FIRE
Foundation for Individual Rights and Expression

February 15, 2024

Board of Selectmen
Suffield Town Hall
83 Mountain Road
Suffield, Connecticut 06078

Sent via U.S. Mail and Electronic Mail (cmoll@suffieldct.gov)

Dear Board of Selectmen:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by the Town of Suffield's proposed Town Green Policy. As currently written, the proposed policy would infringe upon residents' First Amendment right to use the Town Green, a traditional public forum, for expressive activity. FIRE urges Suffield to revise the proposed policy to eliminate its constitutional flaws.

The Proposed Policy

Our concerns involve a draft policy Suffield's Board of Selectmen discussed at its January 17, 2024, meeting that would regulate use of the Town Green, a grassy public space located along North Main Street in Suffield.[2] The Town Green's long history as a public space for "common use" stretches back before the nation's founding.[3] Unfortunately, Suffield's proposed regulations would not only abandon this rich tradition but also raise serious First Amendment issues, as detailed below.

Permit Requirement

The proposed policy would require a permit for any "use" of the green, defined to include any "activity, event, and/or display." The policy would require prospective users to obtain the permit via an application submitted at least 30 days before any proposed use. While Suffield

[1] You can learn more about our mission and activities at thefire.org.

[2] TOWN OF SUFFIELD, *Board of Selectmen Meeting Agenda and Corresponding Documents* (Jan. 17, 2024), https://resources.finalsite.net/images/v1705421891/suffieldctgov/ihms8njt8krm6uf5s0e8/01-17-2024BoardofSelectmenMeetingAgendaandCorrespondingDocuments.pdf.

[3] *Suffield Town Green*, TOWNGREENS.COM, https://towngreens.com/datacenter/historical/suffield-town-green.

may require permits for certain events—such as those involving large groups or exclusive use of the Town Green—the proposed policy's broad definition of "use" easily encompasses an almost limitless range of expressive activity, from an acoustic guitarist to a book club meeting, from a ten-person protest to a lone pamphleteer. Requiring even individuals and small groups to obtain a permit to engage in expressive activity on the Town Green would violate the First Amendment.

The Supreme Court has long made clear the "public retain[s] strong free speech rights when they venture into public streets and parks, 'which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[4] Suffield's Town Green has long been precisely this kind of public gathering ground.[5] The authority of government actors like the Town of Suffield to "limit expressive activity" in these quintessential public forums is "sharply circumscribed."[6]

Because permit requirements impose a prior restraint on speech, there is a "heavy presumption" against their constitutionality.[7] While a municipality may create permit schemes that regulate the time, place, and manner of speech in public forums, such regulations "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."[8]

Applying that standard, federal courts have consistently struck down permit requirements that apply to individuals or small groups wishing to use physical public fora.[9] To the extent

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[4] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see also Frisby v. Schultz*, 487 U.S. 474, 480 (1988) ("Time out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.") (cleaned up).

[5] *See, e.g.*, CELEBRATION OF THE BI-CENTENNIAL ANNIVERSARY OF THE TOWN OF SUFFIELD, CONN. (1871), *available at* https://tile.loc.gov/storage-services/public/gdcmassbookdig/celebrationofbic00suff/celebrationofbic00suff.pdf ("A large tent was erected on the town green—the ladies prepared their choicest viands. A programme was arranged, comprising a procession, firing of guns, and oratorical exercises at one of the churches, and every one anticipated a fine time.").

[6] *Perry Educ. Ass'n*, 460 U.S. at 45.

[7] *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

[8] *Id.*

[9] *See, e.g.*, *Berger v. City of Seattle*, 569 F.3d 1029, 1048 (9th Cir. 2009) (*en banc*) ("[N]either we nor the Supreme Court has *ever* countenanced" a policy that "requires single individuals to inform the government of their intent to engage in expressive activity in a public forum."); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (striking down licensing scheme for public parades because city's "significant interest in crowd and traffic control, property maintenance, and protection of the public welfare is not advanced by the application of the [o]rdinance to small groups," and noting "[p]ermit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring"); *Knowles v. City of Waco*, 462 F.3d 430, 436 (5th Cir. 2006) ("ordinances requiring a permit for demonstrations by a handful of people are not narrowly tailored to serve a significant government interest"); *Cox v. City of Charleston*, 416 F.3d 281, 283, 285–86 (4th Cir. 2005) (invalidating ordinance sections barring "any person" from participating in "any parade, meeting, exhibition, assembly or procession" on

Suffield may require a permit for certain large gatherings, a universal 30-day notice requirement is unconstitutional. In *Sullivan v. City of Augusta*, the U.S. Court of Appeals for the First Circuit—whose decisions bind Suffield—held that a 30-day advance application requirement for a parade permit violated the First Amendment, emphasizing that the parade ordinance made no allowance for spontaneous expression and assembly "in quick response to topical events," which is a constitutional prerequisite.[10] The First Circuit further noted that "[a]dvance notice requirements that have been upheld by courts have most generally been of less than a week."[11]

Requirement to pay for law enforcement

The proposed policy would also mandate that "[i]f it is determined at the time of the event that law enforcement is required per the Town or the Police Department, payment will be made by the Individual or Organization," with failure to do so will subject to a $500 fine. This provision is unconstitutional to the extent it allows for a "heckler's veto," empowering the Town to impose greater costs on those whose expression may elicit hostile reactions.[12]

In *Forsyth County v. Nationalist Movement*, the Supreme Court invalidated a security fee requirement for demonstrations and other uses of public property because it vested unbridled discretion in government officials and authorized them to assess fees based on their "measure of the amount of hostility likely to be created by the speech based on its content."[13] Suffield may require event holders to pay *actual* administrative expenses *unrelated* to the expressive content of an event, but "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[14] Any permit fees must be based on "narrow, objective, and definite standards" unrelated to the content of speech,[15] and be limited to an amount the does not exceed the costs of administering the regulation.[16]

Insurance requirement

The draft policy requires permit applicants to "provide the Town with a Bond or a Certificate of Liability Insurance with the Town of Suffield named an insured and in a format approved by the Town, in the amount of $1,000,000," which amount "may be increased at the discretion of the First Selectman and Town Attorney if the activity, has a potential liability risk in excess of

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public streets or sidewalks without permit because city failed to show why its application to small groups was necessary to keeping streets and sidewalks safe, orderly, and accessible).

[10] *Id.*

[11] 511 F.3d 16, 38 (1st Cir. 2007).

[12] *See* Zach Greenberg, *Rejecting the 'heckler's veto,'* FIRE (June 14, 2017), https://www.thefire.org/news/rejecting-hecklers-veto.

[13] 505 U.S. 123 at 134.

[14] *Id.* at 131–33.

[15] *Id* at 131.

[16] *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943).

$1,000,000." The First Amendment prohibits the Town from universally imposing a minimum insurance requirement that has no connection to the actual risk of specific expressive activity.

Even assuming the Town's interest in protecting itself from liability is significant, its proposed insurance requirement is not narrowly tailored to advancing that interest.[17] Even if $1,000,000 of insurance coverage is warranted for *some* events, Suffield cannot show that amount is proportionate to the risk of *all* potential uses of the Town Green. The provision also would impermissibly allow the Town to increase the required coverage based on how third parties may respond to an applicant's expressive activity. As with security fees, Suffield must tie any insurance requirement to the actual risk of an activity based on pre-established, objective, content-neutral criteria.[18]

Restrictions on uses likely to incite violence or create unsafe conditions

The draft policy also establishes criteria assertedly related to public safety, banning Town Green uses that, in Suffield's judgment, would "unreasonably interfere with or detract from the promotion of public health, welfare, safety and recreation" or are "reasonably likely to cause injury to persons or property, incite violence, crime or disorderly conduct." Further, "[i]f the condition of the Town Green is determined to be unsafe for any reason by the Director of Public Works, the Town Green shall be shut down and all events cancelled."

Suffield certainly has an interest in ensuring public safety and may shut down the Town Green if physical conditions on the grounds render it unsafe. Suffield may also ban expressive activity that properly falls within the narrow, unprotected category of incitement, namely speech *intended to* and likely to cause imminent unlawful action.[19] But the Town should clarify and narrow the safety provisions to avoid enabling a heckler's veto that completely shuts down expressive activity based on actual or potential hostility of observers.

The First Amendment protects those "wishing to express views unpopular with bottle throwers."[20] The "freedom to espouse sincerely held religious, political, or philosophical beliefs, especially in the face of hostile opposition, is too important to our democratic institution for it to be abridged simply due to the hostility of reactionary listeners who may be offended by a speaker's message."[21] The Town is thus obliged to address crowd hostility without punishing or silencing the speaker, which "will seldom, if ever, constitute the least restrictive means available" to keep the peace.[22]

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[17] *See, e.g.*, *iMatter Utah v. Njord*, 774 F.3d 1258 (10th Cir. 2014) (Utah's minimum requirement of $1,000,000 in liability insurance for parade permit violated First Amendment because it was not tied to risk of specific parades based on objective characteristics like location, duration, and number of participants); *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050 (2d Cir. 1983) (invalidating $750,000 insurance requirement for group seeking to protest on abandoned railway bed, as state offered no basis for amount).

[18] *Forsyth Cnty.*, 505 U.S. at 131; *iMatter Utah*, 774 F.3d at 1269–70.

[19] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[20] *Forsyth Cnty.*, 505 U.S. at 134.

[21] *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 252 (6th Cir. 2018).

[22] *Id.* at 248.

Restrictions on vending and engaging in activities for private profit

The proposed policy would ban "vending" unless a permit applicant requests and receives permission for it, though no criteria are stated for reviewing such requests. At the same time, the policy would *completely* ban activities, events, and displays "designed to be held for private profit." Apparently, then, only requests to vend for purposes other than private profit may receive approval. These provisions cannot survive First Amendment scrutiny.

Speech does not lose constitutional protection simply because the speaker is paid to speak or solicits contributions in the course of disseminating a message.[23] Likewise, expressive materials like newspapers and artwork receive full First Amendment protection regardless of whether they are sold or given away.[24] Suffield cannot categorically ban expressive activity in a traditional public forum for the sole reason that money changes hands. And any permit scheme applicable to vending expressive materials must be content-neutral and narrowly tailored in service of significant government interest, with adequate procedural safeguards to preclude arbitrary decision-making.[25]

Ban on advertising

The proposed policy would also ban activities, events and displays "held for the purpose of advertising any product, good, or event," which violates the First Amendment. This provision's failure to define its terms renders it unconstitutionally vague.[26] Does "advertising" refer only to speech promoting the commercial availability of a product, service, or event? Or does the provision encompass the "advertising" of "events" with no commercial purpose or activity, like a flyer promoting a gathering on the Town Green to sing Christmas carols? Because the proposed policy does not specify its scope, residents and visitors will rationally choose to refrain from engaging in protected expressive activities on the Town Green to avoid crossing the policy's indeterminate boundaries. The resulting chill on speech violates the First Amendment.[27]

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[23] *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) ("our cases long have protected speech even though it is . . . in the form of a solicitation to pay or contribute money").

[24] *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."); *White v. City of Sparks*, 500 F.3d 953, 957 (9th Cir. 2007) (First Amendment protects artists' sale of their original paintings); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.").

[25] *Forsyth County*, 505 U.S. at 130–31.

[26] A policy is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Speech regulations also must "provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[27] *See, e.g., Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011) (noting constitutional "prohibit[ion of] overly vague laws" serves in part to "avoid chilling the exercise of First Amendment rights").

Because the regulation discriminates against speech based on its content, to the extent it *does* reach noncommercial speech, it must be narrowly tailored to serve a compelling state interest in the least speech-restrictive way.[28] It is unclear what interest the Town has in restricting this type of speech, and, in any event, a flat ban is the opposite of the narrow tailoring the First Amendment requires.

Even if the regulation is interpreted narrowly to reach *only* commercial speech, it still fails to satisfy the relevant constitutional standard. Outside of restrictions on false or deceptive speech or speech that proposes an illegal transaction, a restriction on commercial speech must be no more extensive than necessary to achieve a substantial government interest.[29] Again, Suffield's interests are unclear, and an indiscriminate ban is almost certainly an unnecessarily restrictive means of advancing them.

Conclusion

FIRE calls on Suffield to excise or revise the unconstitutional provisions in the proposed Town Green Policy and to ensure its citizens are fully able to exercise their First Amendment rights in the Town's public forums. FIRE recently worked with the City of Belleair Beach, Florida, to revise its ordinance governing public spaces to ensure it both protects residents' First Amendment rights and furthers the city's interest in reasonably regulating the time, place, and manner of speech.[30] We would be happy to do the same with the Town of Suffield, free of charge.

We respectfully request a substantive response to this letter no later than February 29, 2024.

Sincerely,

Aaron Terr
Director of Public Advocacy

Cc: Derek Donnelly, Town Counsel

[28] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

[29] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

[30] Aaron Terr, *After FIRE's intervention, Florida city ditches unconstitutional restrictions on political protests*, FIRE (Jan. 25, 2024), https://www.thefire.org/news/after-fires-intervention-florida-city-ditches-unconstitutional-restrictions-political-protests.