, confined area that conflicted with other Park users.

COMMERCIAL ACTIVITY PERMIT

On June 17, 2015, the Village passed Ordinance No. 459, "Regulation of Solicitations and Commercial Activities" which superseded the previous ordinance. In pertinent part, Ordinance 459 prohibited the use of park property, unless the Village Board of Trustees had issued a permit. The intent of the permitting process was to "help to ensure that the Village is aware of the activity taking place within the park, that the proposed date/time/location does not conflict with the scheduled activities/events/operations, and that no harm is done to the landscape of the park."

In reviewing a permit request, the Ordinance required the Board of Trustees to consider the "disruption of or conflict with the public's use and enjoyment of the park" and whether "the issuance of such permit may result in crowded or congested conditions due to the anticipated number of attendees for a planned event." Further, a permit request review would consider whether a commercial activity would exceed one hour and whether the number of people involved would exceed ten. In so doing, a permit review request would also consider whether "the time requested conflicts with a period of peak visitation to the park or other scheduled events, activities, or operations."

In addition, any permit request involving more than ten people, lasting more than one hour, or posing potential conflicts had to be submitted at least fourteen days in advance of the proposed activities. This permit requirement would allow sufficient time for the Board of Trustees to review the request, including limiting the permit to certain designated areas. The permit fee for was set at $100.

Taking commercial photographs in the Park without a permit would violate the ordinance and subject individuals and businesses, including Havlak, to penalties of up to $1,000 in fines or 90 days in county jail pursuant to the Village Code's general penalty provision. Faced with the threat of prosecution for violating the ordinance, Havlak claimed she was "refraining from engaging in commercial photography in the Park." According to Havlak, complying with the application process would chill her First Amendment speech rights.

COMMERCIAL PHOTOGRAPHY DISCRIMINATION

As characterized by Havlak, the challenged ordinance was "akin to a content-based regulation because it discriminates between commercial photographers and amateur photographers." Further, Havlak noted the ordinance "does not apply to the Village itself which uses photographs of the Park on its website." That being said, Havlak recognized the "safety and fair use of the Park for all users are legitimate government interests." Havlak, however, argued, "the ordinance's restriction of commercial activity such as commercial photography has no relation to these [park safety and fair use of the park] interests."

According to Havlak, "non-commercial and commercial photography are equally disruptive to public use of the Park, and that any distinction between the two is meaningless." As a result, having "failed to articulate any harm exclusively caused by commercial activity," Havlak contended the Village had "not met their burden to show that the ordinance serves a significant governmental interest."

Moreover, Havlak maintained the ordinance was unconstitutional because three criteria to be considered by the governmental decision maker in deciding to issue a permit were "too vague," specifically "disruption of the public's use and enjoyment of the Park, use of models or equipment, the sale of products or equipment." Havlak argued further that "the use-of-models-or-equipment criterion is content based and is not related to a compelling government interest."

Havlak also maintained "a different park is not an adequate alternative forum in which to take the desired photographs" because Twin Oak Park was "a unique and beautiful space" and "photographic artists have a right to decide the appropriate setting for their expressive works."

Accordingly, Havlak petitioned the federal district court to issue a "declaratory judgment that the ordinance is unconstitutional" and issue an order enjoining (i.e., prohibiting) the Village from enforcing the ordinance against Havlak. In response, the Village claimed, "the challenged ordinance withstands constitutional scrutiny" because the ordinance was "narrowly tailored to serve a significant government interest and leaves open ample alternatives for communication." In so doing, the Village asserted, "a significant interest in mitigating disruption of Park activities and ensuring the public is able to use the relatively small Park."

The Village further contended the ordinance was "narrowly tailored to serve these interests" because the ordinance required permit request evaluations consider specific factors, including "disruption of public use of the Park, congestion, and crowd control." Further, the Village maintained Havlak had "ample alternative channels for their photographic expression, namely, a significant number of parks located in the greater St. Louis area that provide a similar stage for photographs."

PHOTO SHOOT CONGESTION

Havlak testified that having to get a permit in advance of a photo shoot in the Park would make it almost impossible for her to use the Park because sometimes she changes location at the last minute due to weather and lighting. She testified that a wedding party was most commonly comprised of about 15 people, although on occasion, there could be as many as 30

people, and that a shoot never lasted more than one hour. Havlak further testified that she had never seen, or even heard of, squabbles between commercial photographers who might be at the same park site at the same time, and that she saw no need for the ordinance.

Lisa Eisenhauer (a member of the Village's Board of Trustees) testified that as the mother of three young children, she frequently went to the Park and, especially on weekends, regularly encountered three or four commercial photographers and their groups of subjects, whose presence made it difficult, for example, to walk a lap around the lake because they would be in the way.

Eisenhauer stated that Park users would not want to bring their bikes to the Park because they could not get through on the paths, due to professional photographers setting up equipment and taking photographs of a group. Eisenhauer testified that going into a professional photographer's space was inhibiting, and that the issues posed by other walkers or amateur photographers were different because they were easy to maneuver around or might break for you.

Ray Slama (Chair of the Village's Board of Trustees) explained that people using the Park congregated primarily in the area of the bridge, favored also by commercial photographers. He witnessed up to eight commercial photographers with wedding parties at the same time competing for space in this area, obstructing pathways, "taking over the gazebo," and placing subjects in dangerous places. He testified that he received complaints from other park users about congestion in the park due to the presence of commercial photographers and their subjects.

DECISION MAKING PROCESS

Slama described the decision-making process of the Board of Trustees in adopting Ordinance No. 459. Slama testified that the purpose of Ordinance No. 459 is to "ensure that the Village is aware of activity taking place in the Park, so that proper planning and security can be arranged, and to ensure that no harm is done to the landscape." According to Slama, the Board wanted to "balance the interests of the commercial photographers and the people wanting their photographs taken in the Park, with the interests of the other patrons of the Park enjoying it per its intended use."

According to Slama, the amount of $100 for the permit fee was arrived at by canvassing other such ordinances, and in light of the cost of approximately $100 for having a police officer at the Park for about two to three hours. The Village entered into evidence copies of nine ordinances or written policies from municipalities/cities across the county, for use of a public park for wedding and event commercial photography, requiring a permit that ranged in cost from $35 to $260, to $400 for an annual pass; and not mentioning advance notice, or requiring advance notice of 10 business days to 14 days.

The Board did not discuss the impact the fee would have on individual photographers. The Board did consider not requiring a permit for smaller groups of three to four people, but realized that multiple smaller groups would pose similar problems as one large group.

Slama testified that the Board directed the Village Clerk to grant permits meeting the conditions in the ordinance, and explained that the 14-day advance notice requirement was to allow the Board, which met every other Monday or Wednesday, to review an application, when

necessary, under the ordinance.

PROFESSIONAL PHOTOGRAPHER TESTIMONY

Joel Marion, a professional photographer since 1971, testified that in the past, he used Twin Oaks Park three or four times a week in seasonal times, but now the $100 fee per session was prohibitive for him and his customers, and so he goes to other parks for his outdoor shoots. Marion's testimony comported with Havlak's with respect to the need for spontaneity due to weather, and with respect to never having experienced squabbles with other photographers or users of a park.

Like Havlak, Marion believed his photography was a form of artistic expression. He believed that a policy requiring a permit at a yearly fee, for use of the park anytime, would have the advantage of keeping nonprofessional photographers out. Marion did not understand how there was a correlation between the $100 fee and any cost to the Village due to a commercial photographer using the Park.

Contrary to Havlak's and Marion's testimony, Scott Shy, also a commercial photographer, testified that he experienced conflicts between commercial photographers and the general public in the Park, and described one occasion when over six photographers and their subjects were in the area near the bridge and "took over."

Shy also realized he was in the way of "the foot traffic" in the Park during his photography sessions, noting that professional photographers tend to get very focused on their work when they are attempting to capture the proper shots. Shy believed that Ordinance No. 459 was a fair way to deal with the competing interests, and that the $100 fee may be fair, although it deters him from using the Park.

CONSTITUTIONAL REQUIREMENTS

According to the federal district court, "the degree of First Amendment protection" to which speech is entitled "is not diminished merely because the speech is sold rather than given away." Further, the court noted, "Parks are traditional public forums, historically associated with the free exercise of expressive activities."

As characterized by the court, Ordinance No. 459 imposed "a prior restraint on such conduct" because a permit was required "to engage in commercial photography in the Park." The court noted that an ordinance imposing a prior restraint on the free exercise of expressive activities in a public park would carry a "heavy presumption against the Ordinance's validity." The court, however, recognized "government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to engage in protected speech in that forum."

> Regulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties but are one of the means of safeguarding the good order upon which civil liberties ultimately depend.

That being said, the court acknowledged that a permit scheme governing use of a public park

must meet certain the following constitutional requirements:

> [Regulations] may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.
>
> Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests...
>
> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed, or if a law, though content neutral on its face, cannot be justified without reference to the content of the regulated speech," or was "adopted by the government because of disagreement with the message the speech conveys.

DIFFERENT LEVELS OF INTERFERENCE

In this particular instance, Havlak had argued that the challenged ordinance was "a content-based permit scheme" because "amateur photography in the Park and photography by the Village itself in the Park are not regulated." The court rejected this argument. In treating commercial and amateur photographers differently, the court found the ordinance in no way reflects a "content preference." On the contrary, the court found the ordinance could be "justified without reference to the content of the regulated conduct." Specifically, the court found the different treatment was "based on different levels of interference with use and enjoyment of the Park by all":

> The evidence shows that commercial photographers' sessions last for longer periods of time, use more large equipment, are more intrusive, and likely involve more subjects in one group, than amateur photographers' photographing conduct...
>
> Given the size and configuration of the area of the Park that Plaintiffs and other commercial photographers wish to use for their photography, the Village has a significant interest in coordinating when and how many commercial photographers use the Park at any given time.

SUBSTANTIAL GOVERNMENT INTEREST

Further, in the opinion of the federal district court, the challenged ordinance was "narrowly tailored to serve significant government interests." As noted by the court, the constitutional requirement that "the regulation be narrowly tailored "does not mean that it need be the least restrictive or least intrusive means of "serving a significant government interest." On the contrary, the court acknowledged, "the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively

absent the regulation."

In this particular instance, the court noted evidence that "professional photographers and their subjects would often block other Park users from enjoying the bridge and nearby areas of the Park." In response, the court found the Village had developed a "content-neutral" permit scheme that required photographers to obtain a permit before conducting commercial photography activity in the park:

> The object of the permit system is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event.

$100 FEE REQUIREMENT

As a general principle, the court acknowledged, "the government may not tax the exercise of a constitutionally protected right." That being said, the court recognized "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity" would not necessarily violate the Constitution "so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest":

> Such a fee is not excessive, even if it is more than nominal, where the fee is imposed to meet the expense incident to the administration of the statute requiring a license for engaging in protected activity and to the maintenance of public order in the matter licensed.

In the opinion of the court, the Village had adequately demonstrated a relationship between the permit fee and its legitimate purpose.

> Here the fee correlates to the expenses incurred for an officer, and Defendants have presented sufficient credible evidence that the amount of the permit fee is reasonably related to the legitimate goal of assuring the safety and enjoyment of the Park by all its users.

Moreover, the court found "the amount of the fee is not variable, so the danger of discretionary abuse by the permitting authority is absent."

DISCRETION AND STANDARDS

As noted by the court, to pass constitutional muster, a regulation must "contain adequate standards to guide the official's decision" whether or not to issue a permit.

> Even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.

In this particular instance, the court found "the criteria set forth in Ordinance No. 459 to guide the determination of whether to grant a permit" were "reasonably specific and objective, and do not leave the decision to the whim of the administrator." Moreover, the court found the permit criteria, including the three criteria specifically challenged by Havlak, "do they allow for the consideration of the content of the expression involved."

ALTERNATIVE CHANNELS OF COMMUNICATION

In the opinion of the federal district court, "other public parks in the St. Louis area, if not in the Village" offered "attractive landscape for outdoor wedding and portrait photography" that satisfied the "ample-alternative-channels requirement." In particular, the court noted commercial photographers "may use Twin Village Park by obtaining a permit" and have available "numerous other parks in the area with landscapes that would allow for the photographers' full artistic expression, such as the parks Havlak herself testified she used over the years." As a result, the court concluded, "Ordinance No. 459 satisfies the ample-alternative-channels requirement." In so doing, the court noted: "The First Amendment does not guarantee speakers access to every or even the best channels or locations for their expression."

ADVANCE NOTICE

Further, the federal district court found "the evidence that on some rare occasions commercial photographers may change, at the last minute, the location of a session set with their customers, does not render unconstitutional the advance application provision of Ordinance No. 459 for obtaining a permit." In the opinion of the court, "[t]he situation at issue here is quite different from classic First Amendment activity such as political protests where spontaneity is crucial."

> Here, where the time for the protected expression is almost always planned in advance, the Court believes that having to provide the Village with 48 hours advance notice, and, at the most, 14 days advance notice, is reasonable in order to allow the Village fair opportunity to review an application, and is not an undue burden on Plaintiffs' First Amendment rights.

CONCLUSION

As a result, the federal district court concluded: "to the extent Ordinance No. 459 applies to protected expressive activity engaged in by Plaintiffs [Havlak and Havlak, Inc.] the ordinance is content neutral, and does not violate the First Amendment." The court, therefore, entered a declaratory judgment in favor of the Village.

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