

PARK BUY-A-BRICK FUNDRAISER HITS A CONSTITUTIONAL WALL

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In the case of *Tong v. Chicago Park District*, No. 03 C 5075, 2004 U.S. Dist. LEXIS 7530 (N.Dist. Ill. 2004), the defendant Chicago Park District ("CPD") approved and oversaw a park fundraiser in which community members were invited to purchase a brick that would be engraved with an inscription chosen by the donor and included in a walkway in a neighborhood park. Plaintiffs Robert and Mildred Tong (the "Tongs") submitted a proposal for a brick engraving that included the phrase "Jesus is the cornerstone."

The CPD rejected the Tongs' proposal based on its religious content. The Tongs brought suit in federal district court alleging "the CPD's decision to reject their proposed engraving was based on unconstitutional viewpoint discrimination." The issue before the federal district court was, therefore, "whether the CPD's decision to reject the Tongs' proposed engraving violated the Tongs' Free Speech rights under the First Amendment."

FACTS OF THE CASE

Under state law, CPD was authorized to create "advisory councils" composed of groups of volunteers to assist in the operation of the parks. One method that advisory councils used to generate funds for Chicago parks was to solicit donations through "buy-a-brick" programs. Buy-a-brick programs provide members of the public with the opportunity to purchase a brick engraved with an inscription chosen by the donor.

The CPD retained the right to review and approve proposed brick engravings, making the final decision as to whether a particular engraving was accepted or rejected. In making such decisions, CPD had no specific written policy or criteria to determine whether a particular proposal would be accepted or rejected. CPD, however, did have a written policy "where the primary purpose of a sign, plaque, or marker is to acknowledge donors." These "Donor Guidelines" did not contain any express prohibition on religious messages. On the other hand, CPD's "Public Art Guidelines" recommended that proposed works of public art not be accepted when such works had the effect of "endorsing or advocating religion or a specific religious belief."

The CPD had no written policy that described how, if at all, the Donor Guidelines and Public Art Guidelines applied to proposed engravings for buy-a-brick programs. While the CPD had no written policy to review proposed brick engravings, CPD followed an unwritten policy which, in part, denied brick engravings that "endorse or advocate religion or a specific religious belief." Further, the CPD law department reviewed some, but not all, proposed buy-a-brick engravings.

SENN PARK BUY-A-BRICK PROGRAM

In this particular instance, the Senn Park Advisory Council proposed the Senn Park buy-

a-brick program to raise funds to refurbish Senn Park. After receiving the CPD's approval to run the Senn Park buy-a-brick program, the advisory council circulated approximately 1500-2000 hard copies of advertisements and applications for the Senn Park buy-a-brick program to community members, and posted a copy of the application on the Internet. The CPD did not review those advertisements before they were circulated.

The Senn Park buy-a-brick advertisements indicated that applicants could "Leave Your Mark on Senn Park" and "Choose Your Words." In response to these solicitations, the Senn Park Advisory Council received a number of applications for buy-a-brick donations. The Senn Park buy-a-brick applications included proposals for bricks reading:

"Peace on Earth;" "Proudly supporting the children of Edgewater State Senator Carol Ronen;" "Bootsie Albert Drennan Best Cat Ever!;" "Plenty of grace be to this place. The Weyandt Family;" "Respect Nature Seek Understanding Truman & Emily;" "Manchester Commons Condo Association 2002;" and "If you build it, they will play. The Cvetas Family."

Among the applications was a proposed engraving which read as follows: "Your neighbor Immanuel Lutheran Church--With thanks to God for our neighbors." Also included in the applications was the Tongs' proposal for an engraved brick, which is the subject of the present suit. The Tongs' submission read as follows: "Missy, EB & Baby Tong--Jesus is the cornerstone. Love, Mom and Dad."

After receiving these applications, the advisory council president created several spreadsheets containing the donor names and proposed engravings, and e-mailed them to the Senn Park project manager at CPD. The project manager had been instructed to deliver proposed engravings to CPD's law department if she "was worried about anything." The CPD project manager, however, was not aware of the unwritten policy applied by CPD to determine whether to accept or reject an engraving.

The project manager delivered spreadsheets containing all of the proposed engravings for the Senn Park buy-a-brick program to the senior counsel of the CPD law department. The senior counsel at CPD reviewed the proposed engravings and determined that the only problematic proposals were those submitted by the Tongs and the Immanuel Lutheran Church. The senior counsel then asked the president of the advisory council to determine whether the church and the Tongs would be willing to change the text for their proposed engravings to exclude their religious references.

When asked by the advisory council, the Immanuel Lutheran Church agreed to remove the reference to God from its proposal. The revised inscription read "Your neighbor Immanuel Lutheran Church--With thanks for our neighbors." The Tongs, however, refused to change their proposed inscription. Following their refusal, CPD senior counsel sent a letter to the Tongs which stated that the CPD "cannot accept any donors' commemorative bricks that have a religious message." The letter did not refer to any specific CPD policy, but communicated the CPD's concern that installing a brick

inscribed with a religious message in public property could violate the Establishment Clause. (The Establishment Clause of the First Amendment to the U.S. Constitution has been interpreted to prohibit governmental endorsement or excessive entanglement with religion.) After refusing senior counsel's invitation to "edit their proposal to include a personal expression devoid of religious content," the Tongs filed suit in federal district court after their brick proposal was not accepted for the Senn Park Walkway.

VIEWPOINT DISCRIMINATION?

In their complaint, the Tongs claimed CPD's rejection of their proposed engraving based on its religious content violated the Free Speech clause of the United States Constitution

As noted by the federal district court, "governmental restrictions based on the content of speech must be reasonable and viewpoint neutral," regardless of the nature of the public forum. On the other hand, the court acknowledged that content-based discrimination may be permissible where it preserves the purposes of a limited [public] forum," i.e., "where the government reserves access to its property for certain groups or for the discussion of certain topics." Under such circumstances, the court found "[c]ontent-based restrictions in a limited public forum must be viewpoint-neutral and reasonable in light of the purpose served by the forum."

In this particular instance, CPD claimed that the Senn Park walkway, where the buy-a-brick program bricks were installed, was a limited public forum which excluded messages from bricks that advocate a religious, political, or social idea, regardless of the point of view." In response, the Tongs claimed that the ir brick, except for its religious viewpoint, was otherwise includible within the stated purpose and subject matter of this limited public forum, i.e., "the 'mark' that the donor wishes to leave."

As described by the court, "viewpoint discrimination is presumed impermissible when it is directed against speech otherwise within the forum's limitations." Accordingly, if the Tongs' proposed inscription fell within the included subject matter for which the Senn Park walkway was opened, the CPD cannot exclude the message because of its religious viewpoint on that subject matter.

Further, the court noted that the U.S. Supreme Court has clarified the distinction between content-based restrictions and viewpoint discrimination as follows:

Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

The issue before the court was, therefore, whether the Tongs' proposed religious message fell within the included subject matter for bricks in the Senn Park walkway wherein applicants could "Leave Your Mark on Senn Park" and "Choose Your Words."

Specifically, the issue was whether “CPD engaged in viewpoint discrimination when it rejected the message ‘Jesus is the cornerstone’.”

In the opinion of the federal district court, the issue of viewpoint discrimination was “complicated by the CPD's lack of a written policy describing the appropriate subject matter for buy-a-brick program engravings.” Despite “the absence of an explicit list of permissible subjects upon which discourse is permissible,” the court found “CPD had opened the walkway to community members for the limited purpose of providing “commemorative messages” recognizing donations.”

Moreover, given CPD's “expansive” interpretation of “commemorative messages,” inscriptions that “express something important’ to the donor's family” could be considered an “otherwise includible subject” for discussion in the forum. Under such circumstances, the federal district court had to determine “whether the message ‘Jesus is the cornerstone’ falls within the subject matter of commemorative messages that express something important to the donor's family.”

In the opinion of the court, CPD’s expansive view of the term “commemorative messages” included “community messages that may be encouraging in a general sense to the broader public.” Within this broad definition of “otherwise includible subject” matter for inscribed bricks, the court noted that CPD had allowed the following “commemorative messages” to appear in the Senn Park walkway:

“Playing Should Be FUN 1528-30 W. Thorndale Condo Association;”
“Bootsie Albert Drennan Best Cat Ever!;” “Peace on Earth;” and “To Sen.
Carol Ronen Thanks for your commitment & vision From the Early
Childhood Network of Edgewater & Rogers Park.”

Under such circumstances, the court found these messages indicated “CPD's intent to open the Senn Park walkway to commemorative messages extended to statements of praise for other people and animals, statements of personal belief, and expressions of goodwill.” Under such a policy, the court speculated that CPD would have approved the Tongs application if they had submitted an engraving stating that ‘Bootsie is the cornerstone’.” The court, therefore, concluded that the Tongs’ application was rejected because they “wished to commemorate their personal belief that *Jesus* is the cornerstone.” (*Emphasis of court.*) In so doing, the federal district court held that CPD had “violated the Tongs' First Amendment rights by excluding their religious viewpoint on the otherwise included subject matter.”

In reaching this conclusion, the federal district court acknowledged “CPD's concerns that, if forced to include the Tongs' inscription, it will be forced to accept all religious messages, including some that may be offensive to the community at large.” The court, however, advised CPD that it could “protect itself in the future from this perceived problem, however, by creating a narrower definition of the ‘includible subject matter’ for its buy-a-brick programs.

By limiting inscriptions to names of donors and their immediate family, for example, and by clearly communicating those limitations to potential donors, the CPD might avoid dilemmas such as the one presented here.

ESTABLISHMENT CLAUSE

In response to the Tongs' allegations of viewpoint discrimination in violation of the Free Speech clause of the First Amendment, CPD maintained that its prohibition on any religious expression was necessary to "avoid an appearance of endorsing religious beliefs" in violation of the Establishment Clause. In the opinion of the federal district court, however, there was "no realistic danger that the community would think that the CPD was endorsing religion or any particular creed" given the "diverse inscriptions... all gathered together in a designated space" with many of the sponsors identified. Moreover, the court noted that "Establishment Clause concerns do not justify a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." On the contrary, the court found that "maintaining a neutral policy avoids establishment of religion difficulties." Accordingly, the court advised that the CPD could "best protect itself from these concerns by maintaining an even-handed approach to its policy for brick inscriptions in its buy-a-brick programs."

In deciding to open up broadly the subject matter of buy-a-brick program engravings to commemorative messages that are important to a donor or the donor's family, the CPD put itself in a position to play editor to root out such expressions that include a religious viewpoint. This level of government interference with private speech is exactly the kind of activity that the First Amendment is designed to curtail.

As a result, the federal district court held that "the Tongs are entitled to summary judgment based on the CPD's unlawful viewpoint discrimination in violation of the Tongs' First Amendment rights."

PRIOR RESTRAINT

The Tongs had also argued that "the CPD's policy for reviewing proposed engravings--or lack thereof--amounts to an unconstitutional prior restraint on speech because it confers unfettered discretion on the CPD to decide whether to accept or reject a submission." The federal district court agreed. In the opinion of the court, the CPD's policy for buy-a-brick engravings was "vulnerable to a First Amendment attack as a prior restraint on speech."

In reaching this conclusion, the court examined the CPD's buy-a-brick policy "to determine if it confers unfettered discretion on decision-makers and thus acts as an unconstitutional prior restraint." As defined by the court, "a prior restraint exists when a law gives public officials the power to deny use of a forum in advance of actual expression."

In this particular instance, the court found that CPD's policy was a prior restraint "because it allows officials to deny expression before it takes place." Under such circumstances, the court would consider "whether the standards guiding the CPD officials who oversee the approval of brick engravings are sufficiently narrow and definite to survive First Amendment scrutiny."

A prior restraint is unconstitutional where the government grants itself unfettered discretion to determine whether to allow certain speech. Unbridled discretion exists where it simply cannot be said that there are any narrowly drawn, reasonable and definite standards guiding the hand of the government administrator.

The prohibition on unbridled discretion applies even if the discretion and power are never actually abused. Where the lack of specificity in the procedure and the amount of discretion vested in the official lends itself to manipulation by the City, a court cannot presume that officials will act in good faith.

Applying these principles to the facts of the case, the court noted that CPD's admission that it had "no written policy that lays out all of the rules for reviewing proposed buy-a-brick engravings." Moreover, the court noted that CPD did not consistently apply its Donor Guidelines or Public Art Guidelines to brick engravings. On the contrary, the court found that CPD only applied *some of the same criteria* to brick engravings. Moreover, given conflicting and confusing explanations from CPD staff regarding how the unwritten policy for reviewing and approving proposed brick inscriptions, the court found such "confusion among government officials as to the policy's meaning created "too great a risk that it could be used to engage in prohibited censorship of speech."

As characterized by the court, "CPD's buy-a-brick policy is not given structure or substance by any written standards and its meaning escapes even the CPD officials charged with administering and interpreting it."

The record is replete with examples of the CPD's confusion. At various points, CPD representatives testified that an engraving could be rejected if it is "not appropriate," "distasteful," or would create a "hazard."

Based upon such testimony, the court found "those who the CPD designated to explain its buy-a-brick policy are confused as to its standards, if they are aware of any policy at all." As a result, the court concluded CPD's "scattered" policy amounted to "an unconstitutional prior restraint in violation of the First Amendment."

Because the CPD policy is unwritten, and is applied in an incoherent and inconsistent manner, the CPD effectively grants unfettered discretion to whichever CPD staff member--if any--first comes into contact with a buy-a-brick application.

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The CPD has simply not governed its own decision-making by "narrow, objective, and definite standards," and its policy demonstrates a "lack of specificity in the procedure and the amount of discretion vested in the officials.

The federal district court, therefore, issued a judgment ordering "the CPD to include a brick in the Senn Park walkway bearing the following inscription: 'Missy, EB & Lexi [i.e. "Baby"] Tong--Jesus is the cornerstone. Love, Mom and Dad'."