



September 14, 2012

VIA ELECTRONIC AND FIRST CLASS MAIL

Mayor Margo G. Bailey
Town Manager William Ingersoll
118 N. Cross Street
Chestertown, MD 21620

Dear Mayor Bailey and Mr. Ingersoll:

We write on behalf of the American Civil Liberties Union of Maryland and the Ottenwaelder family, concerning unconstitutional restraints the Town of Chestertown is placing upon free speech by artists and performers. The issue arises as a result of an incident that occurred in the Chestertown town park in June, when Town officials sought to enforce an unconstitutional Chestertown ordinance¹ against a young musician. For reasons that follow, we request that you immediately cease enforcement of this unlawful ordinance.

The facts, as we understand them, are these:²

On Saturday, June 9, 2012, Casey Ottenwaelder, a 12-year-old girl, was playing her guitar at the Chestertown town park, with a hat available should anyone wish to tip her, just as she had done on many prior occasions. She was approached by Mayor Bailey, who did not identify herself as a public official but told Casey she was not allowed to solicit tips. Casey asked her grandmother, Mrs. Janet Ottenwaelder, whether she could continue to play and Mrs. Ottenwaelder told her that she could. Casey continued playing her guitar. Shortly thereafter, Mayor Bailey again approached Casey and demanded to know why the girl was not "obeying" her. A scene ensued, during which the mayor stated that she was the "boss" of the park and asked the Ottenwaelders whether they think they can do whatever they "damn well please." Mrs. Ottenwaelder asked the Mayor not to curse in front of her granddaughter, who by that point was upset and crying. Mrs. Ottenwaelder subsequently inquired about the applicable rules with Mr. Ingersoll, who informed her of a Chestertown ordinance that prohibits *all* forms of activities by individuals or groups on town property without a permit. It is our understanding that several other musicians and performers have recently been prohibited from performing on town property pursuant to this ordinance.³ As a

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¹ Streets and Sidewalks Code, Town of Chestertown, §§ 145-13 to 145-19.

² Please advise us if you contend that any of these facts are incorrect.

³ For example, Keith Thompson, a local musician and radio show host, indicates that he has similarly been prohibited from performing without a permit and that his application for a permit has been denied. After the incident with her granddaughter was publicized, Ms. Ottenwaelder received several emails from musicians and performers expressing

result, the matter of the Town's efforts to clamp down on artistic performances has begun to gain some notoriety in the local media and online – and those commenting on the issue clearly agree that the Town's actions are objectionable.⁴

The town ordinance at issue provides:

It shall be unlawful for any individual, association, corporation, or organization to use the streets, sidewalks, public rights-of-way, or town-owned property for any event or activity without first obtaining a permit from the town.

Streets and Sidewalks Code of the Town of Chestertown, § 145-13. Because the ordinance purports to apply to *all* forms of speech and conduct in public spaces without limitation, it is an unconstitutional prior restraint on speech and should immediately be revoked.

As you may be aware, the First Amendment to the Constitution protects both the right of performers to engage in protected speech in public fora, and the right to solicit funds. *See, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (“It goes without saying that artistic expression lies within [the ambit of] First Amendment protection.”); *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) (“Solicitation is a recognized form of speech protected by the First Amendment”). Parks, streets, and sidewalks, such as the park at issue in Chestertown, are all quintessential public forums. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 196 (1992); *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *Hague v. CIO*, 307 U.S. 496, 515 (1939). Moreover, any prior restraint on speech “bear[s] a heavy presumption against its constitutional validity.” *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *N.Y. Times v. Sullivan*, 403 U.S. 713, 714 (1971) (per curiam).

Inarguably, a permitting requirement is a prior restraint on speech. Thus, a government may impose a permitting requirement in a public forum *only* if that requirement is narrowly tailored to serve the limited purpose of managing competing uses of the forum, *see Forsyth Co. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Watchtower Bible and Tract Soc. of NY, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), and *only* if the restriction is reasonable. *See, e.g., Chase v. Town of Ocean City*, 825 F.Supp.2d 599 (D. Md. 2011) (finding unconstitutional an Ocean City ordinance that unreasonably restricted street performances on the boardwalk). An ordinance that prohibits *all* uses of *every*

their support for Casey and indicating that they had similarly been prohibited from performing.

⁴ *See* Craig O'Donnell, *Let the Kids Play*, The Kent County News, July 12, 2012, available at http://www.myeasternshoremmd.com/opinion/kent_county/columns/article_f1418f7c-cb67-11e1-92fb-001a4bcf887a.html; Musicians Against the Busking Ban in Chestertown, Maryland, Facebook, <http://www.facebook.com/BuskingBanInChestertownMaryland>.

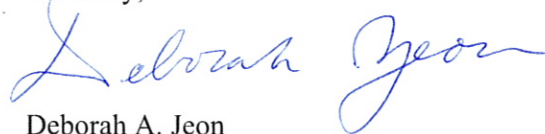
public space without a prior permit clearly goes far beyond the strictly-limited permissible restrictions on free speech, since it applies even to non-competing uses of public space. Courts including the United States Court of Appeals for the Fourth Circuit have invariably found such broad permitting requirements facially unconstitutional. See *Cox v. City of Charleston*, 416 F.3d 281 (4th Cir. 2005) (finding facially unconstitutional a city's parade permit ordinance that lacked exceptions for small groups).

Moreover, rules governing a permitting requirement are unconstitutional if they are not specific enough to guide administrative officials' discretion in granting or denying a permit request. See *Forsyth*, 505 U.S. at 130-33. The only grounds provided in the ordinance for a denial of a permit are that "[w]henver the town finds that an activity . . . is not in the public interest or represents a threat to public safety or is not an historically accepted event or activity, it shall deny the permit application." Streets and Sidewalks Code § 145-17. Criteria such as "in the public interest" and "is not an historically accepted event or activity" are so vague that they cannot provide meaningful guidance to administrative officials issuing the permits. These grounds on their own suffice to render the ordinance unconstitutional because they introduce indisputably content-based restrictions on speech in a public forum. See *Forsyth* at 134; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). Since the only proper purpose of a permitting requirement in a public forum is managing competing uses of the space, these content-based criteria render it clearly unconstitutional.

For these reasons, we request that you cease enforcement of the above-referenced ordinance immediately and that you rescind this ordinance as soon as practicably possible.

Thank you for your attention to this matter. Please feel free to contact either of us if you have any questions. We look forward to your response.

Sincerely,



Deborah A. Jeon
Legal Director



Sirine Shebaya
Liman Fellow

cc: Stewart Barroll, Esq.
Town Council