by Kenneth Heinz

Court Focuses On Park Photography Permits

While it would seem unlikely that the picturesque surroundings of a public park in a community of 400 residents would become the subject of a decision of the United States Court of Appeals for the Eighth Circuit, that is exactly what happened in the case of *Josephine Havlak Photographer, Inc. v. Village of Twin Oaks*, decided July 26, 2017.

Twin Oaks is a community in St. Louis County. In 1994, the Village dedicated an 11-acre public park. The park includes a walking trail, lake, waterfall, gazebo, bridge, playground and sporting amenities. In 2011, the Village upgraded the playground and the park experienced a dramatic increase in visitors, including a large number of commercial photographers. A photographer testified that because of the gazebo, waterfall, bridge and other garden structures, the park presented "a lot of good photo opportunities in a small area." Apparently, commercial photographers began competing for shooting locations within the idyllic park. There were often up to eight at a time, who would congregate for photos on the park bridge and use the park's restroom facilities as dressing rooms. In reaction to this increased overexposure, the Village notified photographers of its ordinance prohibiting commercial activity within the park.

Plaintiff is a professional photographer who describes her work as conveying an expressive message. She filed suit against the commercial activity ban even though she had never used the park for photography before the lawsuit. In response to the lawsuit, the village board amended its park ordinance to create a permit process for commercial use of the park. The ordinance allowed for automatic approval of events lasting less than an hour, having fewer than 10 people and with 48-hours advance notice. The permit fee was $100. Larger events required board approval with consideration of the risk of damage or injury, disruption to public use and other factors. Plaintiff amended her lawsuit to challenge the new permitting ordinance.

Plaintiff first challenged the village ordinance as being overbroad facially. The Eighth Circuit dismissed the facial overbreadth challenge because there was no evidence of any allegedly unconstitutional scenarios as applied to the plaintiff.

The Eighth Circuit then analyzed the plaintiff's challenge that the permitting process abridged her freedom of speech rights under the First and Fourteenth Amendments. The court acknowledged that permitting is a legitimate manner of regulating competing uses in a public forum like a park. The court pointed out that regulation must not be based on the content of the message. This was made clear by the U.S. Supreme Court in cases such as *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). The Court found that the ordinance was content neutral since it applied to all commercial enterprises, not just photographers.

The court then considered whether the ordinance was narrowly tailored to serve significant government interests of reducing congestion and maintaining park safety. The court answered in the negative to the photographer's argument

that the ordinance was overbroad because it applied to groups of all sizes, citing the history of congestion and the limited facilities. The court also rejected the plaintiff's argument that the ordinance was overbroad because it was not restricted to certain congestion points, since it regulated all commercial activities, not just photographers. The court next rejected the plaintiff's argument that the two-day application period for small groups and 14 days for larger groups "chilled artistic expression." Plaintiff argued that unpredictable light and weather conditions required spontaneity. The court held that these time periods were reasonable for photographers to obtain permits. Next, the court rejected the plaintiff's argument that the $100 permit fee was excessive. The court found that the evidence of the overall cost of employing an officer for patrol and permitting was sufficient. Next, the plaintiff argued that the park was "unique" and "one of a kind" so that there were no other reasonable alternatives. The court answered in the negative, pointing out that the natural attributes of a park exist in multiple locations across the St. Louis area. Finally, plaintiff argued that the licensing ordinance was impermissibly vague. The court found, however, that the ordinance provided articulated standards and objective factors for the clerk and board to consider in granting permits.

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