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NEW YORK CIVIL LIBERTIES UNION

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April 23, 2010

Alessandro G. Olivieri
General Counsel
Department of Parks & Recreation
The Arsenal, Central Park
830 Fifth Avenue
New York, New York 10065

Re: Revision of §1-02 and 1-05(b) of Title 56 of the Official Compilation of Rules of the City of New York

Dear Mr. Olivieri:

We write in response to the proposal to impose numerical limitations regarding the vending of expressive material at various locations under the jurisdiction of the New York City Department of Parks and Recreation. As we understand the proposal, fixed locations for the sale of expressive material are to be set along the perimeter and at various venues in Central Park, Battery Park, Union Square Park and elevated portions of High Line Park. These locations are to be made available on a first-come, first-served basis. As described by the *New York Times*, it has been estimated that these proposals will reduce, by 75 percent, the number of persons who will engage in the vending of expressive materials at these locations. Chen, "New York Seeks Limits on Art Vendors in Park," *N.Y. Times* (April 16, 2010).

We offer these observations with regard to this proposal. First, the Parks Department has failed utterly to provide the public with the census information and utilization data so necessary to reach a fair judgment as to whether the limitations contemplated by this proposal are "reasonable, time, place and manner" measures sufficient to satisfy the City's constitutional obligations under the First Amendment. Second, we are concerned that a first-come, first-served approach might not result in the fair allocation of what promises to be an intense competition among vendors for scarce and limited locations. Third, different parks offer different aesthetic environments and can be designed to accommodate different levels of bustle and ebullience. We urge the Parks Department to recognize these potential differences as it allocates locations for the vending of expressive materials.

We amplify these observations below.

I.

It is well-established that the distribution and sale of expressive materials are protected by the First Amendment. *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996). Accordingly, any effort to curtail such expressive activity, even if not based upon the content of the material that is being regulated, can be sustained only if shown to be “reasonable, time, place and manner” restrictions and only if “narrowly tailored” to serve a “significant governmental interest” and only if they leave open “ample alternative opportunities” for such expressive activity. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Any assessment of the reasonableness of such restrictions will depend upon a careful evaluation of the number of vendors of expressive materials seeking venues in the City parks and the nature and quantity of other competing uses and users of the desired sites.

The Parks Department may or may not have gathered the appropriate data and conducted such an evaluation. It is clear, however, that the Department has not shared such data or such an assessment with the public. This lack of transparency is particularly regrettable where, as here, it has been estimated that the proposal at issue will reduce by 75% the number of locations available for the vending of expressive materials. So severe a reduction in the number of expressive opportunities will be treated with considerable skepticism by the vendors and by a fair-minded public. To overcome such skepticism, the Parks Department will need to come forward with powerful evidence and persuasive data to demonstrate the reasonableness of this measure. It has not done so, to date. It should do so forthwith.

II.

The proposal contemplates that the designated locations for the vending of “expressive materials” will be made available on a “first-come, first-served” basis. We are concerned that such a system will not, in the end, function to distribute fairly the designated locations. Such a system presents the risk that a few vendors or their agents will muscle their way into the most desirable locations and will otherwise obtain more than their fair share of sites for more than their fair share of time. The Parks Department should consider alternative methods of distributing the sites such as a weekly lottery system or a rotating list of assignments that assures that, over time, all eligible vendors gain access to each of the designated sites.

III.

Urban parks have long been recognized as democratizing institutions. They provide opportunities for social interaction, communal recreation and the exchange of political ideas. Indeed, in recognizing the geography of free expression under the First Amendment, the Supreme Court has included parks – along with streets and sidewalks – as the locations that “have immemorially been held in trust for the use of the public and, time out of mind” have been devoted to expressive activities and have, therefore, served as traditional public fora. *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

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But all parks are not the same. In cities such as New York, each park has its own rhythm, its own aesthetic and its own level of energy and, indeed, its own tolerance for a level of disorder. And as Jane Jacobs has observed the large urban parks such as Central Park exhibit broad variations in sensibilities even within differing sections of the park. Jacobs, *The Death and Life of Great American Cities* (1961) at 89-111.

We are confident that the Parks Department understands this. But it should employ this understanding as it allocates locations within the different parks. Union Square Park is different in style and aesthetic from the southern perimeter of Central Park. On the fringe of Greenwich Village, Union Square Park can tolerate a level of disorder and energy that might be undesirable on Fifty-Ninth Street. These observations should inform the judgment of the Parks Department and any assessment of “reasonable time, place and manner” considerations that it makes.

IV.

In sum, we urge the Parks Department to withdraw this proposal at this time. If the Parks Department wishes to pursue this matter fairly, it must gather and make public the data necessary to assess the reasonableness of any limitations. Further, it should re-evaluate the methodology for awarding designated locations. Finally, it should consider the differences in the aesthetics of each park as it allocates designated locations.

Respectfully submitted,


Arthur Eisenberg
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