

this code is to ensure the safe and enjoyable use of the parks by the public.

- C. Unless otherwise authorized by the Commissioner and notice is given by the posting of signs at the parks, the parks shall be closed from 11:00 p.m. until 5:00 a.m. during the summer season, and from 10:00 p.m. until 7:00 a.m. during the winter season; and no persons except authorized employees or persons with written permission from the Commissioner shall enter or remain in said parks while closed. The summer season shall be from April 1 until November 15, and the winter season shall be from November 16 until March 31.

§79-11. Permit required for camping.

No person shall camp in any park without a permit in writing from the Commissioner.

§79-19. Acts requiring permits.

- A. No person shall commit any of the following acts within a park, except authorized employees or persons with written permission from the Commissioner:
 - (4) Deliver any public speech or hold any public meeting, march or parade. Permits for such activities shall not be unreasonably withheld, and the denial of such a permit shall be based solely upon reasonable time, place and manner concerns.

§79-23. Permits for activities.

The Commissioner is authorized to grant and issue permits for activities authorized in this chapter or under rules and regulations promulgated by the Commissioner. As a condition of granting a permit, the Commissioner may require proof of insurance or a security deposit in accordance with rules and regulations promulgated by the Commissioner. All permits issued by the Commissioner shall be in writing and shall be signed or authenticated by the Commissioner. All such permits

shall be subject to the terms and conditions contained therein, all applicable provisions of this chapter and rules and regulations promulgated pursuant to this chapter and all other applicable laws and ordinances.

Any violation of the terms and conditions of a permit issued hereunder, or of this chapter or a rule or regulation promulgated pursuant thereto, or any other applicable law or ordinance, shall constitute grounds for the immediate revocation of such permit by the Commissioner, which revocation shall be final and without appeal. No permit for the same purpose shall be issued to any person whose permit has been revoked hereunder for a period of one year following the date of such revocation.

This section is not intended to prohibit the casual ad hoc use of park facilities by citizens. However, individuals or groups possessing a valid permit for the use of a park facility shall have preference for such use.

§79-24. Promulgation of rules and regulations.

The Commissioner is authorized to promulgate rules and regulations as may be necessary to effectuate or implement the provisions of this chapter and to provide for the health, safety and welfare of all users of the parks, to regulate activities permitted in the parks and to provide for the orderly issuance of permits and the protection of park property.

Plaintiffs assert that Rochester City Code §79-2(C) is unconstitutional because it is a prior restraint in that it regulates expressive activity in a public forum, it contains no standards to limit or guide the Commissioner, and provides no opportunity for judicial review of an adverse decision. Plaintiffs further assert that it is over-broad both on its face and as applied, is under-inclusive, and is not narrowly tailored to advance a significant governmental interest.

It is well-settled that even in a public forum, such as the Park, the government

may impose reasonable restrictions on the time, place and manner of protected speech, provided the restrictions are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information" (*Clark*, 468 US at 293). Restrictions imposed by a government on time, place or manner of speech in a public forum will fail the neutrality requirement if they confer overly broad discretion to the regulating officials (*see Forsyth County, Georgia v Nationalist Movement*, 505 US 123, 130 [1992]). Thus, regulations governing speech in a public forum have to contain narrow, objective and definite standards (*see Housing Works, Inc. v Kerik*, 283 F3d 471, 479 [2nd Cir 2002]).

The plaintiffs' assertion that the City Code fails the neutrality requirement and grants overly broad discretion to the Commissioner to grant or deny a permit for after hours use of City parks is without merit.² The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys" (*Ward v Rock Against Racism*, 491 US 781, 791 [1989]). The subject City Code does not seek to regulate messages or distinguish between different types of speech. It simply prohibits, without regard to the identity of the user or the content of speech, anyone from using the parks during overnight hours or from camping in the parks unless a permit is obtained.

The City ordinance does not grant unlimited or impermissible discretion to the

²Plaintiffs did not apply for any permits but rather rely on the Agreement.

Commissioner to grant or deny permission for after hours use of the City parks (City Code §79-2[C]) or for camping in the parks (City Code §79-11). City Code §79-19(A)(4) specifically provides that permits for people to "[d]eliver any public speech or hold any public meeting, march or parade. . . shall not be unreasonably withheld, and the denial of such a permit shall be based solely upon reasonable time, place and manner concerns." Such restrictions are constitutional (*see Field Day, LLC v County of Suffolk*, 463 F3d 167, 178-180 [2nd Cir 2006]).

The subject City Code narrowly focuses on the substantial government interest in regulating the safe use and enjoyment of the parks by all its citizens, protecting the parks from overuse and damage, and providing for the public's health, safety and welfare (*see Clark*, 468 US 288; *Occupy Sacramento v City of Sacramento*, 2011 WL 5374748 [E.D. Cal. Nov 4, 2011]). There are ample alternative channels for communication of information by plaintiffs. They may protest and disseminate information in the Park during the permitted hours as well as in other public forums, the Internet, and traditional and social media. Additionally, there is adequate opportunity for judicial review. Plaintiffs' other arguments have been considered and found to be without merit.

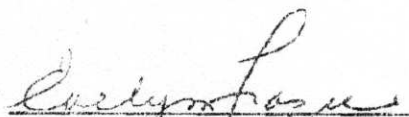
Since no factual issues are raised, defendant's motion to dismiss is deemed to be a motion for a declaration in the City's favor (*see Tilcon New York, Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2nd Dept 2011]). City of Rochester Code §79-2(C), in concert with the other relevant provisions of the City Code, is declared constitutional.

Having failed to satisfy the first criteria for entitlement to an injunction, that is, likelihood of success on the merits, plaintiffs' motion for a preliminary injunction is denied. Since, on the law, the Court has declared that the City has the contractual right under the Agreement to deny additional periods of overnight use and camping and that City Code §79-2(C) is constitutional, judgment is granted in favor of defendant.

Submit order and judgment.

Dated at Rochester, New York

this 28th day of March, 2012.



Honorable Evelyn Frazee
Justice Supreme Court