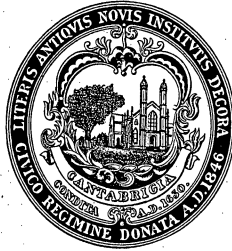


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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

May 15, 2001

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

Re: Council Order #5 (April 2, 2001) – Constitutionality of the Street Performer Ordinance

Dear Mr. Healy:

I write in response to Council Order #5 (April 2, 2001), which asks that the City Solicitor

... report back to the Council why he believes that the permit and fee requirements of the City's Street Performer Ordinance ... do not violate the First Amendment ... as outlined in the attached communication from the American Civil Liberties Union Foundation of Massachusetts

The communication referred to is a letter signed by John Reinstein, Legal Director of the American Civil Liberties Union Foundation of Massachusetts (ACLU). I enclose a copy of Council Order #5 and the letter, dated November 6, 2000.

The Cambridge Street Performers Ordinance, Cambridge Municipal Code, §12.16.170, provides for the licensing and regulation of "Street performers." The initial paragraph states that:

The City Council finds that the existence in the City of street performers provides a public amenity that enhances the character of the City and seeks to encourage such performances to the extent that they do not interfere with the reasonable expectations of residents to the enjoyment of peace and quiet in their homes or to the ability of businesses to conduct their businesses uninterrupted. This section seeks to balance the interests of the performers with those of the residents and businesses of the City.

Mr. Reinstein's summary of the Ordinance is essentially correct.

Mr. Reinstein is correct in stating that, "To survive constitutional review, a permit requirement must ... be related to the government interests it purports to serve, and it must also serve those interests in a manner that is 'narrowly tailored'." Courts are suspicious of permit requirements for speech in the public forum, because they are prior restraints on speech. See Forsyth County v. Nationalist Movement, 505 US 123, 130 (1992).

As the Court stated in Forsyth County,

... Although there is a 'heavy presumption' against the validity of a prior restraint ... the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally, see Cox v. New Hampshire, 312 US 569 ... (1941). Such a scheme, however, must meet certain constitutional requirements. It 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

Id. at 130.

See also Northeast Ohio Coalition for Homeless v. Cleveland, 105 F. 3d 1107 (6th Cir., 1997), cert. den. 118 S. Ct. 335, 139 L. Ed. 2d 260, holding that a license fee of \$50.00 imposed by a city ordinance requiring street peddlers to register with the city and wear identification cards while engaged in peddling was not an impermissible prior restraint of speech under the First Amendment; the fees were charged to defray the costs of administering the ordinance and the ordinance furthered compelling governmental interests in preventing fraudulent solicitations.

I submit that the quoted language from Forsyth County applies also to the Cambridge Street Performers Ordinance, because it is designed to regulate the competing uses of sidewalks and streets throughout the City, and particularly some intensely used areas such as Harvard Square, a public forum. I also believe that the Ordinance satisfies all the criteria set forth in Forsyth.

Mr. Reinstein makes three arguments that the Ordinance is unconstitutional.

Mr. Reinstein asserts that the Street Performers Ordinance is not content-neutral, since it covers only “performers” and not others who use the streets for purposes of expression, such as political speakers. He cites no case for this proposition.

The Street Performers Ordinance is clearly distinguishable from cases like Police Department of the City of Chicago v. Mosley, 408 U. S. 92 (1972), a leading case on content-neutrality. In Mosley, the Court struck down the following Chicago ordinance:

A person commits disorderly conduct when he knowingly: (1) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session ... provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute.

Id. at 92 – 93.

The Court stated:

Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause Of course the equal protection claim in this case is closely intertwined with First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing. As in all equal protection cases ... the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment

Id. at 94 – 95. The Court found that there was not an appropriate governmental interest suitably furthered by the differential treatment between general picketers or demonstrators and picketers and demonstrators involved in a labor dispute, and thus invalidated the ordinance.

Whereas the lack of content neutrality was evident on the face of the Chicago ordinance, this is not true with the Cambridge Ordinance. All street performers are equally subject to the provisions of the Street Performers Ordinance. Also, there is an appropriate governmental interest in Cambridge which is furthered by the different treatment between “performers” and political speakers. There was a need to regulate the noise and relative location of “performers” in Cambridge, but no need to regulate political speakers. Moreover, the Ordinance specifically recognizes the commercial nature of street performers’ activities in the streets and expressly permits the sale of reproductions of the performers’ own work (e.g., tapes and compact disks). See, Cambridge Municipal Code, §12.16.170 (E)(6). However, the Ordinance does not differentiate as to the content of expression of either street performers or political speakers.

Therefore, I am of the opinion that the Cambridge Ordinance is a content-neutral time, place and manner regulation.

Mr. Reinstein's second argument is that the permit requirement "is unrelated to protecting significant government interests", because the regulations are set forth in the Ordinance itself, and, therefore, the permit is superfluous.

In my opinion, the permit and its fee are an integral part of the licensing scheme which is established by the Ordinance. In the first place, the fee raises the money which is necessary to administer the regulations. During the Spring, Summer and Fall months, many street performers gather in and around Harvard Square and in lesser concentrations elsewhere in the City, and the performers in turn attract many spectators to watch them and listen to them.

The Ordinance contains a number of regulations governing the performers' conduct. For example, while amplification is permitted, "No performer ... may generate noise exceeding ... eighty decibels measured at a distance of (25) feet from the performer ... § 12.16.170(E)(3)(a); and performers must be at least 50 feet apart. § 12. 16. 170 (E) (5). Performances are restricted altogether or at certain times in proximity to certain sensitive receptors such as hospitals, schools, libraries, and churches. See, §12.16.170(E)(1)(a). Performances are permitted only during specific hours in recognition of the stated purpose of the ordinance to balance the interests of residents and businesses with those of the performers. See, §12.16.170(E)(2). Displays of items for sale, i.e., reproductions of the performers' work, must not obstruct handicap ramps, doorways, or windows, and must not exceed more than 20% of the width of the sidewalk. See, §12.16.170(E)(6)..

In order to monitor and enforce these and other requirements of the Ordinance, and in order to cope with the crowds of performers and spectators, the Arts Council must hire additional staff to enforce the regulations, and these additional costs to the City are paid for out of the \$40.00 permit fee. A visit to the Harvard Square area on any Friday or Saturday evening during the peak season demonstrates the daunting task faced by Arts Council staff and police department staff in maintaining a safe flow of pedestrian and vehicular traffic and in monitoring noise levels and other Ordinance violations. Sound level measuring equipment and training for the use of such equipment add to the cost of reasonable enforcement of the Ordinance.

Secondly, the permit serves an important notification and educational function for the performers. When each performer receives his or her permit, the Arts Council also gives the performer a copy of the Ordinance. §12.16.170(C)(5). This requirement serves a significant governmental interest, in that it ensures that the performers will be familiar with the regulations, thereby reducing on-street confrontations with Arts Council monitors when sound level or other provisions of the ordinance are called into question. Disputes between performers and monitors in front of large crowds of listeners has in the past produced volatile situations. Advance opportunities to try to assure that performers are familiar with the requirements of the Ordinance serve an important function in seeking to minimize such confrontations or violations of the Ordinance.

Thirdly, Mr. Reinstein alleges that the permit fee of \$40.00 is too high. Although a city may not, by a license, impose a charge for the enjoyment of a constitutional right, a city may charge a “nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question.” Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943). In fact, the fee may be more than nominal. It is “constitutionally permissible for an

ordinance regulating constitutionally protected activity to impose a permit fee which is more than nominal so long as the ... fee is reasonably related to 'the expense incident to the administration of the act and to the maintenance of public order in the matter licensed'.

Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F. 3d 1301, 1323, n. 16 (11th Cir., 2000), quoting Cox v. New Hampshire, 312 U. S. 569, 577 (1941).

I believe that our fee meets this test.

On page 3 of his letter, Mr. Reinstein states:

... 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).

While I agree that this provision demonstrates the content-neutrality of the Ordinance, I do not agree with Mr. Reinstein's assertion that, "The fee cannot be justified by the needs of the enforcement scheme." In the first place, this assertion is not supported by the cited case, AAK, Inc. v. City of Woonsocket.

AAK operated a club featuring semi-nude dancing. It held an entertainment license from the City of Woonsocket for which it paid a fee of \$125.00 per quarter. In 1992, the City amended its ordinances to establish a new entertainment license, called the "adult cabaret" license, for which the fee was \$750.00 per quarter. Plaintiff brought suit under § 1983 asserting that the new license scheme was unconstitutional.

The U. S. District Court for the District of Rhode Island (Lagueux, Chief Judge) held (1) that the adult cabaret ordinance violated the First Amendment on its face by regulating based upon the content of expression; (2) even if the ordinance was considered content-neutral, the city failed to demonstrate that the regulation was a valid time, place and manner restriction; and (3) the city failed to show that the license fee was validly related to the administration of the regulations.

AAK did not hold that “The fee cannot be justified by the needs of the enforcement scheme.” Rather, it held that, “In this case, the City has failed to meet its burden of demonstrating that the \$750.00 per quarter license fee is reasonably related to the costs of administering its adult cabaret ordinance ... The City has provided no estimates of projected man hours for enforcement of the provisions” Id. at 105.

In the case of the Cambridge Ordinance, information furnished to me by the Cambridge Arts Council indicates that the cost of administering the Ordinance clearly supports the fee established for the permits. The following information identifies some, though not all, of the expenses the City incurs in its enforcement efforts:

REVENUE

The Cambridge Arts Council (CAC) issues approximately 350 permits per season (May - October), including replacement permits for permits that are lost. Revenue from the issuance of permits is approximately \$13,500 per season.

COST

Seasonally, the CAC hires three part-time people to serve as street performer monitors to enforce the Ordinance. The three monitors work a total of 700 hours between May and October, and are paid \$12.50 per hour each for a total of \$8,750. Each year the CAC has received requests from businesses and performers

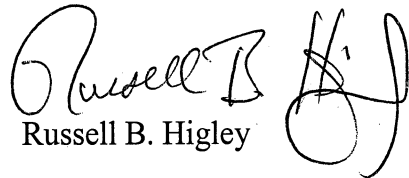
for increases in monitoring. Even a modest increase in monitoring costs alone will push administration costs higher than amounts received through permit fees.

There are additional administrative costs. For example, a staff person of the CAC spends two hours a week to prepare schedules for the monitors at a total cost of \$1,000. There are miscellaneous other administrative costs which total approximately \$2,500.00.

The current total costs for the CAC alone relative to the enforcement and administration of the Ordinance amount to approximately \$12,000. As indicated above, the purchase of sound measuring equipment itself and training on its use, as well as enforcement response by the police department all add costs to the administration and enforcement of the Ordinance.

In my opinion, the revenue figures and the cost figures more than amply demonstrate that the costs to administer and enforce the Ordinance justify the fees imposed. Thus, the \$40.00 fee is reasonable and constitutional, and meets the test set forth in AAK. Accordingly, for all of the reasons articulated above, I believe that the Ordinance does not violate the First Amendment, and is constitutionally permissible.

Very truly yours,


Russell B. Higley



11.

CITY OF CAMBRIDGE • EXECUTIVE DEPARTMENT

Robert W. Healy, City Manager Richard C. Rossi, Deputy City Manager

May 21, 2001

To The Honorable, The City Council:

Please find attached a response to Awaiting Report Item No. 01-168, regarding a report on the permit and fee requirements for the Street Performer Ordinance, received from City Solicitor Russell B. Higley.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert W. Healy".

Robert W. Healy
City Manager

RWH/mec
Attachment



Cal
2305

Consent Agenda #11

Awaiting Report Item
Number 01-168, regarding a
report on the permit and fee
requirements for the Street
Performer Ordinance.

In City Council May 21, 2001

Charter Right
exercised by
Councillor Braudle

In City Council

June 4 2001

Referred to Government
Operations Rules and
Commission motion of
Councillor Braudle

Copy
sent

6-6-01/mc