PARK PERMITS FOR SOUND AMPLIFICATION & RELIGIOUS EVENTS

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In the case of *Stewart v. City & County of San Francisco*, *California*., 2022 U.S. Dist. LEXIS 127346 (N.D. Cal. 6/22/2022), Plaintiffs challenged the constitutionality of the City and County of San Francisco Park Code Section 7.03, a regulation which required a park permit for religious events and sound amplification.

PARK WORSHIP PERMIT

Plaintiffs Alexander Stewart and Andrew Conway are evangelical Christians who "want to worship God on a regular basis." Plaintiffs believe in church fellowship and regular assembly of worship with fellow Christians. As part of their worship, Plaintiffs want to attend weekly worship services in public parks in San Francisco. Plaintiffs are both affiliated with Christ's Forgiveness Ministries ("CFM") in San Francisco, a non-denominational Christian ministry which seeks to serve the world through evangelism and church planting. Plaintiff Stewart is an elder with CFM.

CFM gathers every Sunday morning for worship. CFM does not own any property, so being able to "access public parks which are freely accessible and suitable for worship services is important for CFM to be able to carry out its mission of sharing the gospel of Jesus Christ with others." CFM's weekly services usually range from 40 to 70 attendees. Church services typically begin with 30 minutes of singing and playing musical instruments, followed by testimonies, communion, offering, and a sermon. CFM uses sound amplification so that attendees can hear the music and sermon; without such amplification, plaintiffs cannot effectively participate in their worship services.

Over the course of four months, Plaintiffs had their church services interrupted by park rangers, citing violations of various sections of Section 7.03. On January 24, 2021, Plaintiffs started their church service at San Francisco's Palace of Fine Arts Park. About an hour and a half into the service, service was interrupted by park ranger and Plaintiff Stewart, as a church representative, received a $192.00 fine for violating Section 7.03 which requires a permit for "musical performances" with sound amplification. Plaintiffs disagreed with the fine, but decided to pay it and hoped to find another park to worship in. At the time, Plaintiffs believed that the rule restricting amplification was limited to the Palace of the Fine Arts given the touristy nature of the park.

Two weeks later, on February 7, 2021, Plaintiffs decided to worship in Potrero del Sol Park, believing that a permit was not needed for that location. However, 30 minutes into the worship service, Plaintiffs were confronted by a park ranger who informed Plaintiffs that they were in violation of Section 7.03 because they were having a musical performance with sound amplification without a permit. Plaintiff Stewart was issued another citation for this incident.

CFM received another citation two weeks later on February 21, 2021 due to the group's worship at McClaren Park. However, this time the citation was not for using sound amplification, as CFM did not use amplification during this service. Instead, CFM was cited for simply having a religious service with more than 50 people without a permit.

Despite the troubling and constant presence of park rangers and police officers at their worship services and the recurring citations, Plaintiffs did not wish to give up their right to worship in public spaces. On March 21, 2021, Plaintiffs decided to worship at the United Nations Plaza, an area Plaintiffs did not consider to be a public park. A few minutes into the worship service, a citation was written by another ranger for violation of Section 7.03.

PARK PERMIT APPLICATION

In pertinent part, the City and County of San Francisco's Park Code Section 7.03 provided: "No person shall, without a permit, perform any of the following acts in any park," including: "Conduct or sponsor a religious event involving 50 or more persons" or "Conduct or sponsor any event which utilizes sound amplification equipment."

After reviewing Section 7.03, Plaintiffs had decided that CFM would need a permit for worship services in San Francisco public parks. Plaintiffs started the application process to obtain the necessary permits for their church services, but realized they would also need to provide a "health and safety plan, a certificate of insurance for coverage of two million dollars, payment of the permit fee, and a bond." After further consideration, Plaintiffs decided that they could not go forward with the permitting requirements due to "the costs and burdensome requirements."

PRELIMINARY INJUNCTION

In their lawsuit, Plaintiffs requested the federal district court to issue a preliminary injunction enjoining Defendants from enforcing and applying San Francisco Park Code Section 7.03, specifically subsections 7.03(h) and (m) of the regulation to Plaintiffs' religious worship and expression in San Francisco public parks.

As described by the federal district court: "A preliminary injunction is an extraordinary remedy, which should be granted only in limited circumstances and where the merits of the case plainly favor one party over the other." Accordingly, to obtain a preliminary injunction, Plaintiffs would have to "conclusively prove their case or show that they are "more likely than not" to prevail if the case was allowed to proceed to trial.

FIRST AMENDMENT SPEECH RESTRICTIONS

In their lawsuit, Plaintiffs argued Sections 7.03(h) and 7.03(m) violated the First Amendment. As cited by the federal district court, the First Amendment prohibits governmental entities "from enacting laws abridging the freedom of speech, or the right of the people peaceably to assemble." Moreover, the court noted: "The extent to which a governmental entity can constitutionality restrict protected speech depends on the character of the property at issue," in this case public parks:

> The Supreme Court has recognized that members of the public retain strong free speech rights when they venture into public streets and parks, which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. In order to preserve this freedom, governmental entities are strictly limited in their ability to regulate private speech in such "traditional public fora" like public parks.

Despite the broad First Amendment protection provided to speech in public parks, the court acknowledged "certain restrictions on speech in public parks are valid," specifically, "governmental entities may issue reasonable laws governing the time, place, or manner of speech."

Since "a permitting requirement is a prior restraint on speech," the court further found an ordinance regulating speech "bears a heavy presumption' against constitutionality." As described by the court, to pass constitutional muster, a permit requirement must be a reasonable time, place, or manner restriction. In particular, the court would find such permit requirements to be "reasonable" when governmental restrictions are:

> (1) content-neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open alternative channels for communication of information. Additionally, the permitting system may not delegate overly broad licensing discretion to governmental officials.

Moreover, when a permit requirement is content based, to be considered constitutional, the court would apply a "strict scrutiny test." Under this strict scrutiny standard of judicial review, "the Government must prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."

RELIGIOUS SPEECH RESTRICTIONS

With regard to Section 7.03(h), requiring a permit for religious worship, the level of scrutiny applied by federal district court would be based on whether the challenged park permit regulation was content-based or content-neutral. According to the court: "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."

In this case, the federal district court found "Section 7.03(h) is a content-based regulation" because "the regulation distinguishes between religious events and other types of events and singles out several topics or subject matters for differential treatment":

> For instance, under Section 7.03(h) a permit is required for plaintiffs to "conduct or sponsor a religious event involving 50 or more persons." However, under Section 7.03(e)-(g), a permit is not required for plaintiffs to put on certain entertainment events, no matter how many people attend as long as it is spontaneous, and not planned at least four hours in advance.

> Under those sections, plaintiffs could go to a public park in San Francisco and put on a drama performance, a fair, circus, juggling show, amusement show, and the like, even if hundreds of people attended, assuming other requirements are met. The same is true if plaintiffs decided that they wanted to give a public speech in a public park on virtually any topic except religion.

In response, Defendants had argued "Section 7.03 is content neutral because it requires permits based on the type of event, number of people, and conduct involved, not the content of expression." The federal district court rejected this argument. In the opinion of the court, "laws that distinguish based on the conduct or event involved are still impermissible under the First Amendment if they draw facial distinctions based on a particular subject matter and are not narrowly tailored."

In this case, the court found the challenged regulation was indeed "content-based because it draws a distinction between religious events and nonreligious events." Moreover, the court noted "Section 7.03 does not necessarily require permits based on the size of the event" because "many entertainment events that are publicized less than four hours before the start of the event are permissible no matter how big the event is."

The federal district court did, however, acknowledge "the city imposes those permit requirements to regulate the competing uses of public space and to preserve parks as locations for all San Franciscans to enjoy, while also providing locations for expressive activities." According to the court, that fact alone, however, "does not transform the regulation into a content-neutral regulation":

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.

Having found Section 7.03(h) imposed content-based restrictions on speech, the court acknowledged this park permit requirement could only stand if it survives strict security. In this particular case, the court noted: "The defendants conceded at oral argument that that they cannot meet the strict scrutiny test."

Accordingly, the federal district court granted plaintiffs' motion for a preliminary injunction, enjoining Defendants from enforcing the Section 7.03(h) park permit requirement for religious events.

PERMIT FOR SOUND AMPLIFICATION

The federal district court then considered whether Section 7.03(m), was content-based or content-neutral. On its face, the court found Section 7.03(m) was "content-neutral" because this permit regulation "does not distinguish between the content of the message, but instead applies generally and requires a permit for any event that uses sound amplification." That being said, the court recognized "this subsection must be narrowly tailored to advance significant governmental

interests to pass constitutional muster." The court further noted: "A narrowly tailored requirement need not be the least restrictive means of furthering the government's interests, but the restriction may not burden substantially more speech than necessary to further the interests."

In this particular instance, the Defendants had argued "the challenged subsection serves the significant governmental interest of reducing noise and other inconveniences to park users and nearby guests." The federal district court agreed, noting general agreement that "the government has a significant interest in regulating public places." In so doing, the court noted "the Supreme Court has recognized the propriety of a government entity in regulating competing uses of public property":

> With respect to the government's interest of regulating public places, without the permitting requirements the government is unable to regulate public places effectively and efficiently. This inability to effectively regulate public places is likely to lead to an increase in disorderly conduct and issues around use of competing spaces.

While Plaintiffs had conceded the government's general interest in regulating public spaces, the federal district court found Plaintiffs constitutional challenge to Section 7.03(m) had completely ignored the government's "significant interest of reducing noise and inconveniences to park users":

> The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer from amplified music to silent meditation. There are good reasons for regulating sound-amplifying devices; these devices can produce noise that is unpleasant and, certainly, unrestrained use throughout a municipality of all sound amplifying devices would be intolerable.

The federal district court further noted "Sections 7.03(m) only applies to sound amplification used in public parks, not entirely throughout the city."

LEGITIMATE PARK PERMIT FEES

Plaintiffs had also argued "the permitting requirements of Section 7.03 is not narrowly tailored because the process of seeking and obtaining a permit is burdensome." In so doing, Plaintiffs claimed "Section 7.03's requirement of insurance coverage of two million dollars, a 250 refundable deposit, and other requirements render the permit scheme burdensome."

In some circumstances, the federal district court found "a city may both require a permit for activity involving free expression without violating the First Amendment and also collect fees that fairly reflect costs incurred by the city in connection with such activity":

> Governments may impose a permit fee that is reasonably related to legitimate content-neutral considerations, such as the cost of administering the ordinance, the cost of public services for an event of a particular size, or the cost of special facilities required for the event…

> Here, the government submitted evidence to demonstrate that the $39 permit fee is used to offset some of the city's administrative costs with respect to processing the permit requests; the evidence also shows that the refundable deposit is used to encourage permit holders not to cause damage to the park. Indeed, nothing about these requirements on their face render them not narrowly tailored.

In this particular instance, the federal district court further found: "Plaintiffs have not offered any evidence to demonstrate that the permit fee and refundable deposits are unreasonable, arbitrary, or unrelated to the purpose of administrating the processing of permits."

> Plaintiffs have not offered any evidence to demonstrate that the $39 fee requirement or the $250 refundable deposit operates as a burden that inhibits the use of San Francisco's public parks as a means of expressing one's First Amendment rights. Indeed, during oral argument plaintiffs conceded that the payment of the $39 permit fee is not in fact burdensome to plaintiffs.

Plaintiffs had also argued "the insurance requirement of Section 7.03 makes the regulation not narrowly tailored." The federal district court rejected this argument:

> Section 7.06(d) states that a permit applicant is not "required to comply with the provisions of Subsection (b)(2) pertaining to insurance if the activity proposed is protected by the First Amendment of the U.S. Constitution and the applicant produces evidence that complying with those provisions is impossible or so financially burdensome that it would preclude the applicant from using park property for the proposed activity." S.F. Park Code § 7.06(d).

In this case, the court found: "Plaintiffs do not argue that they attempted to apply for this exemption; nor do plaintiffs argue how applying for such exemption would be burdensome, or that they would not qualify for this exemption."

Having found Plaintiffs had not met their burden to show that Sections 7.03(m) was not narrowly tailored to serve significant governmental interests, the federal district court denied Plaintiffs' preliminary injunction motion to enjoin this subsection of the regulation requiring a park permit for sound amplification. Plaintiffs appealed.

APPEAL TO NINTH CIRCUIT

In a subsequent appellate opinion, *Stewart v. City & County of San Francisco*, 2023 U.S. App. LEXIS 3811 (9th Cir. 2/23/2023, the United States Court of Appeals for the Ninth Circuit Court limited its review to the district court's denial of Plaintiffs' motion for a preliminary injunction to enjoin enforcement of San Francisco Park Code § 7.03(m) requiring a permit to "conduct or sponsor any event which utilizes sound amplification equipment."

SOUND AMPLIFICATION PERMIT

In the opinion of the federal appeals court, the Section 7.03(m) permit requirement for the use of sound-amplifying equipment in the City's parks "constituted a prior restraint on speech." The appeals court, however, acknowledged: "A city may "promulgate permit systems that place reasonable time, place, and manner restrictions on speech in a public forum":

> To withstand constitutional scrutiny, a permit requirement must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, must leave open ample alternatives for communication, and must not delegate overly broad licensing discretion to a government official.

In this particular instance, the federal appeals court found "Section 7.03(m) is content-neutral as it applies to all events regardless of content." As described by the appeals court, "Speech-regulating rules are content-neutral when the rule is not related to the subject or topic of the speech." Further, the appeals court acknowledged "the City's interest in protecting parks from excessive noise is significant."

Moreover, the appeals court found the City's concern in this particular case was not "speculative" based upon complaints generated by Plaintiffs' use of unpermitted amplified sound in the City's parks. Further, the appeals court found the City's "substantial interest in limiting sound volume is served in a direct and effective way by the requirement" to address these complaints about excessive sound volume generated by Plaintiffs' past religious services in the parks.

On appeal, Plaintiffs had argued "the City should instead require permits based on decibel levels, rather than amplification." In response, the City contended "estimating decibel levels in advance to issue permits and enforcing the ordinance based on decibel levels are less feasible" than simply regulating sound amplification. As characterized by the appeals court, Plaintiffs' "hypothesized alternative reflects nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved":

> Because § 7.03(m) is not substantially broader than necessary to achieve the City's interest, it is not invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative.

In addition, the appeals court found "Section 7.03(m) leaves open ample alternative channels for communication because it continues to permit expressive activity in the park and has no effect on the quantity or content of that expression beyond regulating the extent of amplification." Further, the appeals court noted Plaintiffs had found "there are other public spaces within San Francisco available for their religious worship."

Accordingly, the appeals court concluded the City had "reasonably determined that its interest in controlling volume would be best served by its amplification regulation." The federal appeals court, therefore, affirmed the district court's decision to deny Plaintiffs' motion for a preliminary injunction to block enforcement of the Section 7.03(m) sound amplification permit requirement.

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