

THE RUTHERFORD INSTITUTE

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INTERNATIONAL OFFICE
CENTRAL AND EASTERN EUROPE
Budapest, Hungary

September 17, 2012

The Mayor and Council of the Town of Chestertown, Maryland
118N Cross Street
Chestertown, Maryland 21620

VIA ELECTRONIC MAIL AND CERTIFIED MAIL

Re: Restrictions on Musicians in Fountain Park

Dear Madam Mayor and Council Members:

The Rutherford Institute has been contacted by Keith Thompson concerning restrictions placed upon himself and other musicians with respect to their activities within Fountain Park in Chestertown in conjunction with the Farmers Market held in the Park each Saturday. Our understanding is that musicians have been asked to play in the Park during the Market, but they have been required to first obtain a permit and have been prohibited from passively soliciting tips and contributions. These restrictions are a patent violation of the First Amendment rights of musicians and must not be enforced.

Fountain Park is a public park and as such constitutes a traditional public forum where the First Amendment rights of citizens are given the fullest protection under the law. Courts have long recognized that public parks and streets have immemorially been held in trust for the use of the public for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Members of the public retain strong free speech rights when they venture into public parks, and government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

Fountain Park remains a traditional public forum available for speech and expression even during times that it is used for the Farmers Market. The musicians'

performances would not interfere with any message or other purpose of the Farmers Market such that the permitted use of Fountain Park for the Market would change the Park from a traditional public forum. See *Startzell v. City of Philadelphia*, 533 F.3d 183, 196 (3d Cir. 2008), and *Parks v. City of Columbus*, 395 F.3d 643, 651-52 (6th Cir. 2005). The Town's issuance of a permit or authority to conduct a market in the Park does not transform or eliminate the public forum nature of the Park. *Startzell*, 533 F.3d at 196.

Playing music is clearly expression and "speech" protected by the First Amendment. This is confirmed by a recent federal court decision from Maryland which ruled that a painter's performance on the boardwalk of Ocean City was unquestionably constitutionally-protected speech. *Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 614 (D. Md. 2011). See also *Berger v. City of Seattle*, 569 F.3d 1029, 1036 n. 4 (9th Cir. 2009) (performance of music within a public park is activity protected by the First Amendment). Additionally, a musician's passive solicitation of donations (such as placing an upside-down hat or open music case on the ground nearby) and acceptance of donations is similarly protected by the First Amendment. Expression that solicits funds is protected by the First Amendment. *Id.* at 1050. In *Chase*, 825 F. Supp. 2d at 624-25, the court ruled that an artist's sale of paintings within a traditional public forum constituted expressive conduct protected by the First Amendment and that a ban on street performers soliciting or accepting compensation was unconstitutional. It is obvious, then, that the passive solicitation and acceptance of donations by musicians is similarly protected by the constitution.

The Town may not require that musicians obtain a permit as a condition of playing and receiving donations within Fountain Park. Requiring a permit constitutes a prior restraint on speech and is presumptively unconstitutional. It is offensive to the First Amendment that a citizen must first inform the government of his or her desire to speak to other citizens and obtain a government permit to do so. *Watchtower Bible & Tract Soc. of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002). Courts have consistently struck down permit requirements as applied to individuals engaged in expression within a traditional public forum. *Berger*, 569 F.3d at 1038-39; *Chase*, 825 F. Supp. 2d at 627-29.

Nor may the Town impose an outright ban on a musician's passive solicitation and acceptance of donations. At a minimum, such a ban must be content-neutral, narrowly-tailored to achieve a significant government interest, and leave open ample alternative channels of communication. The ban plainly fails the second two parts of this test because there is no governmental interest in forbidding musicians from passively requesting and accepting donations, and the ban does not leave any part of Fountain Park available for this constitutionally-protected activity. *Chase*, 825 F. Supp. 2d at 625-26.

The restrictions imposed upon musicians in Fountain Park are plainly antithetical to the free speech guarantee of the First Amendment. Enforcement of a permit requirement or ban on donations should cease immediately and musicians must be

The Mayor and Council of the Town of Chestertown
September 17, 2012
Page 3

allowed to exercise their constitutional rights. In order that we may advise Mr. Thompson concerning how he should proceed in protecting his rights, we will need a response to this letter by the close of business September 21, 2012.

Sincerely,

A handwritten signature in blue ink that reads "Douglas R. McKusick". The signature is written in a cursive style with a large initial "D" and "M".

Douglas R. McKusick
Staff Attorney

Cc: Bill Ingersoll
R. Stewart Barroll, Esq.
Keith Thompson