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July 14, 2008

Julien X. Neals, Corporation Counsel  
City of Newark  
920 Broad Street  
Newark, New Jersey 07102

Re: Newark's New Permit Ordinance

Dear Mr. Neals,

I write to inform you that the permitting ordinance passed on April 16, 2008, contains numerous unconstitutional provisions. I require your assurance that the ordinance will be rescinded or revised; otherwise I will be forced to file suit. Towards that end, ACLU-NJ cooperating attorney Bennet Zurofsky and I request a meeting with you, to occur no later than August 8, 2008. We expect to hear from you by **July 24, 2008**.

As described below, the constitutional infirmities of the new ordinance include: (1) Section 5:10-3 mandates permits for small non-obstructive speech activities and thus violates the overbreadth doctrine of the First Amendment; (2) the notice requirements of Section 5:10-5 are overly and unnecessarily burdensome and do not allow for constitutionally-protected "spontaneous" speech; (3) Section 5:10-4(B) does not make grammatical sense as written but, apparently, creates a time-line for appeals that would not permit appeals of free speech activities permitted under Section 5:10-5(D); and (4) the "Cost Recovery Charges" of Section 5:10-7 preclude indigent speakers from engaging in protected free speech activity and thus violate the federal and state constitutions. We provide, below, suggestions to bring the ordinance into constitutional compliance.

"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..." Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 165-166 (2002). Permit requirements are therefore highly scrutinized, especially when the free speech activities take place on sidewalks, parks, and streets -- places that, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. at 515.

The United States Supreme Court has repeatedly held that prior restraints of speech, such as permit requirements, "bear[] a heavy presumption against [their] constitutional validity," Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), and that the government "carries a heavy burden of showing justification for the imposition of such a restraint." New York Times Co. v. United States, 403 U.S. 713, 714 (1971); see also Alexander v. United States, 509 U.S. 544, 554 n.2 (1993) (discussing origin of prior restraint doctrine). The basis for the presumption against prior restraints is a "distinction deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

Therefore, while the City has the right to create time, place, and manner restrictions for activities that may impede the flow of traffic or cause safety hazards, the Borough bears the burden of establishing the need for the regulation and must restrict "no more speech than is necessary." Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989). The new ordinance is an overly broad and unnecessarily onerous prior restraint on speech and, as such, is unconstitutional.

1. Sections 5:10-1 creates an overly broad definition of "Special Event" for which permits are required under Section 5:10-3.

The new ordinance subjects more protected speech activities to the permit requirement than is constitutionally permissible. In order for the City to be in constitutional compliance, we advise the City amend the ordinance to ensure that "any event involving activity protected by the First Amendment will not require a permit from the City, so long as that event does not require closure of a public street, sidewalk, alley, public right-of-way, or other property owned or controlled by the City."

Prior to passage of this ordinance, the City only required permits for free speech activities when those activities would require full or partial closure of a street. Per the new ordinance, a permit is required any time there is a gathering of "at least 15 or more people at the same time within a 100 foot radius" on city property, including sidewalks, parks, and other city-owned property.<sup>1</sup> Thus, any time a large group of employees walk together from work to a retirement or holiday party, or a church choir goes Christmas caroling, or a group of children and parents go trick-or-treating, or a baseball team walks from a ball field to a nearby restaurant; or an extended family has a picnic in a park, permit applications (with accompanying routes provided if there is movement from one location to another) must be submitted and approved.

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<sup>1</sup> The ordinance can actually be read to apply to demonstrations, marches, or vigils of any size, even of as few as one or two persons. See 5:10-1 ("Special Event (or 'Event') shall mean those events including but not limited to a block party, fair, festival, parade, march, procession, race, run, walk, vigil, demonstration, or a gathering of at least 15 people at the same time within a 100 foot radius..."). Read that way, it is all the more onerous and overly broad.

Numerous courts have recognized that permit requirements are unconstitutionally over-inclusive when applied to small and non-obstructive expressive events. See, e.g., Douglas v. Brownell, 88 F.3d 1511, 1524 (8th Cir. 1996); Grossman v. City of Portland, 33 F.3d 1200, 1207 n.7 (9th Cir. 1994); Community for Creative Non-Violence v. Turner, 893 F.2d 1387, 1393-4 (D.C. Cir. 1990); Rosen v. Port of Portland, 641 F.2d 1243, 1247-8 n.8 (9th Cir. 1981).

In Douglas, for example, the court struck down a permit requirement for groups of 10 or more persons: "We entertain doubt whether applying the permit requirement to such a small group is sufficiently tied to the City's interest in protecting the safety and convenience of citizens who use the public sidewalks and streets." 88 F.3d at 1524. The court distinguished the case from Cox v. New Hampshire, noting that Cox involved a large demonstration with substantial disruptive potential. Similarly, the court in Grossman held that an ordinance requiring a permit for any "organized" demonstration, regardless of size, was not narrowly tailored, and noted that other cities' ordinances, applicable only to groups of 50 or more persons, were "much more narrowly tailored." 33 F.3d at 1207 n.7.

Here, the City has not established a need for applying a permit restriction upon groups as small as 15 persons. The ACLU-NJ previously sued the City of Pleasantville for enforcing a permit ordinance against a gathering of 20 persons. Ultimately, the City relented, and agreed to modify its ordinance so that "any event involving activity protected by the First Amendment will not require a permit from the City, so long as that event does not require closure of a public street, sidewalk, alley, public right-of-way, or other property owned or controlled by the City."

To avoid litigation, the ACLU-NJ urges the City of Newark to do likewise.

## 2. Section 5:10-5 imposes an impermissibly lengthy notice requirement

It appears that the ordinance generally requires 60-days notice for a permit application to be deemed timely. See 5:10-5(B). While there is an exception for Free Speech activities, the ordinance is not clearly written and thus leaves applicants unsure as to how much notice is actually required.

The ordinance creates a process for applying for permits for free speech activities that respond to "an event that is not anticipated." See 5:10-5(D). However, this creates a gap: What notice is required for free speech activity that does *not* respond to unanticipated events (e.g., a general demonstration in support of troops, a march on Martin Luther King Day, a vigil on the anniversary of a known event)? Those events are neither subject to the 60-day requirement nor to the exception to the 60-day requirement. The ordinance places those events in legal limbo. Please inform us of the City's position on that question.

Further, regardless of whether or not *all* First Amendment activities are covered by the ordinance, there are additional questions raised by this subsection. The ordinance sets forth that the City has up to five business days to respond to applications submitted under this subsection. The ordinance states that the city "reserves the right to modify the authorized duration, route and/or location of the Event based on content-neutral public safety concerns" if the City does not complete its review under the expedited circumstances. It is unclear, however, whether the City also reserves the right to reject applications that do not provide the City five business days for review -- for example, if an organization submits an application on a Tuesday for an event that is to occur the upcoming Saturday. Please inform us of the City's position on this question.

In considering the City's position, please note the following: Time requirements that impermissibly burden the right to "spontaneous" political speech are unconstitutional. "Timing is of the essence in politics. ... When an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969). "A delay of even a day or two may be intolerable when applied to political speech." NAACP v. City of Richmond, 743 F.2d 1346, 1356 (9th Cir. 1984), citing Carroll v. Comm'rs of Princess Anne, 393 U.S. 175 (1968).

The court in Richmond surveyed both practices of surrounding cities and existing precedent, and found that the "mean advance notice period," even among major cities like New York, Boston and San Francisco, was 36 hours. Id. at 1357. Even those requirements should not be permitted to thwart spontaneous speech.

To give a sad but recent example, if the number of soldiers killed in a war reaches a certain level, and an organization wants to hold a small vigil in honor of those fallen soldiers later that evening, they should not be denied from so doing. A delay of even a day would weaken the impact of the expressive activity. A five-day waiting period for "spontaneous" speech would obviously undermine the "spontaneity," power, and timeliness of the statements.

In accordance with prior cases, the City should institute a 36-hour notice requirement for all free speech activity and also institute a process for ensuring "spontaneous" speech is not prohibited.<sup>2</sup>

### 3. Section 5:10-4(B) creates an unworkable appeals process

The appeals process fails to provide a feasible method to appeal a denial of many permit applications. The appeals process is unclear however, as the sentence describing the process is completely nonsensical. See 5:10-4 (B) ("The appeal must be post-marked within four (4) business days of the date on the denial letter and shall contain the applicant's argument as to why the permit should issue appeal received within seven (7)

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<sup>2</sup> Were the City to only require permits for activities that required closure of a street or sidewalk (as suggested above), that would resolve this problem and many others.

business days of the initial, proposed Special Event date shall be accepted, unless it proposes an alternate date at least eight (8) business days in the future.”). Presumably, an appeal will only be accepted if it is submitted seven days prior to the event. Thus, the right to appeal for many free speech applications is illusory.

4. Section 5:10-7 imposes unconstitutional “Cost Recovery Charges” on speakers, including on indigent speakers

Pursuant to the ordinance, the City requires applicants to pay at least 20% of police costs, including for free speech activities. It is inappropriate for the City to institute that charge. Police are paid for by public funds to protect and serve the citizenry. Part of that service is to protect constitutional rights. If the City does not charge or assess specific individuals for use of police or the fire department in other circumstances, it should not do so for persons engaging in their constitutional right of free speech.

Further, if the City insists on the payment of this fee, numerous individuals and organizations will be unable to engage in their protected First Amendment activity. In reality, free speech will no longer be free, and poorer citizens’ voices will be removed from the public sphere, as the right to free speech will only be granted to those who can afford it.

The Supreme Court has recognized that a significant requirement for upholding any permit scheme is whether it is “exerted as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and discussion of public questions immemorially associated with resort to public places.” Cox v. New Hampshire, 312 U.S. 569, 574 (1941). Irrespective of whether Newark may have an interest in recouping police costs for the use of its public spaces, it should have an exception for free speech activities and/or poorly financed speakers. At least three circuit courts have required that permit schemes provide for an indigency exception to burdensome monetary permit conditions.

An exception based on ability to pay is also likely required under the New Jersey Constitution’s more protective speech and assembly provisions. As noted by the New Jersey Supreme Court: “[W]e must not forget that our constitutional free speech provision is different from practically all others in the nation....In New Jersey, we have an affirmative right of free speech, and neither the government nor private entities can unreasonably restrict it.” New Jersey Coalition Against the War in the Middle East v. J.M.B. Ralty Corp., 138 N.J. 326, 369 (1994) (emphasis in original). The Court has further noted that, in analyzing restrictions, “[i]t is the extent of the restriction, and the circumstances of the restriction that are critical....” Here the extent of the restriction is absolute, as a poor organization will be foreclosed from engaging in speech activities that require police services, leaving streets, sidewalks, and other historical forums for free speech for use only for the wealthy.

Indeed, the New Jersey Courts have taken great care to ensure that rights are not granted or denied based on relative wealth. See, e.g., Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 67 N.J. 151 (1975) (right to affordable housing); Abbott v. Burke, 119 N.J. 287 (1990) (holding that the state had to correct the disparity of funding for education between poor and wealthy districts that was created by linking school funding to property taxes). The Mount Laurel decision is of special significance here. In that case, the New Jersey Supreme Court held that a municipality's regulatory powers could not be implemented in such a way as to exclude poor persons from its benefits. Rather, the Court explained, the municipality must act in such a way as to ensure the rights, needs, and desires of all categories of people regardless of their economic status. Id. at 179. The remedy imposed was that the municipality has to make special provisions to meet the needs of low income citizens. Following this example, Newark should ensure that its low income citizens are able to engage in free speech activities.

In the ordinance, Newark has tried to address that concern, but has not adequately done so. Section 5:10-7 provides that the City can absorb some of the projected costs; however, it seems that the applicant will still be responsible "for a minimum of twenty percent" of the projected costs which, in and of itself, is cost-prohibitive for many.

Further, the City will only defray the costs of organizations that are "recognized by the Internal Revenue Service as a 501 (c) entity." Thus, private citizens and non-incorporated grass-roots organizations (such as the People's Organization for Progress) will not be eligible for cost-reduction. As such, they will effectively be foreclosed from conducting the free speech activities that they have engaged in for years – and which they have a constitutional right to engage in in the future.

The City should amend the ordinance to provide that *no* free speech activity is subject to the cost-recovery provisions.

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Given the clarity of the law in this area, it is my hope that our concerns can be resolved without the need for litigation. I request that you let me know by July 24, 2008, whether you will be willing to meet with us and, ultimately, whether the City will agree to amend the ordinance so as to bring it into constitutional compliance.

Thank you for your time and anticipated cooperation. Please feel free to contact me with any questions. Mr. Zurofsky and I look forward to hearing from you.

Sincerely,



Ed Barocas  
Legal Director

C: Bennet Zurofsky, Esq. (via email)  
Diego Navas, Esq. (via email)