STANDARD FOR REVIEW

The plaintiff is entitled to summary judgment when the evidence presents no genuine issue of material fact and he is entitled to judgment as a matter of law. Sanchez v. Candia Woods Golf Links, 161 N.H. 201, 203 (N.H. 2010). The plaintiff is entitled to relief in this case because the regulation (Res 7306.01(a)) on its face and as applied impermissibly chilled his constitutionally protected right to free expression.

PROCEDURAL HISTORY

The Plaintiff filed a request for a preliminary injunction and the court held a hearing and denied the plaintiff's request, finding that the plaintiff had not established a likelihood of success on the merits. Based on the information that was presented at the hearing on preliminary injunction,t establisho03 Tc duse thfollowmTc duse-the

involved in the “dangerous activity of hiking”

THE BIGFOOT PROJECT

On September 6, 2009 the plaintiff and his then girlfriend climbed Mt. Monadnock in Jaffrey, NH. His intention was to produce a brief video that would “draw

Aeomen who was dressed in a pirate costume, and Alex Gutterman, who woul d play the part of Boda the Blue Yoda. The plaintiff's girlfriend was also a part of the group, although she was not in costume and played no part in the story. The plaintiff himself, who was not wearing a costume, would shoot the film.

The group started out from Kelly Dowd's property, which abuts the Royce Trail. Only Aeomen was in costume. When the group got to the intersection of Royce Trail and Halfway House Trail, they stopped and dressed for the production. This occurred at a juncture where many trails converge and th

Defendant Patrick Hummel is the Park Manager for Monadnock State Park. On September 6, 2009 Defendant Hummel had been informed that a person had been on Mt. Monadnock dressed in a Bigfoot costume, but had taken no further action because no one had seemed alarmed and it posed no security concerns and broke no rules. (Hummel Dep. 75)

> I've had film students come into the park before, dress up in costumes, and film for class projects. Most students come and ask permission first. I go over ground rules with them, and make it clear the footage is only to be used for their class project. They film and leave.
>
> These folks never ran anything by me.
>
> Well, now I've had newspapers call me this week asking about Bigfoot on Monadnock as if this is a legitimate story. I suspect the people directly involved are informing the newspapers, not the public. They apparently are also going to be doing this again tomorrow or Saturday and the Keene Sentinel wants to cover it.
>
> This has stepped over the line, to me, from being a simple class project to something more involved. I plan on intercepting this party before their climb and speaking with them. …
>
> PS – if you want to waste 5 minutes of your time, he's on YouTube.

(Hummel Dep. Exhibit 2)

When Mr. Hummel confronted the plaintiff on September 19th, he asked him if he had obtained a special use permit for the filming. The plaintiff said that he had not. Defendant Hummel asked the plaintiff to stop filming, and he complied.[2] Defendant Hummel said nothing to the plaintiff about trampling vegetation for a couple of reasons. First, neither the plaintiff nor his film crew did trample vegetation as they were set up at a rocky intersection of trail, and second and most important, there is no park regulation that prohibits any hiker on the mountain from leaving the trail or trampling vegetation.

The entire encounter between the plaintiff and Defendant Hummel was filmed by Steve Hooper, a reporter with the Keene Sentinel who had accompanied the Bigfoot project members to record their performance piece and

[2] In its order denying the plaintiff's request for a preliminary injunction the Court found that the Park Manager told the plaintiff he had to disband "because he was trampling the vegetation." This finding is contradicted by Defendant Hummel's deposition testimony. (Hummel Dep. 49-53)

report on it for the Sentinel. Defendant Hummel did not stop Mr. Hooper from filming or require him to obtain a special use permit.

reviewing the propriety of the government regulation infringing upon speech or expressive conduct.

First, it should be noted that the Defendants do not deny that Monadnock State Park is a state park and that state parks are a public forum for free expression. (Def Answer to Amended Complaint)

There is no dispute that the primary purpose of Mt. Monadnock State Park is to provide the public with a pristine and beautiful place to enjoy nature. But that feature is common to virtually all parks and is not inconsistent with their designation as public forums. The Supreme Court has consistently held that parks are public forums. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

In Naturist Society, Inc v. Fillyaw, 958 F.2d 1515 (11th Cir. 1992) the eleventh circuit held that John D. MacArthur Beach State Park is a public forum even though the main purpose of the beach was to provide the public a place to swim, play games, and enjoy the sunshine and scenery, and even despite the fact that people in swim suits may feel extra vulnerable if approached by someone. Adopting the reasoning Fillyaw, the United States District Court for the Eastern District of New York found that Jones Beach, despite its myriad of uses, was a public forum for First Amendment purposes. Paulsen v. Lehman, 839 F. Supp. 147 (1993).

THE REGULATION IS A PRIOR RESTRAINT

> 574-576, 85 L. Ed. 1049, 61 S. Ct. 762 (1941). Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. See Freedman v. Maryland, supra. 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. See United States v. Grace, 461 U.S. 171, 177, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983).

Forsyth County v. Nationalist Movement, at 130.

The plaintiff does not dispute that the government has a constitutional power to regulate state parks, neither does he dispute that the regulation is content neutral on its face.

Courts have generally applied what is referred to as the *O'Brien* test to determine the validity of a content neutral restriction. The

impacts of commercial events.[3] (Austen Dep. 5) DRED has promulgated rules and regulations to affect this interest. Res 7306 RULES RELATING TO SPECIAL USE PERMITS. Res 7306.01 states: A special use permit shall be required for the following uses of DRED properties: (a) Holding organized or special events which go beyond routine recreational activities.

Res 7306.02 requires that the permit be applied for 30 days in advance of the planned event.

Res 7306.03 describes the Special Use Permit application procedure. Although the regulation doesn't specify, when read in conjunction with the Special Use Application form itself, the regulations require the applicant to submit a $100 fee and post a $2,000,000 insurance bond.

Res 7306.04 is titled Review of Special Use Permit Application. On the one hand the regulation mandates that the director **shall** approve an application for a special use permit as long as the requirements of 30 day notice, $100 fee and $2,000,000 insurance bond have been met. On the other hand, the same regulation states the directors shall notify the applicant in writing of the specific reasons for denial if the director denies the application. The regulation provides no criteria for denial of an application other than the aforementioned failure to provide the required 30 day notice, pay the $100 fee or post the $2,000,000 insurance bond.

This regulation is overbroad for two reasons. First, since there is no definition of what constitutes a routine recreational activity the regulation gives

[3] In denying the plaintiff's request for a preliminary injunction the court found that the state had a substantial interest in protecting persons involved in the dangerous activity of hiking. However, the Defendants' disputed this as a reason for the regulation.(Bald Dep. 17)

overly broad discretion to the decision maker. Second, the regulation is not narrowly tailored to the advancement of the government's interests because the permit requirement applies not only to large groups, but also to small groups and even lone individuals.

Overly Broad Discretion to Decision maker

> Even a content-neutral licensing scheme may raise significant censorship concerns if it vests government officials with unrestricted freedom to decide who qualifies for a permit and who does not. "It is offensive--not only to the values protected by the First Amendment, but to the very notion of a free society--that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." Watchtower Bible, 536 U.S. at 165-66. Thus, such schemes must "contain adequate standards to guide the official's decision and render it subject to effective judicial review," thereby eliminating the "risk that he will favor or disfavor speech based on its content."

Boardley v. United States DOI, 615 F.3d 508, 516 (D.C. Cir. 2010) quoting Thomas v. Chicago Park District, 534 U.S. 316, 323 (2002).

Res 7306 is unconstitutional because it vests the director with unfettered discretion. First and foremost DRED has not promulgated a definition of "routine recreational activity". (Beav-0.00nder

whether to issue a permit. The United States Supreme Court has consistently held statutes placing unlimited discretion in one governmental official unconstitutional."

The Director also has unfettered and unguided discretion to waive the permit fee, thus allowing some speech while burdening other speech. Res 7306 has no provision for waiver of the 30 day notice requirement, fee, or insurance bond. Nonetheless, DRED has waived the $100 fee. The problem is that the decision to grant a waiver is completely arbitrary. Director Bald waived the fee for the National Guard when it was putting an event for servicemen that were leaving to go to Afghanistan because he "felt it was the right thing to do". (Bald Dep. 25-26).

In 2009 DRED received six applications for special use permits for Monadnock State Park. In two cases the $100 fee was waived. (Hummel Dep. 31) Defendant Hummel recommended waiving the fee for a fundraiser for Motivating Miles "as a gesture – in the interest of

Not Narrowly Tailored

Res 7306 is unconstitutional because it burdens substantially more speech than is necessary to achieve the government's interests. In general, a regulation that is applied equally to large groups, small groups or even lone participants will be struck down as

Res 7306 is far more burdensome when applied to individuals or small groups than it is when applied to large groups. First, the 30 day notice requirement effectively forbids spontaneous speech, essential to artistic expression. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002); Sullivan v. City of Augusta, 511 F.3d 16, 38 (1st Cir. 2007). Although the 30 day requirement may be necessary for the park managers to prepare for a large scale event, it certainly does not require 30 days to prepare for a small scale event such as the one at issue here. Second, the financial cost associated with the regulation is far more onerous on an individual or small group than it would be to a large group. The requirement of a $100 fee and $2,000,000 insurance bond not only chills the plaintiff's right to free expression, but freezes it out entirely. "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." Murdock v. Pennsylvania, 319 U.S. 105, 111 (U.S. 1943)

In this case the defendants cannot explain how prohibiting this small crew from producing their film interferes with the management of the park. Monadnock State Park is vast, over 3,500 acres. It accommodates thousands of hikers in an average fall weekend. The plaintiff's small scale film project would have virtually no impact on the mountain experience for the majority of hikers. This scenario stands in stark contrast to that in Cox v. New Hampshire, in which a large group of people paraded up and down on the public sidewalk in front of the Manchester City Hall, one of the most heavily traveled walkways in Manchester, disrupting the flow of pedestrian traffic for an estimated 26,000 people. 312 U.S. 569,573 (1941). At any rate, the government bears

In further exploring the Director's rationale for his "probable" denial of a special use permit to the plaintiff, this exchange took place:

Q. Okay. And based on that, you would have rejected an application on his part for a permit to do – to engage in the activity he engaged in the second time?

A. Perhaps

Q. What information would you need that you don't have?

A. I'd need to be able to look him in the eye and know that he's saying, in fact, what he's going to do and do what he says.

(Austen Dep. 32)

Thus, while in the past film students have dressed up in costume and produced a film without any requirement of a special use permit, the plaintiff, engaged in exactly the same activity, was denied permission to proceed without the permit. This arbitrary application of a rule is unconstitutional. And there is more.

Mountain Shadows in Dublin NH is a private school serving about 70 students in grades 1-8. The school, consisting of the entire student body and faculty, performs two annual theatrical events on Mt. Monadnock. The description of the school and the events can be found at the school's web site: http://www.mountainshadowsschool.com/index.php?option=com_content&view=article&id=50&Itemid=57. As described, the events consist of the following:

Fall Mountain Climb: *This is the first of our two annual climbs up Mt. Monadnock. On the appointed day and time, we assemble at the bottom of the Marlborough Trail to begin our day. At the summit, we perform the Mountain Shadows Monadnock Opera, a tribute to this majestic peak in our midst. After lunch and the opera, we return to the base of the mountain and head home.*

Monadnock Event: *This is the second of our annual hikes up Mt. Mononadnock. This is combined with an all school (parents and children) picnic dinner following the hike. The evening ends with a campfire, s'mores, songs, and the Mountain Shadows Talent Show Extravaganza*

The Mountain Shadows School has never been required to apply for a special use permit for either of these organized activities.

Thus, in view of all the circumstances, there is at the very least, an appearance that the decision maker disfavored the plaintiff and burdened his expression, because of the content of his speech.

Part 1, Art. 22 of the New Hampshire Constitution

New Hampshire's constitution protects free speech. Part 1, Art. 22 states:" Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved." In general, the rights protected by Part 1, Art. 22 are co-extensive with the rights protected by the First Amendment, so there is not an abundance of developed New Hampshire case law in this area. As the New Hampshire Supreme Court has stated, "[t]he right of free speech as guaranteed by our State Constitution may be subject to "reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535

Constitution. Among the reasons for its decision, the Court stated: “the bill is so vague as to provide little or

Respectfully submitted,
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