

CONSTITUTION REQUIRES PROMPT JUDICIAL REVIEW OF PARK PERMIT DENIAL

James C. Kozlowski, J.D., Ph.D.

© 1990 James C. Kozlowski

The *ISKCON, Inc.* decision described herein challenged the constitutionality of certain public park permit regulations in Baltimore, Maryland (the site for the 1991 Congress for Recreation and Parks). This case is illustrative of the types of legal controversy surrounding free speech rights in public parks. Free speech in the parks is the topic for the first edition of *Legal Issues in Recreation Administration (LIRA)*. Reports in the first edition of LIRA involve first amendment free speech challenges to public park and recreation administrators from such diverse plaintiffs as the nazis, the Ku Klux Klan, anti-nuclear groups and ERA activists. In this edition of LIRA, the U.S. Supreme Court considers the constitutionality of sound amplification regulations for rock concerts in New York's Central Park. Another report considers a first amendment freedom of expression challenge to a municipal ordinance which prohibits shirtless running or jogging along town streets.

LIRA is a new quarterly publication co-sponsored by the National Recreation and Park Association and the George Mason University Center for Recreation Resources Policy. LIRA is a complementary publication to the *Recreation and Parks Law Reporter (RPLR)*. RPLR will continue to provide descriptions of recently reported court decisions in the area of recreational injury liability. LIRA, on the other hand, will present case reports focusing on a specific law-related topic impacting recreation administration. Future topics will include mandatory dedication for public parks, diversion of parkland to other uses, and various civil rights and constitutional issues. Your suggestions regarding topics for a review of case law in future editions of LIRA are encouraged. Subscription rates for LIRA are \$100/yr. (4 issues); \$50/yr for NRPA members. For further information regarding, LIRA please contact: Center for Recreation Resources Policy, George Mason University, 4400 University Drive, Fairfax, Virginia 22030 (703) 323-2826.

Regulator Must Seek Judicial Review

In the case of *ISKCON, Inc. v. Schmidt*, 523 F.Supp. 1303 (D.C. Md. 1981), the International Society for Krishna Consciousness (ISKCON) challenged "the constitutionality of certain Baltimore City public park regulations which allegedly infringe their First Amendment rights." The facts of the case were as follows:

Members of ISKCON adhere to the faith of Krishna Consciousness. This faith compels them to perform Sankirtan, a ritual consisting of chanting, distributing religious literature and soliciting funds. The chanting alone is called "Nagar Kirtan," which is typically conducted by a group of no more than fifteen devotees walking in a single or double file. Plaintiffs have engaged in religious chanting in Baltimore City on public sidewalks for several years. Plaintiffs would like to perform this ritual in the public areas of the Inner Harbor, a park under the jurisdiction of defendant William R. Schmidt, Jr. [Superintendent of the Baltimore City Department of Recreation and Parks] and they

LAW REVIEW JUNE 1990

have alleged that certain regulations of the City prevent them from so exercising their First Amendment rights. Accordingly, they seek a declaration of the invalidity of these regulations and an injunction against their enforcement.

In pertinent part, the challenged public park regulations, Rules 4 and 46, provided as follows:

No person shall solicit money, subscriptions, alms or contributions for any purpose in any park or on any property under the jurisdiction of the Board of Recreation and Parks until a permit shall be obtained. An application for a permit to solicit shall be received by the Superintendent of Parks or the Superintendent of Recreation or their authorized representative, as the case may be, at least four (4) days in advance of the proposed date of the solicitation....

An application for a permit to conduct, operate, present or manage a contest, exhibit, dramatic performance, spectacle... or similar event, shall be filed with the Superintendent of Parks or the Superintendent of Recreation, who is empowered to issue permits, at least (10) days in advance of the proposed date of the event...

Whenever in the judgment of the Superintendent Parks or the Superintendent of Recreation or their authorized representative, as the case may be, the issuance of a permit... will have any detrimental effect when considered in relation to the comfort, convenience, safety, welfare and order of the public generally, upon vehicular and pedestrian traffic, recreational activity, the operation or functioning of stores, offices or other places of business, or the peace and good order of the residents... or any combination thereof, then the Superintendent of Parks or the Superintendent of Recreation or their authorized representative, as the case may be, shall have the right to refuse to issue the requested permit and thereupon may indicate alternative times and places for consideration and selection by the applicant.

After denial of a permit, the applicant may apply for a hearing within forty-eight (48) hours to the Director of Recreation and Parks by filing an appeal with the Executive Secretary of the Board or his representative, who shall thereupon immediately notify the Director of Recreation and Parks; and upon such notification, the Director, or in his absence, the Executive Secretary shall meet promptly for the purpose of acting thereon.

The said Director, or Executive Secretary, after affording all the parties an opportunity for a full hearing, which shall include a recording of all proceedings by a court stenographer, may reverse, affirm, or modify in any regard the determination of the Superintendent of Parks or the Superintendent of Recreation, or their authorized representative, as the case may be.

An appeal from such action of the Director or the Executive Secretary may be taken within forty-eight (48) hours to the Board of Recreation and Parks by filing a notice of appeal with the Executive Secretary or his representative, who shall thereupon immediately notify the members of the Board; and upon such notification, the Board shall meet promptly for the purpose of acting thereon. Upon such appeal, the said Board, after reviewing the testimony of the hearing and affording the parties to present

LAW REVIEW JUNE 1990

oral arguments based on such testimony, shall make a final determination which may reverse, affirm or modify in any regard the determination of the Director or Executive Secretary. The Executive Secretary shall promptly notify the applicant of the determination of the Board.

In this case, the City conceded that the park regulations did not require ISKCON "to secure a permit to distribute free literature or to speak individually to other park patrons." ISKCON did not contest "the requirement that they must obtain a permit before soliciting." ISKCON, however, maintained that the challenged regulations violate "the First Amendment by requiring plaintiffs to secure a permit for religious chanting." In addition, ISKCON argued that the regulations "violate the First Amendment by requiring plaintiffs to apply for a permit either four days in advance of any solicitation or ten days in advance of religious chanting." Further, ISKCON contended that the regulations "violate the First Amendment by failing to include adequate procedural safeguards."

Defendants Schmidt and the City responded that "they have a compelling interest in regulating the time, place and manner of the use of the Inner Harbor in order to protect the safety and convenience of its users, the flow of traffic, the operation of surrounding businesses, and the peace and good order of area residents." Defendants maintained that "the permit requirements and their attendant delays serve these interests." Further, defendants contended that "further procedural safeguards beyond the administrative appeals provided in Rules 4 and 46 are unnecessary as the regulations are directed at solicitation and the conduct of public events, not at the content of pure speech."

As noted by the federal district court, the following "basic principles applicable to this case are familiar," providing a framework for resolving constitutional challenges to public park permitting procedures.

Public parks, including public areas of the Inner Harbor, are public forums. Nonetheless, the time, place and manner of their use for activities protected by the First Amendment may be regulated in the interest of making the forum open to as many as possible. A permit requirement can be a valid means of implementing time, place and manner restrictions. However, to be valid, a permit requirement may not vest unfettered discretion in the official charged with the issuance of permits. Standards must be provided which are clear and limited to the proper regulation of public places.

Where a permit may be required, some advance application may also be required to give the issuing agency time to consider the application, at least in cases where advance notice is possible. However, where protected activity is involved, this delay should be only as long as is absolutely necessary to allow a decision to be made, for the regulation must be narrowly tailored to further the State's legitimate interests. The least restrictive alternative for promoting local safety and welfare must be employed.

Finally, and most importantly for this case, a system of prior restraint upon protected activity must provide adequate procedural safeguards. Such safeguards should include prompt judicial review, with the regulating party bearing the burden of seeking judicial review and of establishing that the activity may properly be regulated.

In addition, the federal district court found that park permit regulations are unconstitutional when, as in

this case, "they fail to provide adequate procedural safeguards for the regulation of plaintiffs' protected activities and speech."

Before the plaintiffs may engage in religious chanting in public areas of the Inner Harbor, they must secure a permit at least ten days before the activity occurs. In other words, permission must be secured in advance from officials of the City of Baltimore before plaintiffs may exercise their First Amendment rights. A regulation of this sort is a type of prior restraint which must include proper safeguards if it is to be found constitutionally permissible.

[A] system of prior restraint requires clearly defined procedural safeguards... [A]ny system of prior restraints on forms of expression comes to the Court bearing a heavy presumption against its constitutional validity. There is the danger that the censor may well be less responsive than a court to constitutionally protected interests in free expression, and if it is made unduly onerous by reason of delays for an applicant for a permit to seek judicial review, the censor's determination may in practice be final. For these reasons, the Supreme Court established... specific procedural safeguards to obviate the constitutional dangers posed by a governmental body which would exercise prior restraint over freedom of expression. First, the burden of proving that the speech is unprotected lies with the censor. Secondly, the regulation must require that the censor will within a specified brief period either issue a license or go to court to restrain the speech. Finally, the procedure adopted must assure a prompt final judicial decision to minimize the deterrent effect of an interim and possibly erroneous denial of the application.

As noted by the federal district court, many recent cases have applied the above described principles "in striking down ordinances requiring ISKCON members to obtain permits before chanting or soliciting." Applying these principles to the challenged regulations in this case, the federal district court concluded "it is clear that they are constitutionally invalid."

If in the judgment of the City's Superintendent of Parks or the City's Superintendent of Recreation (or in the judgment of some other official authorized to act by either one of these individuals), the plaintiffs' religious chanting would have a detrimental effect upon various other activities in the park areas, the requested permit may be denied. After denial, an applicant like plaintiffs may apply for a hearing within 48 hours to the Director of Recreation and Parks. The Director or, in his absence, the Executive Secretary, is then required to hold a hearing and render a decision reversing, affirming or modifying the determination made by the Superintendent of Parks or the Superintendent of Recreation. An appeal from action taken by the Director may be taken within 48 hours to the Board of Recreation and Parks. The Board is then empowered to make a final determination on the issue.

Thus, a two-tiered administrative appeal procedure is provided, and although these appeals are to be heard promptly, no specific time limits are set for rendering the decisions. The party seeking a permit bears the burden of pursuing the appeal and the burden of showing his entitlement to the permit. No provision whatsoever exists in the

LAW REVIEW JUNE 1990

regulations for judicial review of the decision of the Board of Recreation and Parks. Moreover, there is no requirement that the City has the burden of applying to a court to enjoin the activity for which a permit was sought. Under these regulations, any review by a Maryland state court would have to be upon the suit of an applicant challenging the administrative decision. Clearly, these procedures are inadequate... [A]dequate procedural safeguards must be included in any system of prior restraint. The regulations challenged here are unconstitutional because of the absence of such safeguards.

As a result, the federal district court found that ISKCON was "entitled to an injunction" prohibiting the Baltimore Department of Recreation and Parks and the City of Baltimore from enforcing the challenged regulations "hereby declared to be unconstitutional."

Dr. Kozlowski is the associate director of the Center for Recreation Resources Policy, George Mason University, Fairfax, Virginia. He is also the author of the *Recreation and Parks Law Reporter* and *Legal Issues in Recreation Administration*.