

UNPERMITTED PARK LITERATURE DISTRIBUTION

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In the absence of “narrow objective, and definite standards to guide the licensing authority,” laws and ordinances which impose a prior restraint on First Amendment freedoms are unconstitutional. The right to distribute leaflets, tracts and handbills is a constitutionally protected form of speech. As a result, an ordinance which requires an individual to obtain a special permit before distributing literature in a public park must further a compelling governmental interest, unrelated to speech. Although subject to reasonable time, place, and manner restrictions, ordinances regulating free speech activities must be “drawn with narrow specificity and are no more restrictive than necessary to serve those [compelling governmental] interests.”

As noted by the court in the *Mendelson* decision described herein, “a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.” In the case of *People v. Mendelson*, 2007 NY Slip Op 27137, defendant Susan Mendelson was charged with a violation of §168-16 of the Code of the Town of Oyster Bay for “distributing leaflets on behalf of ‘Jews for Jesus’ without a permit” in John Burns Park, a park owned and maintained by the Town of Oyster Bay.

At the time, Section 168-16 of the Code of the Town of Oyster Bay entitled "Public addresses, entertainments or parades" provided as follows:

No person shall erect any structures, stand or platform; hold any meeting; perform any ceremony; make a speech, address or harangue; exhibit or distribute any sign, placard, notice, declaration or appeal of any kind or description; exhibit any dramatic performance or the performance in whole or in part of any interlude, tragedy, comedy, opera, ballet, play, farce, minstrelsy, dancing, entertainment, motion picture, public fair, circus, juggling, ropewalking or any other acrobatics or show of any kind or nature; or run or race any horse or other animal, or, being in or on a vehicle, race with another vehicle or horse, whether such race is founded on any stake, bet or otherwise, in any park or beach *except by special permission of the Town Board.*

No parade, drill or maneuver of any kind shall be conducted, nor shall any procession form for parade or proceed in the park *without special permission of the Town Board. (Emphasis of court.)*

FACTS OF THE CASE

On July 25, 2006 Mendelson went to John J. Burns Park in the Town of Oyster Bay, with two other volunteers for Jews for Jesus, intending to distribute free religious literature and/or to walk through Park and speak with people about their religious beliefs. They were met by the Town's Commissioner for Public Safety who told them they could not engage in either of these activities.

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The police arrived at the request of Town officials and escorted the defendant and her colleagues out of the park.

Mendelson called the Town's offices on July 27, 2006 to find out how to obtain a permit to distribute free religious literature in the Town's Parks and was told by the deputy commissioner of parks that "there was no permit process in place for the distribution of religious tracts and speaking to the public at Town parks."

In addition to parade permits, the Town had issued permits to use Town facilities and parks for a wide variety of sectarian and non sectarian activities including: "Easter Egg Hunts, charity car washes and a 'Community Santa Detail' as well as a permit granted to the Midway Jewish Center to hold a religious ceremony."

Mendelson's attorney contacted Nassau County police officials and the Town attorney to determine "to determine the process for obtaining a permit to distribute literature within the Town of Oyster Bay." According to the deputy police chief, "to the best of his knowledge no person had ever been given a permit to distribute literature in any public parks within the Town of Oyster Bay." Moreover, the Town's deputy commissioner of parks testified that he had advised Mendelson that "there was no permit she could acquire that would authorize her to distribute free religious literature at Town Parks."

The deputy commissioner of parks stated further that "the Parks Department issued permits for picnics and field use for sports, but that any other applications for events, if any, would have to be made to the Town Clerk or the Town Board." In fact, no park permits had been issued directly by the Town Board. Instead, all park permits were issued by the commissioner of parks and signed by the deputy commissioner of parks on behalf of the Town.

In addition, the Town's police chief told Mendelson's attorney that "Jews for Jesus was allowed to enter the public parks to speak with people, but the police would arrest any Jews for Jesus personnel if anyone was offended by the discussion" and "the park officials would be authorized to issue a trespass citation."

Mendelson returned to the park on August 1, 2006 where she distributed literature and discussed her religious beliefs with other citizens in an area of Burns Park specifically designated for a special concert. At approximately 7:15 p.m., as concert patrons were gathering and being seated for the concert, Mendelson was observed walking through the aisles addressing patrons and distributing leaflets espousing affiliation with "Jews for Jesus." When approached, Mendelson admitted that she did not have permission from the Town Board of the Town of Oyster Bay to distribute literature or address park patrons. Mendelson was then given a ticket for violating Section 168-16.

SPECIAL PERMISSION

In her lawsuit, Mendelson claimed Section 168-16 was "unconstitutional on its face and as applied to her" because the ordinance was "vague, indefinite and lacking in ascertainable standards." In addition, Mendelson claimed the ordinance was unconstitutional because it gave

“the Town Board "unfettered discretion" with respect to who shall be granted a permit.” In response, the Town contended that the ordinance was “a reasonable regulation designed to protect public order and public safety and to effectively manage public property.”

As noted by the court, “[i]n determining the nature and extent of constitutionally permissible limitations on First Amendment freedoms the courts have recognized differences between public and non public forums.”

The mere fact that members of the public are free to visit property owned or operated by the government does not mean that such property becomes a "public forum" for the purposes of the First Amendment. However, public places historically associated with the free exercise of expressive activities, such as streets sidewalks and parks, are considered, without more, to be public forums.... In such places, the government may enforce reasonable time, place, and manner regulations.... Additional restrictions, such as an absolute prohibition of a particular type of expression, will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

As noted by the court, a municipality may enact an ordinance which “prevents serious interference with normal usage of streets and parks.” In so doing, however, the court acknowledged that public streets and parks have traditionally “been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Accordingly, courts have “consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.”

According to the court, an ordinance effects an unconstitutional censorship and prior restraint on free speech when First Amendment rights are “contingent upon the uncontrolled will of an official.” In this particular instance, the court found the Town’s license requirement acted as “a prior restraint on the exercise of First Amendment rights” because the ordinance placed “unfettered discretion in the Town Board, without guidelines of any sort whether or not to issue a permit.” In fact, as written, the court found “nothing in the ordinance which requires the Town to issue a permit.”

The ordinance carries no command to grant an application, neither does it prescribe the criteria or standards upon which an application is to be denied... [W]hen the ordinance is altogether silent as to when and under what circumstances the permit shall or shall not be granted, then there is no way to find out what would constitute legal discretion. Only unfettered power remains...

The ordinance at issue in this case does not provide the Town Board with any guidelines whatsoever in the exercise of its discretion to grant or deny a permit to one who wishes to exercise a number of First Amendment rights in the public parks of the Town of Oyster Bay. It does not purport to regulate merely the time, place and manner of such conduct, as the [United States] Supreme Court has time

and again permitted, it bars such conduct altogether unless "special permission" is obtained from the Town Board.

As a result, the court concluded that "this ordinance is indeed unconstitutional on its face and cannot be squared with constitutional guarantees." In addition, the court found that the ordinance was also unconstitutional as applied to Mendelson under the circumstances of this particular case.

The Town does not deny that it refused to allow the defendant to distribute free religious literature, or to speak to other individuals in the park about her religious beliefs, on two occasions. The Town acknowledges that the defendant contacted the Town on July 27, 2006, after she was first removed from the park and that she spoke to Deputy Commissioner Baptista.

Deputy Commissioner Baptista states that he told the defendant that the Parks Department issued permits for picnics and sports activities, but that any other application would have to be made to the Town Clerk or the Town Board... [Evidence indicated, however, that] there were no applications for permits made directly to the Town Board. Most of the applications for the use of the parks for a myriad of activities were made directly to the Parks Department and all of the permits were issued exclusively by the Parks Department "on behalf of the Town Board."

In the opinion of the court, it was, therefore, "clear from the evidence submitted that the defendant attempted to apply to a Town official authorized to entertain the defendant's application and he specifically refused to do so." The court, therefore, held Section 168-16 of the Code of the Town of Oyster Bay acted as an unconstitutional "prior restraint on the exercise of First Amendment Rights."

The clear language of the ordinance in question reveals that it imposes an absolute bar to various forms of speech and that it does not contain the reasonable time, place, and manner restrictions which our courts require to provide safeguards for First Amendment liberties. In addition, the ordinance contains no guidelines, standards, or criteria upon which a permit will be granted or denied.

Having determined that the challenged ordinance afforded the Town Board of the Town of Oyster Bay "unfettered discretion in determining whether to grant or deny 'special permission' to engage in a host of constitutionally protected activities," the court found further that the Town had unconstitutionally refused to consider Mendelson's application for "a permit to distribute religious leaflets and to engage citizens in conversation about religion in a Town park." As a result, the court granted Mendelson's motion to dismiss her alleged violation of Section 168-16 "on the grounds that the ordinance in question is unconstitutional on its face and as applied."