





# City of Cambridge

AMENDED ORDER  
O-5.  
IN CITY COUNCIL

April 2, 2001

COUNCILLOR BRAUDE  
COUNCILLOR BORN  
COUNCILLOR DAVIS  
COUNCILLOR DECKER  
MAYOR GALLUCCIO  
VICE MAYOR MAHER  
COUNCILLOR REEVES  
COUNCILLOR SULLIVAN

ORDERED: That the City Manager be and hereby is requested to instruct the City Solicitor to report back to the Council why he believes that the permit and fee requirements of the city's Street Performer Ordinance (Section 12.16.170) do not violate the First Amendment to the United States Constitution as outlined in the attached communication from the American Civil Liberties Union Foundation of Massachusetts; and be it further

ORDERED: That such analysis be provided to the Council in a timely fashion so that if the Council deems suspension or repeal of the sections of the ordinance to be appropriate, it could be done before prime performance season begins.

In City Council April 2, 2001.

Adopted as amended by the affirmative vote of nine members.

Attest:- D. Margaret Drury, City Clerk.

A true copy;

ATTEST:-

A handwritten signature in cursive script that reads "D. Margaret Drury".

D. Margaret Drury  
City Clerk

with Order # 5

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF MASSACHUSETTS

99 CHAUNCY STREET, SUITE 310 BOSTON, MASSACHUSETTS 02111

John Reinstein  
Legal Director

(617) 482-3170  
Fax (617) 451-0009

November 6, 2000

Robert W. Healy  
City Manager  
Cambridge City Hall  
795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Dear Mr. Healy:

I am writing on behalf of Ian MacKinnon, a Cambridge performance artist, to request that the City suspend enforcement of the permit requirements of Section 12.16.170 of the City ordinances (the Street Performer ordinance) pending review by the city solicitor.

The ordinance, which provides for the licensing and regulation of "Street performers," defines performing as "acting, singing, playing musical instruments, pantomime, juggling, magic, dancing, reading, puppetry, sidewalk art . . . and reciting." Any individual who performs in a public area in Cambridge is required to obtain a permit from the Cambridge Arts Council. A fixed fee of \$40.00 must be paid to the city for each permit. With three exceptions based on specific findings by the City Council, the ordinance allows street performances in all public areas of the city which are not within 100 feet of a church, an elementary or secondary school or library (while in session) or a hospital. Performances are restricted to certain times of day. The ordinance also regulates noise levels and provides that "[n]o performer or group of performers may perform less than fifty feet from another performer or group of performers."

Ian MacKinnon is an opponent of the permit system and fees established by the ordinance. On August 28, 1999, he staged a protest in various areas near Harvard Square, appearing in a shirt that bore the message "NO PERMIT," he sang, played music and spoke against the ordinance. In short order, he was barred from the area in front of the Fleet Bank building, and when he moved his protest across the street to the area known as "the Pit," he was issued a citation. MacKinnon has been repeatedly warned

Robert W. Healy  
November 6, 2000  
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that he may not speak or perform in the area of Harvard Square and has been threatened with arrest.

The Cambridge Street Performer Ordinance is unconstitutional and should not be enforced to prevent MacKinnon and others who have not received a permit from the city from performing in the public areas of Cambridge. There can be no question that the activities of MacKinnon and other performers are protected by the First Amendment and that these activities take place in a public forum - places that have "immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Industrial Org.*, 307 U.S. 496, 515-16 (1939) In such a setting the government may enforce reasonable regulations of the time place and manner of speech, but any such regulations are subject to the requirement that they be content neutral and serve a significant government interest in a narrowly tailored fashion. *Boston v. Back Bay Cultural Association, Inc.*, 418 Mass. 175 (1994). The Cambridge ordinance fails this test in three respects.

First, the ordinance is not content neutral as it distinguishes for all purposes between "performers" and all other persons who use the streets of the City of Cambridge for purposes of expression. For those who speak rather than recite or read, Cambridge requires no permit and imposes no fee. The line between artistic expression and political expression which the ordinance seeks to draw is neither constitutionally nor practically feasible. Both are forms of expression and the line between them is often unclear.

Second, the requirement of a permit is unrelated to protecting significant government interests. To survive constitutional review, a permit requirement must in the first instance be related to the government interests it purports to serve, and it must also serve those interests in a manner that is "narrowly tailored." The ordinance does neither. The primary justification for a permit scheme such as this one is to allocate scarce resources. Cambridge's permit system is unrelated to allocating performance sites. A person holding a permit may perform in any place and time allowed by the ordinance. Allocation is achieved by the provision limiting performance within fifty feet of another performer. The same is true with respect to the regulation of noise levels, performance times, obstruction of public ways and performing in excluded areas. Each of these is directly regulated, not by the conditions of the permit but by the terms of the ordinance itself. In short, each of these objectives is accomplished in a matter that is narrowly tailored in a way that the permit (and fee) requirement is not.

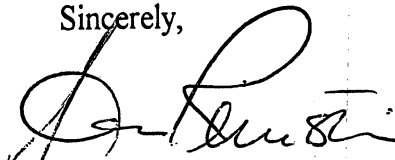
Finally, even if conditions of the permit were reasonable, the amount of the permit fee is not. The Supreme Court has held that permit fees may not be charged as a condition of the exercise of a First Amendment right unless the fee is reasonably related

Robert W. Healy  
November 6, 2000  
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to the costs of administering the permit system. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Under the Cambridge ordinance, the costs of administration are minimal. City employees exercise no discretion in deciding whether to grant a permit or in setting the conditions of the permit. Every applicant is entitled to a permit on payment of the \$40.00 fee and completion of the application. All substantive conditions are contained in the ordinance itself. The fee cannot be justified by the needs of the enforcement scheme. See *AAK, Inc. v. City of Woonsocket*, 830 F.Supp. 99 (D.R.I. 1993).

Mr. MacKinnon is not contending that the other operative provisions of the ordinance are invalid. Indeed, we believe that the objectives of the ordinance can be fully achieved by enforcement of provisions other than the permit and fee requirements. We therefore request that you refer this matter to the City Solicitor for review and that, pending review, the city forbear enforcement of the permit requirement.

Sincerely,

A handwritten signature in black ink, appearing to read "John Reinstein", written in a cursive style. The signature is positioned above the printed name.

John Reinstein

From: MDrury@CI.Cambridge.MA.US (D. Margaret Drury)  
Organization: City of Cambridge, Massachusetts USA  
To: pcrane  
Date sent: Thu, 29 Mar 2001 08:48:40 -0500  
Subject: (Fwd) 3 orders  
Priority: normal

----- Forwarded message follows -----

Date sent: Thu, 29 Mar 2001 06:55:51 -0800  
From: Jim Braude <jimbraude@mediaone.net>  
To: mdrury@ci.cambridge.ma.us  
Subject: 3 orders

M-

Please call me when you get these. Thanks.

1. Ordered that the city solicitor inform the Council why he believes that the permit and fee requirements of the City's Street Performer ordinance (Section 12.16.170) do not violate the First amendment to the United States Constitution

Further ordered that such analysis be provided to the Council in a timely fashion so that if the Council deems suspension or repeal of the offending sections of the ordinance to be appropriate, it could be done before prime performance season begins.

2. [gallucio and braude order on scholarship program]

3.

Whereas use of the internet approaches 90% for those in Cambridge 45 years old and younger

Whereas use declines as age increases, ultimately falling to nearly 50% for those 56 years of age and above

Whereas computer access and internet use not only serve a utilitarian and education function, but allow for social interaction, as well

Ordered that the manager report to the council on access to and training on computers for the City's seniors

----- End of forwarded message -----

D. Margaret Drury  
Cambridge City Clerk  
City Hall  
795 Massachusetts Ave.  
Cambridge MA 02139  
(617)349-4260



# City of Cambridge

O-5.

**IN CITY COUNCIL**

April 2, 2001

COUNCILLOR BRAUDE

**ORDERED:** That the City Manager be and hereby is requested to instruct the City Solicitor to report back to the Council why he believes that the permit and fee requirements of the city's Street Performer Ordinance (Section 12.16.170) do not violate the First Amendment to the United States Constitution; and be it further

**ORDERED:** That such analysis be provided to the Council in a timely fashion so that if the Council deems suspension or repeal of the offending sections of the ordinance to be appropriate, it could be done before prime performance season begins.

79CM

**Order #5**

Constitutionality of permit and fee  
requirements of the Street  
Performers Ordinance.

**Councillor Braude**

**In City Council April 2, 2001**

**ORDER ADOPTED**  
*as amended*