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SPECIAL EVENT FEE LEFT TOO MUCH DISCRETION TO LICENSING OFFICIAL

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In the case of *Transportation Alternatives, Inc v. City Of New York*, 340 F.3d 72; 2003 U.S. App. LEXIS 16304 (Cir. 2nd 2003), the plaintiff organization, Transportation Alternatives, Inc. (TA) challenged the constitutionality of fees charged for events conducted in the City's parks. The federal district court had ruled that "the city's fee-setting scheme for 'special events' held on park property violates the First Amendment's guarantee of free speech." As a result, the federal district court enjoined enforcement of such fees against the plaintiff and awarded damages of $17,500. See *Transportation Alternatives, Inc. v. City of New York*, 218 F. Supp. 2d 423, 2002 U.S. Dist. LEXIS 15035 (S.D.N.Y., 2002). The City appealed.

FACTS OF THE CASE

Any group wishing to hold an event in a New York City park or any other piece of property administered by the NYC Department of Parks and Recreation was required to obtain a permit and pay a $25 permit fee. In addition, the City charged vendors a license fee to sell goods on park property. A fee was also charged for services provided by the parks department (such as stage rentals). In addition, the City required some groups to post refundable clean-up, restoration, or security bonds. TA did not contest any of these fees. Rather, TA challenged the additional $25 fee charged for what the City described as "special events" occurring on park property. Special events were defined by city rules as follows:

> "Special Event" means a group activity including, but not limited to, a performance, meeting, assembly, contest, exhibit, ceremony, parade, athletic competition, reading, or picnic involving more than 20 people or a group activity involving less than 20 people for which specific space is requested to be reserved. 56 R.C.N.Y. § 1-02 (2001).

Prior to April of 2001, there was no schedule or regulation to govern whether or not a "special event" fee would be imposed or the amount of such a fee. The only pertinent document was a publication of the Parks Department entitled "Top Ten Considerations in Evaluating Events Held in New York City Parks: A Guide for Determining Contributions." This document listed ten considerations, but did not assign any weight, either absolute or relative, to any of the listed factors. The conditions listed were:

> 1. What is the impact of the event on the park? Will it affect the normal use of the park?
> 2. When and where will the event take place?
> 3. Recent and relevant precedent.
> 4. Will Parks need to provide production assistance and/or security for the event? What is the total cost to Parks?
> 5. How much time will be needed for set-up and break down?
> 6. How many people are expected to attend the event?
> 7. What is the primary purpose of the event, public benefit or corporate

promotion?
8. What type of product is being promoted? [According to general practice, the promotion of alcohol and/or tobacco products is prohibited.]
9. Is the event consistent with the image of Parks?
10. Will music or noise interfere with people residing or working near the park?

Under this system, between 1997 and 2000, the city charged individuals and organizations a wide range of special event fees -- ranging from $ 500 (for the September, 2000 "Sickle Cell Anemia Walk" in Central Park) to $ 650,000 (for the August, 2000 "Earthshare Concert" in Prospect Park) to "one horse" (for an April, 1999 celebration of Shakespeare's 435th birthday). In many instances, these fees were charged for the use of the parks for traditional expressive activities, such as the 2000 Earth Day event in Battery Park ($ 10,000 fee) and a speech by the Dalai Lama in August, 1999 ($ 7,500 fee). Pursuant to this scheme, the City charged plaintiff fees of $ 5,500 and $ 6,000 in 1999 and 2000 respectively.

In April of 2001, the city promulgated formal rules governing special event fees, codified as § 2-10 of Chapter 56 of the Rules of the City of New York. Section 2-10 listed eleven factors, which "shall be taken into consideration" in determining the fee to be charged. The list of factors was as follows:

1. the length of time, time of day and time of year of the event;
2. the nature of the use;
3. the number of persons expected to attend the event;
4. whether the applicant will impose an admission charge;
5. the size and type of the proposed venue;
6. the types and extent of public resources required to stage the event;
7. the potential for damage to the park or disruption of other park activity;
8. whether the event is a charitable event;
9. whether the event is held for the purpose of raising funds;
10. the amount and nature of advertising, including whether the event has title sponsorship; and
11. such other information as the Commissioner shall deem relevant.
56 R.C.N.Y. § 2-10(g).

Once again, no weight was assigned to any of the listed factors. Section 2-10 did, however, fix the maximum fee that could be charged. The maximum fee varied based on the location of the event (e. g. community park, regional park, Central Park). The fee also took into account whether the event was "public" or "private," and whether the event enjoyed "commercial sponsorship." As described by the City, a private event in Central Park with commercial sponsorship might incur a fee up to $ 125,000, while the same event without commercial sponsorship would be limited to a $ 50,000 fee. 56 R.C.N.Y. § 2-10(f).

According to the regulation, an event was deemed to have "commercial sponsorship" (1) "where a for-profit entity is the permittee [or] primary host, [or] has contributed to underwriting the cost of an event," or (2) where the "trade name, trademark or logo [of a for-profit entity] appears in advertising associated with the event." 56 R.C.N.Y. § 2-10(a).

2001 NYC CENTURY BIKE TOUR

As described by the federal appeals court, TA is a "non-profit advocacy group that seeks to promote bicycling, walking, and the reduction of automobile use in New York City."

> [TA] has over 5,000 members and seven full-time employees. Founded in 1973, Transportation Alternatives is a leading regional advocate for cycling, responsible for such accomplishments as a bike lane on Second Avenue and legal bike access on New York City subways and commuter railroads.
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> For the last 13 years, TA has annually sponsored the New York City Century Bike Tour. Participants ride through the city on pre-arranged routes of up to 100 miles. TA uses the Bike Tour as a fundraiser and an opportunity for advocacy in support of TA's goals. At rest stops along the way, for example, participants are urged to sign petitions advocating a car-free Central Park; many riders wear shirts with slogans such as "One Less Car"; riders in the 2000 tour were given pro-bike postcards and urged to mail them to city officials.
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> The Century Bike Tour begins and ends in Central Park; its route passes through a number of areas under the control of the Parks Department. Though riders can join the tour at any point along the way without charge, TA encourages participants to register for the event and pay a fee, which goes directly to advance the organization's advocacy efforts. TA also solicits donations during the event.
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> In preparation for the event, TA solicits and receives monetary and in-kind donations from various corporate sponsors. For example, Transportation Alternatives volunteers pass out free Clif Bars (a type of energy bar) to riders, and any rider who returns to Central Park at the end of the ride is treated to a free cup of Ben & Jerry's ice cream, dispensed from a Ben & Jerry's truck located inside the park. (The ice cream is not offered for sale.) To recognize this support, TA lists the names of corporate sponsors and reproduces their logos in printed materials associated with the event and on its website. [TA website: http://www.transalt.org/]

As noted by the court, TA was charged a special event fee of $5,500 for the 1999 tour and $6,000 for the 2000 tour. Since these fees were levied before the promulgation of the 2001 rules; the fees were set in accordance with the "Top Ten Considerations" listed above.

After the promulgation of § 2-10, TA requested a meeting with department representatives to discuss the fee it would pay for the 2001 tour. At this meeting, representatives of Transportation Alternatives expressed the belief that the group should be required to pay only the $25 permit fee. The Parks Department disagreed and informed TA that the fee for the 2001 tour would, like the previous year's fee, be $ 6,000, unless TA chose to forego corporate sponsorship:

> If you remove the corporate elements of your event, specifically the Ben and Jerry's presence and the Clif Bar sampling, and make the entrance fee simply a suggested donation, on all your literature including your website, then you will only be required to pay the permit application fee of $ 25.00 and post the appropriate insurance bond.

TA chose to retain corporate sponsorship for the 2001 tour and paid the $ 6,000 fee. TA then filed suit in federal district court challenging the constitutionality of § 2-10, as well as the scheme under the Guide for Determining Contributions, which preceded the promulgation of § 2-10. In the lawsuit, TA was seeking recovery of the fees paid for its Bike Tours conducted in 1999 and 2000. The federal district court granted summary judgment to TA. The City appealed.

BROAD GOVERNMENTAL DISCRETION?

As noted by the federal appeals court, "[a] fee as a condition on an assembly or demonstration in a public park is a prior restraint on speech, and as such faces a heavy presumption" of invalidity." On the other hand, the court acknowledged that government may impose a permit requirement on those wishing to hold expressive events, such as "marches, parades, or rallies in order to regulate competing uses of public forums." However, in regulating "the time, place, and manner of demonstrative public events," such governmental restrictions could not be based on the content of the message. Moreover, such regulations had to narrowly tailored to serve a significant governmental interest, leaving open ample alternatives for communication.

More importantly, however, for purposes of this particular case, the appeals court found a permit requirement could not delegate overly broad licensing discretion to a government official. Rather, as cited by the appeals court, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." Accordingly, the federal courts would strike down as unconstitutional any permitting scheme which "involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority."

Applying these principles to the facts of the case, the federal appeals court concluded that "Section 2-10 vests exactly this sort of impermissible discretion in the Parks Commissioner." In reaching this determination, the appeals court noted that "the Commissioner has unrestricted discretion in deciding whether to impose a 'special events' fee at all." Moreover, the court found "the regulations allow the Commissioner uncontrolled discretion in deciding the amount of the fee, limited only by the prescribed maximums… once the Commissioner has decided to impose a "special events" fee."

> It is true, the ordinance prescribes a list of "factors" to be considered, but it assigns no weight to any of the factors. And, especially in view of the fact that the 11th prescribed factor is "such other information as the Commissioner shall deem relevant," the statutory scheme effectively gives the Commissioner absolute, unregulated discretion as to the amount of the fee for any reason she deems pertinent, within the prescribed maximum limits.

> The Commissioner may impose a fee as high as $ 100,000 and as low as one dollar (or zero dollars) on a public Central Park event that enjoys commercial sponsorship, and any fee between $ 25,000 and zero for an identical event without commercial sponsorship.

Further, the court found the Commissioner had "even greater discretion in determining fees for special events held in City parks" under the pre-April 2001 guidelines. In particular, the court noted that "[n]either the guidelines nor § 2-10 requires the Commissioner to explain the reasoning that justified the fee or to charge similar fees to similar events."

In particular, the court noted that the City was unable to explain how it set fees ranging from $1,000 to $10,000 for particular events. In the opinion of the federal appeals court, "[r]egulations granting such broad and unchecked discretion to a government official charged with imposing fees on traditional expressive activities cannot overcome the 'heavy presumption' of invalidity to which prior restraints on speech are subject."

On appeal, the City had also contended that it should be "free to employ its discretionary regulatory scheme" for commercial events, including the Bike Tour. Specifically, the City maintained that the Bike Tour should receive "less robust First Amendment protection than purely political speech" because it involved "commercial speech." As characterized by the City, the Bike Tour was more of a commercial venture rather than a political event because TA "receives commercial support for its event and displays the logos of sponsors in some of its promotional literature." The appeals court rejected the City's argument.

> The commercial elements of the Bike Tour are relatively trivial. By far the main thrust of the event is a political demonstration by thousands of people advocating in favor of bicycle-friendly regulation by the City. Notwithstanding the presence of minor commercial elements, such as display of corporate logos, this speech was a far distance from commercial speech undertaken to solicit a commercial transaction.

The federal appeals court, therefore, found the City's regulatory scheme was unconstitutional because it conferred "overbroad discretion" on the Parks Commissioner. As a result, the appeals court affirmed the judgment of the lower court which had declared "§ 2-10, and the predecessor guidelines for determining fees, unconstitutional when applied to events involving the exercise of rights protected by the First Amendment." In addition, the federal appeals court instructed the City to "give particular attention to pertinent rulings of the United States Supreme Court when defining variables that increase or decrease permissible fees" should the City "wish to promulgate an amended set of regulations governing special events fees" in response to this opinion.

NYC PARK EVENT WEBSITE

According to the New York City Department of Parks and Recreation website, the $25 permit application fee remains. Specifically, a "$25 non-refundable administrative processing fee" is

required "for all special events permits" Further, "[a]ll events in the City of New York require special event permits." In looking at the departmental website, it would appear that there are no longer any additional "special event fees" similar to those successfully challenged by TA. If so, the flat $25 administrative fee for all events would eliminate any constitutional concerns associated with administrative variables or governmental discretion in calculating special event fees. See the NYC Dept. of Parks and Recreation website instructions for "Planning an Event" at:

http://www.nycgovparks.org/sub_things_to_do/events/ev_special_events_guidelines.html