STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Jonathan Doyle

V.

CIVIL ACTION 217-2010-CV-00334

George Bald, et al

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOW COMES plaintiff, Jonathan Doyle, and pursuant to Rule 58-A submits the following motion for summary judgment.

INTRODUCTION

The plaintiff, Jonathan Doyle, is an amateur film maker and performance artist. He created an art project which he called *Bigfoot on Mt. Monadnock*. On September 6, 2009 he purchased a Bigfoot costume and climbed Mt. Monadnock. At the summit of the mountain, he donned the costume, engaged in a brief performance as Bigfoot, and then filmed interviews with hikers on top of the mountain about sightings of Bigfoot.

On September 19, 2009 the plaintiff returned to Mt. Monadnock with five additional people to perform and film a sequel involving the capture of Bigfoot. Defendant Patrick Hummel, the manager of Monadnock State Park, prohibited plaintiff from performing and filming unless he applied for a Special Use Permit.

A Special Use Permit is required for use of the state parks when "holding organized or special events which go beyond routine recreational activities". Res 7306.01(a). In order to obtain a Special Use Permit one must apply 30 days in advance of a planned event, pay a $100 fee, and post a $2,000,000 insurance bond.

STANDARD FOR REVIEW

The plaintiff is entitled to summary judgment when the evidence presents no genuine issue of material fact and he is entitled to judgment as a matter of law. Sanchez v. Candia Woods Golf Links, 161 N.H. 201, 203 (N.H. 2010). The plaintiff is entitled to relief in this case because the regulation (Res 7306.01(a)) on its face and as applied impermissibly chilled his constitutionally protected right to free expression.

PROCEDURAL HISTORY

The Plaintiff filed a request for a preliminary injunction and the court held a hearing and denied the plaintiff's request, finding that the plaintiff had not established a likelihood of success on the merits. Based on the information that was presented at the hearing on preliminary injunction, the court made the following findings:

1. Res 7306 does not delegate overly broad licensing discretion to the Defendants because the regulations state that the director ***shall*** approve an application for a special use permit. So long as the application is filled out correctly and filed timely, there is nothing the director can do to prevent the granting of the permit.

2. The permit process applies equally to film productions teams with six members, with sixty, or with six hundred, regardless of whether the film is about Bigfoot or another subject matter.

3. The state seeks to protect persons involved in the dangerous activity of hiking a mountain and the regulations are designed to do that.

As will be discussed further below, the Defendants provided information during depositions that directly refute those findings. In brief summary that information includes the following: 1) the regulations were not promulgated to protect persons

involved in the “dangerous activity of hiking” but as a means to regulate competing uses of the parks; 2) the director enjoys unfettered discretion to require an application for special use permits, to approve or deny an application, and to waive provisions such as the fee requirement; and 3) the regulation has been applied in an arbitrary manner. Although there have been many other film, art and theater projects that have occurred at Monadnock State Park, the only film project that has been subjected to the requirement for a special use permit is the plaintiff’s.

FACTS

THE MOUNTAIN

Mt. Monadnock is a majestic peak located in Jaffrey, New Hampshire at Mt. Monadnock State Park. It is the jewel of Southern New Hampshire. The mountain is 3165 feet above sea level and provides spectacular views of New Hampshire, Vermont, Massachusetts and New York. It is a magnet for outdoor enthusiasts. It is claimed that it is the second most climbed mountain in the world, second only to Mt. Fuji in Japan.

Both Henry Thoreau and Ralph Emerson loved the mountain and wrote extensively about it. It's easy to see why. Beautiful and lush forests on the bottom give way to a barren and ethereal summit with gorgeous views in every direction. Mt Monadnock has been climbed, worshiped and adored for centuries.

Present day, the mountain is managed by the Parks and Recreation Division of the Department of Resources and Economic Development. Monadnock State Park is approximately 3500 acres. The DRED website boasts that the park has a pavilion that is perfect for small groups. Amenities include camping, flush toilets, hiking, picnicking, and showers. There are no facilities on the mountain.

THE BIGFOOT PROJECT

On September 6, 2009 the plaintiff and his then girlfriend climbed Mt. Monadnock in Jaffrey, NH. His intention was to produce a brief video that would "draw together community in a way that was humorous and experimental". (Doyle dep. 32). The message that the plaintiff was attempting to convey is that individuals should come together and form community. The plaintiff carried a Bigfoot costume that he purchased that morning at IParty in a backpack as he ascended the mountain. At the summit he went behind some rocks and donned the costume. He then came out and did a brief performance as Bigfoot, which involved beating his chest. While in costume, the plaintiff took a small video camera, walked up to people on top of the mountain and, while he was still in costume, asked them if they had seen Bigfoot and if they would like to be interviewed about their sighting. "So people were like, Yeah. They were just making up stories. And they thought it was very much a lot of fun." (Doyle dep. 38) No one refused to be interviewed. Several people asked the plaintiff to pose for pictures with them for their own cameras.

The Park Service received no adverse complaints at all about the plaintiff's activity on the mountain. (Hummel Dep. 41). Wearing a costume on the mountain did not violate any rule. (Hummel Dep. 43)

On September 19, 2009 the plaintiff went back to the mountain. This time he assembled a small team of five individuals to create a film about the "capture" of Bigfoot on Mt. Monadnock, which would serve as a sequel to the film he had produced on September 6th about the sightings of Bigfoot. The cast consisted of Kelly Dowd, a local lawyer, who this time would wear the Bigfoot costume; Kelly's young son

Aeomen who was dressed in a pirate costume, and Alex Gutterman, who woul d play the part of Boda the Blue Yoda. The plaintiff's girlfriend was also a part of the group, although she was not in costume and played no part in the story. The plaintiff himself, who was not wearing a costume, would shoot the film.

The group started out from Kelly Dowd's property, which abuts the Royce Trail. Only Aeomen was in costume. When the group got to the intersection of Royce Trail and Halfway House Trail, they stopped and dressed for the production. This occurred at a juncture where many trails converge and there is no vegetation that can be trampled. (Dole dep. 49). Kelly Dowd put on the Bigfoot costume while Alex Gutterman put on a blue Snuggie and the plaintiff painted his face silver and put some elf ears on him in order to create the Boda and Blue Yoda character. After they were in costume the plaintiff directed a scene in which he interviewed a hiker about having seen Bigfoot, while Kelly Dowd, dressed as Bigfoot was sneaking up on the hiker. This was staged and the hiker, whose name is unknown, was a willing participant.[1]

The plaintiff and his group were at the Halfway House trail for a brief period of time shooting the scene for the film. While they were shooting, the group came into contact with several people who were hiking the mountain. "…there were a team of like these Cub Scouts that came through, and they sat and just they watched for a little bit and they were laughing. And then I probably spoke with about, I don't know, probably eight people. Because I wasn't there for very long, mind you. I got the costumes on, and then it was like I shot two shots and then bang, Patrick Hummel was there and it was over." (Doyle Dep. 51)

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[1] In its Order denying the plaintiff's request for Preliminary Injunction the court found that several of the crew had ape costumes on September 19th. This finding appears to be in error.

Defendant Patrick Hummel is the Park Manager for Monadnock State Park. On September 6, 2009 Defendant Hummel had been informed that a person had been on Mt. Monadnock dressed in a Bigfoot costume, but had taken no further action because no one had seemed alarmed and it posed no security concerns and broke no rules. (Hummel Dep. 75)

However, by September 17, 2009 Mr. Hummel had become concerned about the Bigfoot project. This was due, in part, to the publicity that the September 6th filming had received.

The plaintiff had approached the Keene Sentinel with the "news" that Bigfoot had been sighted on Mt. Monadnock. The paper wrote a front page article about the Bigfoot project, which appeared on the front page of its edition on Thursday, September 17, 2009. (Exhibit 3 to Doyle deposition) Defendant Hummel was quoted in the article as saying, "It's really hard to do anything on the mountain that hasn't been done before."

On the morning of September 17th Defendant Hummel sent an email to his immediate supervisor Brian Warburton with the subject line: *Bigfoot problem on Monadnock….not kidding.*

The email reads in pertinent part:

> Labor Day Weekend, aside from the rest of the madness we went through, we had a college student dressed in a Bigfoot costume walking around the summit and trails and having someone videotape him.
>
> Nothing new on Monadnock. Some people mentioned it to Mountain Patrol that day. But as more of an FYI rather than a complaint. We had more than 2,000 people on the mountain that day. We've had people do many crazy and absurd things on this mountain over the years. With safety concerns overriding investigating a Bigfoot costume that no one seemed to care about, patrol chose not to pursue the matter and neither did I. …

> I've had film students come into the park before, dress up in costumes, and film for class projects. Most students come and ask permission first. I go over ground rules with them, and make it clear the footage is only to be used for their class project. They film and leave.
>
> These folks never ran anything by me.
>
> Well, now I've had newspapers call me this week asking about Bigfoot on Monadnock as if this is a legitimate story. I suspect the people directly involved are informing the newspapers, not the public. They apparently are also going to be doing this again tomorrow or Saturday and the Keene Sentinel wants to cover it.
>
> This has stepped over the line, to me, from being a simple class project to something more involved. I plan on intercepting this party before their climb and speaking with them. …
>
> PS – if you want to waste 5 minutes of your time, he's on YouTube.

(Hummel Dep. Exhibit 2)

When Mr. Hummel confronted the plaintiff on September 19th, he asked him if he had obtained a special use permit for the filming. The plaintiff said that he had not. Defendant Hummel asked the plaintiff to stop filming, and he complied.[2] Defendant Hummel said nothing to the plaintiff about trampling vegetation for a couple of reasons. First, neither the plaintiff nor his film crew did trample vegetation as they were set up at a rocky intersection of trail, and second and most important, there is no park regulation that prohibits any hiker on the mountain from leaving the trail or trampling vegetation.

The entire encounter between the plaintiff and Defendant Hummel was filmed by Steve Hooper, a reporter with the Keene Sentinel who had accompanied the Bigfoot project members to record their performance piece and

[2] In its order denying the plaintiff's request for a preliminary injunction the Court found that the Park Manager told the plaintiff he had to disband "because he was trampling the vegetation." This finding is contradicted by Defendant Hummel's deposition testimony. (Hummel Dep. 49-53)

report on it for the Sentinel. Defendant Hummel did not stop Mr. Hooper from filming or require him to obtain a special use permit.

Why did the plaintiff's small scale film project require a special use permit? It was not because the Bigfoot project involved people dressed in costume and filming. That activity had been allowed before with no requirement for a special permit. (Hummel Dep. 76). It was not because the film crew consisted of five participants. It is not unusual for groups to ascend the mountain together and no special arrangements are necessary until a group reaches 20 or more people (Hummel Dep. 14) (Austen Dep. 7). And then a group of 20 of more receives *favorable* treatment because it gets a group discount. (Austen Dep. 44) It was not because creating a film by definition goes beyond the scope of "routine recreational activity", since DRED has not defined what is and is not a routine recreational activity, (Hummel Dep. 23) and filming has been allowed in the past without the requirement of a special use permit. (Hummel Dep. 36)(Austen Dep. 21) It was not because the plaintiff asked hikers to participate in his film if they wanted to, because there is no rule or regulation prohibiting someone from approaching another hiker on the mountain. (Austen Dep. 18-19). And it was not because any of the participants might have wandered off the trail and trampled vegetation, because there is no rule or regulation prohibiting anyone from leaving the trail or trampling vegetation. (Austen Dep. 15)

So, why did the plaintiff's small scale film project require a special use permit? Defendant Hummel had discussed the Bigfoot film project with his supervisors, including Ted Austin, the Director of the Division of Parks and

Recreation, prior to September 19th. (Hummel Dep. 86) They made a collective decision that the film project required a special use permit. Hummel said the reason was "[b]ecause it was an organized event, advertised event that seemed to go out of our routine activities on the mountain." (Hummel Dep. 86).

Mr. Austen testified at his deposition that he, as Director of the Division of Parks, has ultimate authority to grant or deny a request for a special use permit. (Austen Dep. 5) He provided a tortured explanation for when a special permit might be needed, stating ultimately that would rely on "precedent", i.e. whether a similar activity had been approved in the past. Despite the apparently mandatory nature of the regulation, Austen said that he could deny an application for a special use permit notwithstanding that the application was complete, and the fee and insurance bond were provided. (Austen Dep. 27-28).

Austen testified that with respect to the Bigfoot Project, not only would he have required a special use permit, but, in all likelihood, even had the plaintiff applied for such a permit, he would have denied it because of "his previous behavior":

Q. Okay. What is it about his previous behavior that would have led you to deny the permit?

A. He didn't inquire as to whether what he was intending to do was a routine recreational activity or event.

Q. So the first time he went up without a permit; is that your complaint?

A. To the best of my knowledge, yes.

(Austen Dep. 29-30)

An email that Hummel sent to his supervisors on January 19th describing his interaction with the plaintiff that day perhaps most accurately conveys the reason that DRED decided to require him to obtain a special use permit and prevented him from completing his film on that day.[i] When asked, the plaintiff told Hummel that it was his intention to bring his Bigfoot costume to the summit of the mountain. Hummel wrote to his supervisors, "I told him that the stunt was not appropriate and that I would not allow it." Thus it appears that the true reason that DRED required the plaintiff to obtain a special use permit was animus and disdain for him and his project.

LEGAL ARGUMENT

THE PLAINTIFF'S CONDUCT WAS PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND PART 1, ARTICLE 22 OF THE NEW HAMPSHIRE CONSTITUTION AS EXPRESSIVE ACTIVITY

As a preliminary matter, it should be made clear that the First Amendment encompasses the plaintiff's expressive conduct in producing the Bigfoot film. The First Amendment shields more than political speech and verbal expression; its protections extend to all forms of entertainment including film, theater and music. "If the First Amendment reached only "expressions conveying a 'particularized message', its protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schnberg, or Jabberwocky verse of Lewis Carroll'" Bery v. City of New York, 97 F.3d 689, 694 (2d Cir. N.Y. 1996) quoting Spence v. Washington, 418 U.S. 405, 411 (1974).

In Wyner v. Struhs, 254 F. Supp. 2d 1297 (2003) the US District court of the Southern District of Florida, citing Supreme Court precedent, found that a "living nude peace symbol" was expressive conduct "well within the ambit of the *First Amendment*." at 1301. If a "living nude peace symbol" is protected expressive conduct, how could a man clothed in a Bigfoot costume not be?

In fact, there can be no question but that the plaintiff's film project was expressive conduct protected by the First Amendment and Part 1, Article 22 of the NH Constitution. The newspaper got it right when it characterized the Bigfoot project as a "performance art piece." (Exhibit 3 to Doyle Dep.) The plaintiff was using his film to express a message that individual hikers having a solitary experience on the mountain should come together to share a communal experience.

Additionally, the plaintiff does not forfeit any of the protection of the First Amendment because he may have hoped, albeit in vain, to earn some money from the Bigfoot project. "The sale of protected materials is also protected….'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'" Bery at 695 quoting Riley v. Nat'l Fed'n of Blind of North Carolina, 487 U.S. 781, 801 (1988).

MT. MONADNOCK STATE PARK IS A PUBLIC FORUM

As a second preliminary matter, the Court must first determine whether Monadnock State Park is a public or non-public forum. The nature of the forum as either public or non-public determines the standards the Court must apply in

reviewing the propriety of the government regulation infringing upon speech or expressive conduct.

First, it should be noted that the Defendants do not deny that Monadnock State Park is a state park and that state parks are a public forum for free expression. (Def Answer to Amended Complaint)

There is no dispute that the primary purpose of Mt. Monadnock State Park is to provide the public with a pristine and beautiful place to enjoy nature. But that feature is common to virtually all parks and is not inconsistent with their designation as public forums. The Supreme Court has consistently held that parks are public forums. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

In Naturist Society, Inc v. Fillyaw, 958 F.2d 1515 (11th Cir. 1992) the eleventh circuit held that John D. MacArthur Beach State Park is a public forum even though the main purpose of the beach was to provide the public a place to swim, play games, and enjoy the sunshine and scenery, and even despite the fact that people in swim suits may feel extra vulnerable if approached by someone. Adopting the reasoning Fillyaw, the United States District Court for the Eastern District of New York found that Jones Beach, despite its myriad of uses, was a public forum for First Amendment purposes. Paulsen v. Lehman, 839 F. Supp. 147 (1993).

THE REGULATION IS A PRIOR RESTRAINT

A regulation that imposes a condition upon free expression such as a permit fee is a prior restraint. **"**Prior restraints are inherently suspect because they threaten the fundamental right to free speech." State v. Chong, 121 N.H. 860, 862 (N.H. 1981). There is a heavy presumption against the validity of prior restraints. Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)

Courts have generally found mandatory insurance provisions to be unconstitutional prior restraints on speech. See, e.g., E. Conn. Citizens Action Group, 723 F.2d 1050, 1057 (2d Cir. 1983)(invalidating state transportation department's $750,000 liability insurance requirement for political march); Collin v. Smith, 578 F.2d 1197, 1208-09 (7th Cir. 1978) (the Nazi/Skokie case) ($300,000 liability insurance requirement was conceded to be unconstitutional as applied to group that could not afford it. In general courts have found those provisions to be offensive because they are not sufficiently narrowly tailored to governmental interests in protecting public property and averting liability for injuries, at least as applied to those who could not afford it.

By definition, Res 7306, which imposes a fee and an insurance bond that dwarfs even that required in *Skokie* is a prior restraint on speech. The question becomes, is the restraint permitted.

THE REGULATION IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT IS OVERLY BROAD AND NOT NARROWLY TAILORED

> Although there is a "heavy presumption" against the validity of a prior restraint, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963), the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally, see Cox v. New Hampshire, 312 U.S. 569,

> 574-576, 85 L. Ed. 1049, 61 S. Ct. 762 (1941). Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. See Freedman v. Maryland, supra. Further, any permit scheme controlling the time, place, and manner of speech 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. See United States v. Grace, 461 U.S. 171, 177, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983).

Forsyth County v. Nationalist Movement, at 130.

The plaintiff does not dispute that the government has a constitutional power to regulate state parks, neither does he dispute that the regulation is content neutral on its face.

Courts have generally applied what is referred to as the *O'Brien* test to determine the validity of a content neutral restriction. The *O'Brien* test requires that the regulation (1) be within the government's constitutional power to enact; (2) further a substantial or important government interest; (3) is unrelated to the suppression of free expression; (4) is no greater than is essential to further the government interest**.** United States v. O'Brien, 391 U.S. 367, 377 (U.S. 1968).

Since, the plaintiff concedes the first three prongs of the O'Brien test, the issue becomes one of balancing the government interest in regulating activity in the state parks with the burden on *First Amendment* freedom inherent in the requirement of a permit for protected *First Amendment* activity.

The government interest in requiring a Special Use Permit is to manage varied and competing use of the park resources (Bald Dep. 17), or to mitigate the

impacts of commercial events.[3] (Austen Dep. 5) DRED has promulgated rules and regulations to affect this interest. Res 7306 RULES RELATING TO SPECIAL USE PERMITS. Res 7306.01 states: A special use permit shall be required for the following uses of DRED properties: (a) Holding organized or special events which go beyond routine recreational activities.

Res 7306.02 requires that the permit be applied for 30 days in advance of the planned event.

Res 7306.03 describes the Special Use Permit application procedure. Although the regulation doesn't specify, when read in conjunction with the Special Use Application form itself, the regulations require the applicant to submit a $100 fee and post a $2,000,000 insurance bond.

Res 7306.04 is titled Review of Special Use Permit Application. On the one hand the regulation mandates that the director **shall** approve an application for a special use permit as long as the requirements of 30 day notice, $100 fee and $2,000,000 insurance bond have been met. On the other hand, the same regulation states the directors shall notify the applicant in writing of the specific reasons for denial if the director denies the application. The regulation provides no criteria for denial of an application other than the aforementioned failure to provide the required 30 day notice, pay the $100 fee or post the $2,000,000 insurance bond.

This regulation is overbroad for two reasons. First, since there is no definition of what constitutes a routine recreational activity the regulation gives

[3] In denying the plaintiff's request for a preliminary injunction the court found that the state had a substantial interest in protecting persons involved in the dangerous activity of hiking. However, the Defendants' disputed this as a reason for the regulation.(Bald Dep. 17)

overly broad discretion to the decision maker. Second, the regulation is not narrowly tailored to the advancement of the government's interests because the permit requirement applies not only to large groups, but also to small groups and even lone individuals.

Overly Broad Discretion to Decision maker

> Even a content-neutral licensing scheme may raise significant censorship concerns if it vests government officials with unrestricted freedom to decide who qualifies for a permit and who does not. "It is offensive--not only to the values protected by the First Amendment, but to the very notion of a free society--that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." Watchtower Bible, 536 U.S. at 165-66. Thus, such schemes must "contain adequate standards to guide the official's decision and render it subject to effective judicial review," thereby eliminating the "risk that he will favor or disfavor speech based on its content."

Boardley v. United States DOI, 615 F.3d 508, 516 (D.C. Cir. 2010) quoting Thomas v. Chicago Park District, 534 U.S. 316, 323 (2002).

Res 7306 is unconstitutional because it vests the director with unfettered discretion. First and foremost DRED has not promulgated a definition of "routine recreational activity". (Bald Dep. 38) Ted Austen, Director of the Division of Parks and Recreation, asserted that he has authority to grant or deny the application for a special use permit. (Austen Dep. 5) He could not articulate any objective criteria that he would or could use to determine whether to grant or deny an application. (Austen Dep 26-28). Without such a definition the regulation can be unfairly and arbitrarily applied. See State v. Chong, 121 N.H. 860, 862 (1981): " The ordinance is particularly offensive because it gives one governmental official unfettered discretion to determine who may distribute handbills in the city of Keene. No standards guide the chief of police in deciding

whether to issue a permit. The United States Supreme Court has consistently held statutes placing unlimited discretion in one governmental official unconstitutional."

The Director also has unfettered and unguided discretion to waive the permit fee, thus allowing some speech while burdening other speech. Res 7306 has no provision for waiver of the 30 day notice requirement, fee, or insurance bond. Nonetheless, DRED has waived the $100 fee. The problem is that the decision to grant a waiver is completely arbitrary. Director Bald waived the fee for the National Guard when it was putting an event for servicemen that were leaving to go to Afghanistan because he "felt it was the right thing to do". (Bald Dep. 25-26).

In 2009 DRED received six applications for special use permits for Monadnock State Park. In two cases the $100 fee was waived. (Hummel Dep. 31) Defendant Hummel recommended waiving the fee for a fundraiser for Motivating Miles "as a gesture – in the interest of a more successful event for the group." (Hummel Dep. 30)

The decision to grant or deny a fee waiver is completely arbitrary. There are no objective criteria or written guidelines to determine when the fee should be waived. A regulation that gives such unfettered discretion to a decision maker is overly broad and unconstitutional on its face. Burk v. Augusta, Richmond County, 365 F. 3d 1240, 1256 (11th Cir. 2004). The reason that a regulation that allows arbitrary application is unconstitutional is that such unfettered discretion has the potential for becoming a means of suppressing particular points of view. "To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license; must contain 'narrow, objective, and definite standards to guide the licensing authority'" Forsyth at 131, internal quotations omitted. Res 7306 fails this test.

Not Narrowly Tailored

Res 7306 is unconstitutional because it burdens substantially more speech than is necessary to achieve the government's interests. In general, a regulation that is applied equally to large groups, small groups or even lone participants will be struck down as overbroad. The case of Boardley v. National Park Service which involved a challenge to a regulation prohibiting various forms of expressive conduct in the National Parks is instructive:

> Boardley argues the NPS regulations are not narrowly tailored to the advancement of these interests because the permit requirement applies not only to large groups, but also to small groups and even lone individuals. His argument draws considerable support from this and other circuits. The Sixth Circuit, for instance, has found that "[p]ermit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring." 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 the 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"). The Fourth Circuit reached the same conclusion in Cox v. City of Charleston, where a lone protestor challenged an ordinance barring "any person" from participating in "any parade, meeting, exhibition, assembly or procession . . . on the streets or sidewalks of the city" without a permit. 416 F.3d 281, 283 (4th Cir. 2005) (internal quotation marks omitted). The court held that the "application of the [o]rdinance to groups as small as two or three renders it constitutionally infirm" because the city failed to "establish[] why burdening such expression is necessary to facilitate its interest in keeping its streets and sidewalks safe, orderly, and accessible." Id. at 285-86. The Ninth Circuit relied on similar grounds in striking down an ordinance requiring street performers at a public park to obtain permits before performing. See Berger v. City of Seattle, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc).

Boardley v. United States DOI, 615 F.3d 508, 520 (D.C. Cir. 2010)

Res 7306 is far more burdensome when applied to individuals or small groups than it is when applied to large groups. First, the 30 day notice requirement effectively forbids spontaneous speech, essential to artistic expression. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002); Sullivan v. City of Augusta, 511 F.3d 16, 38 (1st Cir. 2007). Although the 30 day requirement may be necessary for the park managers to prepare for a large scale event, it certainly does not require 30 days to prepare for a small scale event such as the one at issue here. Second, the financial cost associated with the regulation is far more onerous on an individual or small group than it would be to a large group. The requirement of a $100 fee and $2,000,000 insurance bond not only chills the plaintiff's right to free expression, but freezes it out entirely. "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." Murdock v. Pennsylvania, 319 U.S. 105, 111 (U.S. 1943)

In this case the defendants cannot explain how prohibiting this small crew from producing their film interferes with the management of the park. Monadnock State Park is vast, over 3,500 acres. It accommodates thousands of hikers in an average fall weekend. The plaintiff's small scale film project would have virtually no impact on the mountain experience for the majority of hikers. This scenario stands in stark contrast to that in Cox v. New Hampshire, in which a large group of people paraded up and down on the public sidewalk in front of the Manchester City Hall, one of the most heavily traveled walkways in Manchester, disrupting the flow of pedestrian traffic for an estimated 26,000 people. 312 U.S. 569,573 (1941). At any rate, the government bears

the burden of demonstrating that applying this regulation to the plaintiff does advance its interest.

As with the NPS regulations at issue in Boardly, "[t]he fit between means and ends is far more precise when the NPS regulations are applied to large groups. The most important function of a permit application is to provide park officials with the forewarning necessary to coordinate multiple events, assemble proper security, and direct groups to a place and time where interference with park visitors and programs will be minimized. These needs arise routinely with large-scale events, but only rarely with small ones." Boardley at 522.

THE REGULATION IS UNCONSTITUTIONAL AS APPLIED TO THE PLAINTIFF

The problem with the lack of standards becomes apparent in this case because the Director said that he probably would have denied the plaintiff's request for a special use permit but could provide no objective or even coherent reason for the denial.

Mr. Austen testified that he would probably have denied the plaintiff a special use permit for his film project. When asked on what grounds, he responded:

A. His previous behavior.

Q. Okay. What is it about his previous behavior that would have led you to deny the permit?

A. He didn't inquire as to whether what he was intending to do was a routine recreational activity or event.

Q. So the first time he went up without a permit; is that your complaint?

A. To the best of my knowledge, yes

(Austen Dep. 29-30)

In further exploring the Director's rationale for his "probable" denial of a special use permit to the plaintiff, this exchange took place:

Q. Okay. And based on that, you would have rejected an application on his part for a permit to do – to engage in the activity he engaged in the second time?

A. Perhaps

Q. What information would you need that you don't have?

A. I'd need to be able to look him in the eye and know that he's saying, in fact, what he's going to do and do what he says.

(Austen Dep. 32)

Thus, while in the past film students have dressed up in costume and produced a film without any requirement of a special use permit, the plaintiff, engaged in exactly the same activity, was denied permission to proceed without the permit. This arbitrary application of a rule is unconstitutional. And there is more.

Mountain Shadows in Dublin NH is a private school serving about 70 students in grades 1-8. The school, consisting of the entire student body and faculty, performs two annual theatrical events on Mt. Monadnock. The description of the school and the events can be found at the school's web site: http://www.mountainshadowsschool.com/index.php?option=com_content&view=article&id=50&Itemid=57. As described, the events consist of the following:

Fall Mountain Climb: *This is the first of our two annual climbs up Mt. Monadnock. On the appointed day and time, we assemble at the bottom of the Marlborough Trail to begin our day. At the summit, we perform the Mountain Shadows Monadnock Opera, a tribute to this majestic peak in our midst. After lunch and the opera, we return to the base of the mountain and head home.*

Monadnock Event: *This is the second of our annual hikes up Mt. Mononadnock. This is combined with an all school (parents and children) picnic dinner following the hike. The evening ends with a campfire, s'mores, songs, and the Mountain Shadows Talent Show Extravaganza*

The Mountain Shadows School has never been required to apply for a special use permit for either of these organized activities.

Thus, in view of all the circumstances, there is at the very least, an appearance that the decision maker disfavored the plaintiff and burdened his expression, because of the content of his speech.

Part 1, Art. 22 of the New Hampshire Constitution

New Hampshire's constitution protects free speech. Part 1, Art. 22 states:" Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved." In general, the rights protected by Part 1, Art. 22 are co-extensive with the rights protected by the First Amendment, so there is not an abundance of developed New Hampshire case law in this area. As the New Hampshire Supreme Court has stated, "[t]he right of free speech as guaranteed by our State Constitution may be subject to "reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980); see Cox v. New Hampshire, 312 U.S. 569 (1941). However, such time, place, or manner controls may only be as broad as is required to further a significant government interest, and they may not be related to the content and subject matter of the message being communicated." Opinion of Justices, 128 N.H. 46, 50 (N.H. 1986).

In Opinion of Justices, supra the Court interpreted the reach of Part 1, Art. 22 and held that a statute forbidding criticizing hunters would violate the New Hampshire

Constitution. Among the reasons for its decision, the Court stated: "the bill is so vague as to provide little or no notice to an individual of ordinary intelligence as to what activity would come within its proscriptions. … Further, the language in the bill is overbroad in that critical terms in the bill are left undefined and could therefore be used to sweep whole categories of protected speech into its ambit. See State v. Nickerson, 120 N.H. 821, 824, 424 A.2d 190, 192 (1980); State v. Albers, 113 N.H. 132, 134, 303 A.2d 197, 199 (1973). The potential chilling effect on free speech would be substantial." Id at 50.

The same problems inflict Res 7306. Critical terms such as "beyond recreational activity" are left undefined. As a result a whole category of protected speech – performance art – has the potential to be suppressed. In addition, a person in the plaintiff's shoes has to guess at whether his activity might come under the ambit of the regulation, since the term "beyond recreational activity" has no definition and can be and has been applied arbitrarily. Thus the regulation is unconstitutional under Part 1, Art. 22 of the New Hampshire Constitution.

WHEREFORE the plaintiff requests that this Honorable Court:

A. Grant his motion for Summary Judgment;

B. Award costs and attorney fees;

C. Award him nominal damages; and

D. Grant whatever additional relief is necessary and just.

E. The plaintiff requests a hearing on this motion.

Respectfully submitted,
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By his Attorney,

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CERTIFICATE OF SERVICE

I certify that a copy of the Plaintiff's Motion for Summary Judgment has been sent to Assistant Attorney General Matthew Mavrogeorge, Esq. on the ___ day of March, 2011.

Barbara R. Keshen

[i] Hummel Dep. Exh 2