

APPENDIX A, EIGHTH CIRCUIT OPINION

United States Court of Appeals
For the Eighth Circuit

No. 16-3377

Josephine Havlak Photographer, Inc., and
Josephine Havlak individually

Plaintiffs – Appellants,

v.

Village of Twin Oaks, and
Kathy Runge Clerk/Controller,
in her official capacity only,

Defendants – Appellees.

July 26, 2017

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Before Smith, Chief Judge, Arnold and Shepherd,
Circuit Judges

SMITH, Chief Judge

The Village of Twin Oaks (“The Village”) passed a municipal ordinance prohibiting all commercial activity in its neighborhood park without a permit. A commercial photographer, Josephine Havlak, sued the Village for injunctive and declaratory relief on behalf of herself and her business, Josephine Havlak Photographer, Inc. Havlak alleged that the ordinance violates her Free Speech rights guaranteed by the First Amendment of the United States Constitution. The district court¹ denied her claims, and we affirm.

I. Background

The Village is a community of approximately 400 residents in Saint Louis County, Missouri. It has a five-member Board of Trustees (“the Board”), which administers the legislative and policymaking functions of the community. Too small to operate its own police department, the Village contracts with Saint Louis County (“County”) to provide police services. The County regularly assigns Officer Mike Maxwell to the Village for 40 hours per week. Officer Maxwell responds to calls, writes speeding tickets, and provides other municipal policing services. When it needs additional police support, the Village contracts directly with Officer Maxwell and other officers at an hourly rate.

In 1994, the Village dedicated an 11-acre public park in the middle of the community; the park includes a walking trail, lake, waterfall, gazebo, bridge, playground, and sporting amenities. To

¹ The Honorable Audrey G. Fleissig, United States District Judge for the Eastern District of Missouri.

protect this new resource, the Board enacted a comprehensive ordinance prohibiting, among other things, motorized vehicles, hunting, all commercial activity, and the obstruction of walkways. In 2011, the Village upgraded the park's playground equipment, and the park experienced a dramatic increase in visitors—including a large number of commercial photographers. Because of the gazebo, waterfall, bridge, and other garden structures, one photographer referred to the park as presenting “a lot of good photo opportunities in a small area.”

Commercial photographers (as many as eight at a time) and their subjects began competing for shooting locations within the park. Wedding parties would congregate for photos on the park bridge. Photo subjects would occupy the park restroom facilities, using them as dressing rooms. Some photographers would even set up outdoor studios in the park for shooting multiple subjects in an assembly-line fashion. In reaction to this increased traffic and in response to the Village residents' complaints, the Board erected signs notifying photographers of the longstanding ordinance prohibiting commercial activity within the park. Havlak filed this lawsuit to enjoin enforcement of the ordinance and to declare the ordinance a violation of her right of free speech.

Havlak is a professional photographer based in Saint Louis, Missouri. She describes her work as conveying an expressive message in a manner similar to the work of American portrait painter John Singer Sargent. Havlak maintains the copyright to all her photographs and licenses them to

her clients for personal use only. Every year, she photographs hundreds of senior class portraits and more than a dozen weddings. Her photo shoots usually last for less than an hour and feature only a handful of people. Despite knowing about the park for more than ten years, she had never used it for photography before filing this suit. Havlak testified that she had taken photographs in the park on two occasions. Both times, she saw at least three other photographers and their subjects in the park. During one of these shoots, Havlak instructed her client to change clothes in a wooded area and to pose outside the railing on the park bridge; it is undisputed that “a fall from the bridge could cause serious injury.”

In response to this lawsuit, the Board amended its park ordinance to create a permit process for the commercial use of park facilities (Ordinance § 220.020).² The permit process requires

² The relevant portion of the ordinance follows, as codified at the time of the injunction hearing:

Regulation of Solicitations and Commercial Activities.

- P. *Regulation of Solicitations and Commercial Activities.* Solicitation of any business or service is prohibited. No person, firm, or corporation is permitted to offer or advertise merchandise or other goods for sale or hire. Excepting Village-sponsored events and activities, the maintaining of a concession or the use of any park facility, building, trail, road, bridge, bench, table or other park property for commercial purposes is prohibited unless a permit is issued by the Board of Trustees of its designated representative(s). Such permit shall be clearly displayed by the person(s) seeking to conduct commercial activities within the park. The permitting process will help to ensure that the Village is aware of the activity taking place within the park, that

the proposed date/time/location does not conflict with scheduled activities/events/operations, and that no harm is done to the landscape of the park. In its review of the permit request, the Board of Trustees or its designated representative(s) should consider.

1. The risk of damage and injury as set forth in Sections 220.020(B)-(E);
2. The disruption of or conflict with the public's use and enjoyment of the park;
3. Whether the issuance of such permit may result in crowded or congested conditions due to the anticipated number of attendees for a planned event.
4. The nature of the requested activity, including whether such activity involves:
 - a. The sale of products or items, which is prohibited unless it is a First Amendment protected activity;
 - b. The use of furniture, tents (as that term is defined in Section 220.040(D)) or large "prop" amenities, which is prohibited; or
 - c. The use of models or equipment.
5. The time and duration requested for such commercial purposes, including:
 - a. Whether the activity will exceed one (1) hour;
 - b. Whether the number of people involved exceeds two (10); or
 - c. Whether the time requested conflicts with a period of peak visitation to the park or other scheduled events, activities, or operations.

Any permit request involving less than ten (10) people, lasting for less than one (1) hour, and complying with the above, will be granted by the Village Clerk/Controller or a designee. All

the Board to consider the risk of damage to the park, any disruptive effects on typical park use, the potential congestion caused by the activity, and the nature of the activity itself. The ordinance allows for automatic approval of events lasting less than one hour, having fewer than ten people, and with 48 hours' advance notice. The permit fee is \$100. As far as the record discloses, the Village has approved all permit applications.³

Two Board members, Lisa Eisenhauer and Chairman Ray Slama, testified at the injunction hearing regarding the legislative intent behind the permit process. In Eisenhauer's words,

We do enjoy the photographers coming to see the park and taking pictures and using the park, but we had to balance the interest of the other park users and that's why we went to the permitting process so that the photographer receives the exclusive use of

permit requests must be submitted at least forty-eight (48) hours before the proposed activities. Any permit request involving more than ten (10) people, lasting more than one (1) hour, or otherwise conflicting with any of the above factors must be submitted at least fourteen (14) days in advance of the proposed activities so that the Board of Trustees may review the request and the permitted authority may be limited to certain designated areas. Each permit issued by the Village shall only be effective on the date and time specified on the permit. Specific permit fees shall be set by the Board of Trustees from time to time and shall be posted on the Village's website.

Village of Twin Oaks, Mo., Rev. Ordinances ch. 220, § 220.020(P) (2016) (alteration in original).

³ Havlak amended her complaint in response to the Village's updated permit process.

certain areas in which they wish to do their shoot so that they can perform their shoot efficiently.

The permit fee pays for a police officer to manage the commercial event, ensure exclusive use of certain park areas, protect against interference with other park users, and ensure that park rules are followed. Chairman Slama testified: “We have found that our commercial photographers generally have issues obeying those rules.” He emphasized that the Board endeavored to draw the restrictions as narrowly as possible with the express intention to “allow [] the commercial photographer[s] to come in and take their shoot.” Both Board members testified to a direct correlation between the permit fee and the administration of the permit, specifically noting the cost that the Village incurs for the additional police support. Per Eisenhower: “We ask for a permit because if we don't have a way to regulate not having five or six wedding groups down there at the same time, then we have congestion in our park which we have found to cause problems.” Havlak has never applied for a commercial permit.

The district court denied Havlak's request for injunctive relief and entered a declaratory judgment in favor of the Village.

II. *Discussion*

A. *Facial vs. As-Applied Challenge*

Havlak challenges the Village ordinance as overly broad both facially and as applied to her. “Ordinarily, a party may not facially challenge a law on the ground that it would be unconstitutional if

applied to someone else.” *SOB, Inc. v. Cty. of Benton*, 317 F.3d 856, 864 (8th Cir. 2003). The First Amendment overbreadth doctrine, however, provides an avenue “whereby a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). “[T]he facial overbreadth doctrine ‘is a departure from traditional rules of standing,’ such that a party whose own expressive conduct may be unprotected is allowed to assert the First Amendment rights of others not before the court....” *Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004) (citation omitted) (quoting *Alexander v. United States*, 509 U.S. 544, 555, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993)).

For a federal court to entertain a facial challenge pursuant to the First Amendment overbreadth doctrine, “[t]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the [c]ourt.” *Jacobsen v. Howard*, 109 F.3d 1268, 1274 (8th Cir. 1997) (quoting *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987)). “ ‘To be facially invalidated under this doctrine, the overbreadth of an ordinance affecting both conduct and pure speech must be both “real” and “substantial” in relation to its “plainly legitimate sweep.” ’ ” *Minn. Majority v. Mansky*, 708 F.3d 1051,

1056 (8th Cir. 2013) (quoting *Excalibur Grp., Inc. v. City of Minneapolis*, 116 F.3d 1216, 1224 (8th Cir. 1997)). “ ‘Facial challenges are disfavored’ because they ‘often rest on speculation ... [and] raise the risk of premature interpretation of statutes on the basis of factually barebones records.’ ” *Phelps–Roper v. City of Manchester*, 697 F.3d 678, 685 (8th Cir. 2012) (alteration in original) (internal quotation marks omitted) (quoting *Wash. State Grange*, 552 U.S. at 450, 128 S.Ct. 1184).

Havlak bears the burden to demonstrate that she has standing to bring a facial overbreadth claim. *See Klobuchar*, 381 F.3d at 791. For such challenges, “the party before the court must identify a significant difference between his claim that the statute is [facially] invalid on overbreadth grounds, and his claim that it is unconstitutional as applied to his particular activity.” *Van Bergen v. Minn.*, 59 F.3d 1541, 1549 (8th Cir. 1995). “We generally do not apply the ‘strong medicine’ of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law.” *Wash. State Grange*, 552 U.S. at 449 n.6, 128 S.Ct. 1184 (internal quotation marks omitted) (quoting *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)). It is inappropriate to entertain a facial overbreadth challenge when the plaintiff fails to adduce any evidence that third parties will be affected in any manner differently from herself. *See Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 802, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984); *see also Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 584–85, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (dismissing a

facial overbreadth challenge for failure to meet burden relating to other parties); *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1157 (8th Cir. 2014) (“[T]he fact one can conceive of an impermissible application of a statute is not sufficient to render it susceptible to an overbreadth challenge.”). Havlak presents no allegedly unconstitutional scenarios affected by the Village ordinance beyond her own commercial photography, so we will limit our analysis to the ordinance's application to Havlak.

B. *Time, Place, and Manner Regulation*

We review the district court's denial of injunctive relief for an abuse of discretion, and we will reverse only if the district court made “clearly erroneous factual findings or erroneous legal conclusions.” *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge*, 775 F.3d 969, 974 (8th Cir. 2014) (quoting *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012)). In First Amendment cases, we review the constitutional claims de novo, see *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1098 (8th Cir. 2013), and we independently examine the record to ensure that there is no “forbidden intrusion on the field of free expression,” *Families Achieving Indep. & Respect v. Neb. Dep't of Soc. Servs.*, 111 F.3d 1408, 1411 (8th Cir. 1997) (en banc) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

As incorporated through the Fourteenth Amendment, see *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 789 (8th Cir.

2015), the First Amendment's prohibition against “abridging the freedom of speech,” U.S. Const. amend. I, applies to ordinances enacted by the Village. Nevertheless, the Village may “regulate competing uses” of a traditional public forum, like a park, by “impos[ing] a permit requirement.” *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *see also* *Packingham v. North Carolina*, — U.S. —, 137 S.Ct. 1730, 1735, 198 L.Ed.2d 273 (2017) (“A basic rule ... is that a street or a park is a quintessential forum for the exercise of First Amendment rights.”). Although we apply a “heavy presumption” against the validity of ordinances that create prior restraints on speech, we will uphold such ordinances if they meet the constitutional standards for time, place, and manner regulations. *See Forsyth Cty.*, 505 U.S. at 130, 112 S.Ct. 2395 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)).

“[A]ny 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.” *Id.* Additionally, “[s]uch regulations ... must not ‘delegate overly broad licensing discretion to a government official,’ and contain narrow, objective, and definite standards to guide licensing authorities.” *Douglas v. Brownell*, 88 F.3d 1511, 1521 (8th Cir. 1996) (quoting *Forsyth Cty.*, 505

U.S. at 130, 112 S.Ct. 2395). We will analyze the ordinance by these elements.⁴

1. *Content Neutrality*

“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, — U.S. —, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). “[C]ourts will apply a strict scrutiny analysis when the regulation discriminates on the basis of content, and a more lenient analysis to content-neutral regulations.” *Bery v. City of N.Y.*, 97 F.3d 689, 696 (2d Cir. 1996). “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 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it

⁴ Like the district court, we assume without deciding that Havlak's photography constitutes expressive conduct entitled to First Amendment protections. See *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 195 F.Supp.3d 1065, 1075 (E.D. Mo. 2016). Because Havlak's constitutional claim fails under the “most exacting test” of First Amendment expression, we need not decide whether her photography qualifies as expressive conduct or analyze the ordinance under the rubric of commercial speech. See *Kaahumanu v. Hawaii*, 682 F.3d 789, 800 (9th Cir. 2012); see also *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (“[T]he outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”).

has an incidental effect on some speakers or messages but not others.” *Id.*

Havlak argues that two recent Supreme Court cases—*Reed*, 135 S.Ct. 2218, and *Sorrell*, 564 U.S. 552, 131 S.Ct. 2653—“have moved the goalposts for legislators seeking to regulate speech based on the identity of the speaker and the type of message.” She argues that the Village ordinance was intentionally created to burden the speech rights of commercial photographers. *See Reed*, 135 S.Ct. at 2230 (“Because ‘[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,’ we have insisted that ‘laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.’” (first quoting *Citizens United v. FEC*, 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); then quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994))). This legislative intent, she argues, requires us to apply strict scrutiny instead of the intermediate scrutiny traditionally applied to content-neutral “time, place, and manner” restrictions of a traditional public forum.

Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny. *Id.* at 2228. In this case, the Village ordinance is facially content neutral and no evidence shows a content-based purpose or justification.

Ordinance § 220.020 is facially neutral, unlike the restrictions in both *Reed* and *Sorrell* which directly burdened speech content. *See, e.g., Reed*, 135 S.Ct. at 2227 (“The Town’s Sign Code is content based on its face.”); *Sorrell*, 564 U.S. at 564, 131 S.Ct. 2653 (“The law on its face burdens disfavored speech by disfavored speakers.”). The Village’s ordinance does not reference any specific commercial enterprise or any specific message. It applies equally, for example, to commercial photographers and to hot dog vendors. The “commonsense meaning of the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.” *Reed*, 135 S.Ct. at 2227 (quoting *Sorrell*, 564 U.S. at 565–66, 131 S.Ct. 2653). Lacking any reference to any specific message or messenger, the ordinance facially avoids Havlak’s content-based characterization.

The record also shows the lack of a content-based purpose behind Ordinance § 220.020. “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of *disagreement* with the message it conveys.” *Ward*, 491 U.S. at 791, 109 S.Ct. 2746 (emphasis added). Since the park’s dedication in 1994, the Village has banned all commercial activity in the park. The Village updated its ordinance in 2015 to allow permitting for commercial activity. In large measure, the Board enacted the permit process not to further restrict speech but to allow a lawful avenue for expression. The Board members testified of “enjoying” the photographers and wanting to give

them “the benefit” of park resources. The evidence shows that the regulatory intent was not to burden a message but to allocate resources and address legitimate concerns for safety. *See, e.g., United States v. Nenninger*, 351 F.3d 340, 345–46 (8th Cir. 2003).

Havlak argues that because this ordinance burdens commercial photographers and not non-commercial ones, the Village burdens her message of “family, peace, tranquility and love.” There is no evidence that the Village shows antipathy for these values, and the ordinance does not restrict either commercial or non-commercial photographers from expressing these ideals. “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791, 109 S.Ct. 2746; *cf. Kaahumanu*, 682 F.3d at 810–11 (denying an equal-protection claim against an ordinance that burdened commercial weddings but not non-commercial ones). “Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.” *Reed*, 135 S.Ct. at 2230–31. When a facially-neutral restriction is not based on “disagreement with the message” and is “justified without reference to the content of the regulated speech,” we will apply intermediate scrutiny. *Cf. id.* at 2227 (internal quotation marks omitted) (quoting *Ward*, 491 U.S. at 791, 109 S.Ct. 2746).

We find the Village ordinance content neutral because it does not facially discriminate on the basis of content and the record does not indicate any

governmental purpose to burden any particular message. *See Recycle for Change v. City of Oakland*, 856 F.3d 666, 674 (9th Cir. 2017) (“Because the Ordinance does not, by its terms, discriminate on the basis of content, and there is no evidence that Oakland enacted the Ordinance with an intent to burden RFC’s message of charitable solicitation or out of any disagreement with that message, the Ordinance is content neutral.”); *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 306 (7th Cir. 2017), *cert. denied sub nom. Patriotic Veterans, Inc. v. Hill*, No. 16-1198, — U.S. —, 137 S.Ct. 2321, — L.Ed.2d —, 2017 WL 2722437 (U.S. June 26, 2017) (“Because Indiana does not discriminate by content—the statute determines who may be called, not what message may be conveyed—these decisions have not been called into question by *Reed*.”).

2. *Narrow Tailoring*

Havlak concedes that the ordinance was adopted to serve the significant government interests of reducing congestion and maintaining park safety. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (“As a general matter, it is clear that a State’s interest in protecting the ‘safety and convenience’ of persons using a public forum is a valid governmental objective.”). Under the test for time, place, and manner restrictions, the question remains whether the ordinance is narrowly tailored to meet those interests. “[T]he requirement of narrow tailoring is satisfied ‘so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’ ”

Ward, 491 U.S. at 799, 109 S.Ct. 2746 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). “[T]he government's choice among the means to accomplish its end is entitled to deference.” *Ass'n of Cmty. Orgs. for Reform Now v. St. Louis Cty.*, 930 F.2d 591, 595 (8th Cir. 1991). Acceptable legislative purposes for permits include “to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event.” *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002).

First, Havlak contends that the ordinance's application to groups of all sizes renders it overly broad. Because groups smaller than ten do not pose the same hazards to the use and safety of the park that larger groups would, she argues that requiring a permit for these smaller groups shows a lack of narrow tailoring. She relies on *Douglas*, 88 F.3d at 1524, in which we suggested that a permit requirement for parades containing ten or fewer people might not be narrowly tailored. *See also Am.–Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (“The Ordinance is overly broad because under the Ordinance as written, any procession of people with a common purpose or goal, whether it be a small group of protestors or a group of senior citizens walking together to religious services, are conceivably required to obtain a permit....”). Unlike *Douglas*, in which the permit process quelled potential

spontaneous speech by an unlimited number of different small groups, Ordinance § 202.020 applies specifically to commercial activity and is distinguishable because it does not prevent small-scale expressive activity unrelated to commercial enterprises. The Ninth Circuit rejected a similar argument in *Kaahumanu*, in which plaintiffs argued that a permit requirement for commercial weddings “as small as three individuals” on public beaches was not narrowly tailored. 682 F.3d at 804. Even though Hawaii contains more than 200 public beaches for this activity, the court upheld the permit requirement because it was reasonably “designed to minimize conflicting uses of limited beach area and to conserve the physical resource of the beaches.” *Id.* at 803. The same reasoning applies here.

Havlak also points to *Thomas*, but she argues that the Supreme Court allowed the permit requirement there because the pertinent regulation applied only to groups of 50 or more. 534 U.S. at 322, 122 S.Ct. 775. In *Thomas*, however, the Court did not suggest that requiring a permit for fewer than 50 people would be unconstitutional, but it rather suggested that permit ordinances should be fashioned for the efficient use of park resources. *See id.* (“[T]o allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech.” (quoting *Thomas v. Chi. Park Dist.*, 227 F.3d 921, 924 (7th Cir. 2000))). Havlak ignores the problem of the aggregation of small-group commercial activity within the Village park. The record reveals an occasion when as many as eight small groups of commercial photographers and their clients simultaneously attempted to use the park's

amenities. Havlak testified that on both occasions in which she attempted to photograph subjects in the park there were no less than three other groups shooting photography, too. Given the high demand, the history of congestion, and the limited facilities of the park, the ordinance's lack of a permit exception for groups smaller than ten people does not create a constitutional infirmity.

Second, Havlak argues that the ordinance is overly broad because the permit is not restricted to certain congestion points known to attract commercial photographers, but rather covers the entire 11-acre park. This argument ignores the fact that the ordinance is designed to regulate all commercial activity—from commercial yoga classes to basketball tournaments—not all of which would attempt to use the same small areas preferred by commercial photographers. The permit allows the Village to globally promote maximum use of park resources and protect against damage to all park facilities, not just those most used by photographers. *See Kaahumanu*, 682 F.3d at 803.

Third, Havlak argues that the two-day application period (for events of fewer than ten people) and the 14-day period (for larger groups) are not narrowly tailored because they serve to chill artistic expression. *See, e.g., Church of the Am. Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 682–83 (7th Cir. 2003) (rejecting 45-day advance permit notifications); *Douglas*, 88 F.3d at 1524 (“The five-day notice requirement restricts a substantial amount of speech that does not interfere with the city's asserted goals of protecting pedestrian

and vehicle traffic, and minimizing inconvenience to the public.”). The cases presented by Havlak, however, deal exclusively with ordinances that inhibit spontaneous speech. Much like weddings, *see Kaahumanu*, 682 F.3d at 805, commercial photography shoots are rarely spontaneous. Havlak testified that she discusses potential locations with clients before shooting. For wedding photography, these discussions happen up to a year in advance. Havlak contends that unpredictable light and weather conditions require spontaneity. Much like commercial weddings, however, commercial photography only requires spontaneity if unfavorable weather conditions arise. Planning for the event itself is rarely spontaneous. As applied to her, these time periods sufficiently enable Havlak to reasonably obtain permits for her commercial shoots.

Additionally, Board members testified that the two-day period was designed to give their clerk (one of two full-time Village employees) the time required to process permit applications. The 14-day period enables the Board itself to review permits for larger commercial events, because the Board “meets the first and third Wednesday[s] of each month.” These time periods fall squarely in line with the processing times of similar constitutional permit ordinances. *See, e.g., Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1045 (9th Cir. 2006) (“The two-day period ... accords with Santa Monica's significant governmental interests by ... providing a coordinated process for managing community events in heavily burdened and limited public space...”); *Thomas*, 534 U.S. at 324, 122 S.Ct. 775 (approving a permit application process for large groups of 28

days). We conclude that the permit processing times included in the ordinance are narrowly tailored to the significant interests of the Village's efficient administration of its governmental duties.

Fourth, Havlak contends that the ordinance is not narrowly tailored because the administrative fee is too high. It is well established, however, that “fees that cover only the administrative costs of the license are permissible.” *Jacobsen v. Crivaro*, 851 F.2d 1067, 1071 (8th Cir. 1988). Havlak argues that the \$100 fee is excessive considering the cost that the Village incurs to administer the permit process. Yet, Board members testified that there was a “direct correlation” between the fee and the cost that the Village incurs, and the record supports this assertion. Board members testified that any commercial activity would require a police officer for at least two hours. By contract, the Village is charged \$38.70 per hour for officer patrols, and this does not include the additional fees that the Village must pay for patrol-vehicle maintenance and mileage. The record demonstrates an overall cost of employing an officer for two hours amounts to more than \$93. Moreover, this number does not include the administrative costs for the Village clerk to handle the permit process. *See Kaahumanu*, 682 F.3d at 794, 809 (approving a \$20 application fee, plus a \$0.10 fee per square foot, and an insurance requirement of approximately \$250 per year). We hold that the fee amount is narrowly tailored to the actual costs that the Village incurs.

The Village may not broadly prohibit free expression when satisfactory alternatives exist. *See*

Ass'n of Cmty. Orgs. for Reform Now v. City of Frontenac, 714 F.2d 813, 819 (8th Cir. 1983). But, the Village ordinance “need not be the least restrictive or least intrusive means” of regulating public space. *Ward*, 491 U.S. at 798, 109 S.Ct. 2746. “So long as the means chosen are not substantially broader than necessary to achieve the government's interest ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.” *Id.* at 800, 109 S.Ct. 2746. As applied to Havlak, we find the ordinance meets the narrowly-tailored requirement.⁵

3. *Ample Alternatives*

Havlak also argues that the “unique” nature of the park makes it a one-of-a-kind place, which no alternative could replace—and thus, the Village cannot demonstrate that sufficient alternatives exist. *Cf. Galvin v. Hay*, 374 F.3d 739, 756 (9th Cir. 2004) (“[T]he question must be whether the regulation prevents the speakers from expressing their views, where that expression depends in whole or part on the chosen location.”). The record demonstrates, however, that the natural attributes of the park exist in multiple locations across the Saint Louis area. In fact, although Havlak does hundreds of photo shoots per year, she had not used the Village park until learning about the ordinance; and since that time,

⁵ Havlak also argues that the ordinance is overly broad because it targets only commercial photographers instead of unpaid photographers, but this is simply a reiteration of her claim that the ordinance is content based, and it fails for the same reasons as her content-discrimination argument.

she testified to using it only twice. She frequently uses other city locations to voice the same messages she seeks to express at the Village park. “[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Heffron*, 452 U.S. at 647, 101 S.Ct. 2559; *see also Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 101 (2d Cir. 2006) (“The requirement that ‘ample alternative channels’ exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand; indeed, were we to interpret the requirement in this way, no alternative channels could ever be deemed ‘ample.’”). The First Amendment does not require that artists get unrestricted access to “an ideal venue,” but rather that “alternative avenues” of communicating their message are available. *Mastrovincenzo*, 435 F.3d at 102. The record demonstrates that Havlak has ample alternative channels for communicating her message.⁶

4. *Licensing Discretion*

“[A] city may enact licensing procedures for conduct commonly associated with expression, so long as the city ‘establish[es] neutral criteria to [e]nsure that the licensing decision is not based on

⁶At the heart of Havlak’s argument that alternative options do not exist is the fear that this ordinance establishes incentives for “every small town to create identical permit schemes.” We do not address this situation because it is not before us. *Cf. Thomas*, 534 U.S. at 325, 122 S.Ct. 775 (“[T]his abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements.”).

the content or viewpoint of the speech being considered.’ ” *Crivaro*, 851 F.2d at 1070 (second alteration in original) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)). “A government regulation that allows arbitrary application is ‘inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.’ ” *Forsyth Cty.*, 505 U.S. at 130, 112 S.Ct. 2395 (quoting *Heffron*, 452 U.S. at 649, 101 S.Ct. 2559). “ ‘[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.’ ” *Id.* at 131, 112 S.Ct. 2395 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)).

Havlak argues that the ordinance is “impermissibly vague” and provides unbridled discretion to the Village to approve or deny permits. The ordinance, however, provides “articulated standards” and “objective factors” that the clerk and the Board are to consider when granting permits. *See id.* at 133, 112 S.Ct. 2395. The ordinance requires the Village licensing officials to look at the nature of the activity, potential conflicts with other scheduled events, the number of participants, and other factors relevant to resource allocation. *See Thomas*, 534 U.S. at 323, 122 S.Ct. 775 (approving a “time, place, and manner regulation contain[ing] adequate standards to guide the official's decision”). None of the factors listed in the ordinance deal with the content of

speech, and Board members testified that they have never denied a permit application.

The plain language of the ordinance guarantees permit approval for events consisting of less than ten people, for less than an hour, and submitted 48 hours in advance. For larger events, the Board may look only at legitimate factors relating to park use and safety when analyzing a permit application. “While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Ward*, 491 U.S. at 794, 109 S.Ct. 2746; *see also Thomas*, 534 U.S. at 324, 122 S.Ct. 775 (noting “the Park District may deny a permit only for one or more of the reasons set forth in the ordinance”). Thus, we conclude the ordinance does not grant unbridled discretion to the Village, and its licensing factors survive constitutional scrutiny.

Because the Village ordinance is content neutral, has been narrowly tailored to serve the Village's significant governmental interests, leaves ample alternatives for Havlak to communicate her message, and does not provide the Village with unbridled discretion, we find the permit process survives Havlak's challenge. *See Forsyth Cty.*, 505 U.S. at 130, 112 S.Ct. 2395.

III. *Conclusion*

We conclude that the Village ordinance meets constitutional scrutiny as-applied to Havlak. We, therefore, affirm the judgment of the district court.

APPENDIX B, DENIAL OF REHEARING

United States Court of Appeals
For the Eighth Circuit

No. 16-3377

Josephine Havlak Photographer, Inc., and
Josephine Havlak individually

Plaintiffs – Appellants,

v.

Village of Twin Oaks, and
Kathy Runge Clerk/Controller,
in her official capacity only,

Defendants – Appellees.

July 26, 2017

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

The petition for rehearing en banc is denied.
The petition for rehearing by the panel is also
denied. Judge Gruender did not participate in the
consideration or decision of this matter.

August 29, 2017

APPENDIX C, DISTRICT COURT OPINION

United States District Court
Eastern District of Missouri
Eastern Division

No. 4:15-CV-00518 AGF

Josephine Havlak Photographer, Inc., and
Josephine Havlak individually,

Plaintiffs,

v.

Village of Twin Oaks, and
Kathy Runge Clerk/Controller,
in her official capacity only,

Defendants.

July 26, 2017

[Audrey G. Fleissig](#), United States District Judge

MEMORANDUM OPINION

This action for declarative and injunctive relief is before the Court for a decision on the merits, following an evidentiary hearing held on April 27, 2016.

Plaintiffs Josephine Havlak Photographer, Inc., and Josephine Havlak seek (1) declaratory judgment that a municipal ordinance of the Village of Twin Oaks regulating commercial activity within Twin Oaks Park is an unconstitutional prior restraint on their engagement in commercial photography, which they maintain is protected First Amendment activity, and (2) permanent injunctive relief against Defendants' enforcement of the ordinance.¹ Defendants are the Village of Twin Oaks ("Village"), Village Clerk/Controller Kathy Runge, and St. Louis County Police Chief Jon Belmar. For the reasons set forth below, the Court concludes that even if the commercial photography at issue is expressive speech covered by the First Amendment, the ordinance in question passes constitutional scrutiny.

BACKGROUND

Josephine Havlak Photographer, Inc., is a corporation offering commercial photography services, focusing on wedding and portrait photography. Josephine Havlak, a professional photographer who takes all the photographs on

¹ The Court previously dismissed the claims of Plaintiffs William Joseph Hill and Mary Katherine Hill for lack of standing.

behalf of Havlak Photographer, Inc., is the sole corporate officer and director of the company.

Plaintiffs believe that Twin Oaks Park is an excellent place to take photos of their clients, such as wedding groups and high school seniors. The Park is approximately 11 acres in total, including a lake, a playground, a basketball court, and a wooded area. The area that commercial photographers, such as Plaintiffs, tend to use for their work is a small area in which there is a waterfall and a small picturesque wood bridge spanning a creek. This area is also the most popular area for other patrons of the Park.

Plaintiffs initiated this lawsuit in February 2015. At the time, the Village had an ordinance that prohibited use of the Park for commercial purposes, and posted two signs in the Park that stated, “No commercial activity, including commercial photographers.” On June 17, 2015, the Village passed Ordinance No. 459, which superseded the previous ordinance and provides, in relevant part, as follows:

Regulation of Solicitations and Commercial Activities. Solicitation of any business or service is prohibited. No person, firm, or corporation is permitted to offer or advertise merchandise or other goods for sale or hire. Excepting Village-sponsored events and activities, the maintaining of a concession or the use of any park facility, building, trail, road, bridge, bench, table or other park property for commercial purposes is prohibited unless a permit is issued by the Board of Trustees or their designated representative(s). Such permit shall be clearly displayed by the person(s) seeking to conduct

commercial activities within the park. The permitting process will help to ensure that the Village is aware of the activity taking place within the park, that the proposed date/time/location does not conflict with the scheduled activities/events/operations, and that no harm is done to the landscape of the park. In its review of the permit request, the Board of Trustees or its designated representative(s) should consider:

1. The risk of damage and injury as set forth in Sections 220.020(B)-(E);
2. The disruption of or conflict with the public's use and enjoyment of the park;
3. Whether the issuance of such permit may result in crowded or congested conditions due to the anticipated number of attendees for a planned event.
4. The nature of the requested activity, including whether such activity involves:
 - a. The sale of products or items, which is prohibited unless it is a First Amendment protected activity;
 - b. The use of furniture, tents (as that term is defined in Section 220.040(D)) or large "prop" amenities, which is prohibited; or
 - c. The use of models or equipment.
5. The time and duration requested for such commercial purposes, including:

- a. Whether the activity will exceed one (1) hour;
- b. Whether the number of people involved exceeds two (10); or
- c. Whether the time requested conflicts with a period of peak visitation to the park or other scheduled events, activities, or operations.

Any permit request involving less than ten (10) people, lasting for less than one (1) hour, and complying with the above, will be granted by the Village Clerk/Controller or a designee. All permit requests must be submitted at least forty-eight (48) hours before the proposed activities. Any permit request involving more than ten (10) people, lasting more than one (1) hour, or otherwise conflicting with any of the above factors must be submitted at least fourteen (14) days in advance of the proposed activities so that the Board of Trustees may review the request and the permitted authority may be limited to certain designated areas. Each permit issued by the Village shall only be effective on the date and time specified on the permit. Specific permit fees shall be set by the Board of Trustees from time to time and shall be posted on the Village's website.

The fee for the permit at issue here was set at \$100. With the passage of this ordinance, Plaintiffs amended their complaint to challenge this version. They claim that it impermissibly restricts their First Amendment freedom of expression and violates their due process rights under the Fifth and Fourteenth Amendments. It is undisputed that taking

commercial photographs in the Park without a permit would violate the ordinance and subject Plaintiffs to penalties of up to \$1,000 in fines or 90 days in county jail pursuant to the Village Code's general penalty provision.

Plaintiffs maintain that the photography at issue is artistic expression of ideas such as love, harmony, and humor, both for commercial purposes and as an expression of Josephine Havlak's individual artistic motivation. Plaintiffs assert that this expressive message is conveyed to an audience, namely the subject/owner and other subsequent viewers of the photographs, which are often posted on social media. They assert that because of the threat of prosecution, they are refraining from engaging in commercial photography in the Park, and that even complying with the application process would chill their First Amendment speech. Plaintiffs maintain that the ordinance is akin to a content-based regulation because it discriminates between commercial photographers and amateur photographers, and does not apply to the Village itself which uses photographs of the Park on its website.

Although Plaintiffs recognize that safety and fair use of the Park for all users are legitimate government interests, Plaintiffs argue that the ordinance's restriction of commercial activity such as commercial photography has no relation to these interests. Plaintiffs assert that non-commercial and commercial photography are equally disruptive to public use of the Park, and that any distinction between the two is meaningless. Thus, according to

Plaintiffs, Defendants have not met their burden to show that the ordinance serves a significant governmental interest because Defendants failed to articulate any harm exclusively caused by commercial activity.

Plaintiff also contend that the criteria for issuing a permit are too vague and render the ordinance unconstitutional. In particular, they point to three criteria the decision maker is to consider: disruption of the public's use and enjoyment of the Park, use of models or equipment, the sale of products or equipment. They further argue that the use-of-models-or-equipment criterion is content based and is not related to a compelling government interest. Plaintiffs argue that the Park is a unique and beautiful space, and that photographic artists have a right to decide the appropriate setting for their expressive works. Thus, in Plaintiffs' view, a different park is not an adequate alternative forum in which to take the desired photographs.

Plaintiffs seek declaratory judgment that the ordinance is unconstitutional, both facially and as applied to them, under the First and Fourteenth Amendments, and seek an order enjoining Defendants from enforcing the ordinance as to Plaintiffs.

Defendants argue that taking photographs for the private use of paying customers is not an activity covered by the First Amendment because the purpose is primarily commercial rather than expressive, and there is no message to a public audience. Assuming *arguendo* that Plaintiffs' activity

at issue is covered by the First Amendment, Defendants assert that the challenged ordinance withstands constitutional scrutiny. First, Defendants argue that Plaintiffs' activity combines both speech and non-speech elements, and is content neutral, and for each of these reasons, is subject to intermediate scrutiny; that is, the ordinance must be upheld so long as it is narrowly tailored to serve a significant government interest and leaves open ample alternatives for communication.

Defendants maintain that the Village has a significant interest in mitigating disruption of Park activities and ensuring the public is able to use the relatively small Park. Defendants reason that the ordinance is narrowly tailored to serve these interests, since the ordinance instructs that when evaluating requests for permits, factors to be considered include disruption of public use of the Park, congestion, and crowd control. Defendants also maintain that Plaintiffs have ample alternative channels for their photographic expression, namely, a significant number of parks located in the greater St. Louis area that provide a similar stage for photographs.

Evidentiary Hearing

Five witnesses testified at the evidentiary hearing: Josephine Havlak; Ray Slama (Chair of the Village's Board of Trustees); Joel Marion and Scott Shy (two other commercial photographers who have used the Park for their photography); and Lisa Eisenhower (a member of the Village's Board of Trustees).

Havlak testified that she has been a commercial portrait, wedding, and events photographer since 1979, and asserts that she is currently one of, if not the, premier such photographer in the area, setting tastes with her photography. She described how she expresses herself through her photography and how the resulting photographs capture not just the likeness of the subjects, but something essential about their lives and who they are as individuals, assuring that they will not be “lost in the heap of history.” Havlak testified that her photographs are works of art in the same way that the portraits of the great American portrait painter, John Singer Sargent, are, and that she uses landscape to help “tell the story” of her subjects. For example, she testified that a recent commercial photograph she took of a high school senior, admitted into evidence as Plaintiff’s Exhibit 10(3), standing on the bridge in the Park hints to the subject’s next stage in life. Two other portraits of the same senior taken during the same shooting were also admitted into evidence. Havlak testified that, like her, Sargent sold each of his portraits to the clients who commissioned him, and only later were the paintings hung in museums.

Havlak testified that since 2011, and particularly since 2014, there has been a movement across the country for governments to place restrictions, such as Ordinance No. 459, on commercial photography in public parks, restrictions she opposes and which she believes are “depriving mothers of their right not to have their child lost in the heap of history.”

She testified that for many years, she used other area parks, such as the Missouri Botanical Garden, with backgrounds for her photographs that were “very similar in many ways” to those at Twin Oaks Park; only very recently did she use Twin Oaks Park for the first time. But if permit schemes like Ordinance No. 459 are allowed, she believes soon other parks would have similar restrictions, leaving commercial photographers with few options for unrestricted exercise of their First Amendment rights. She testified that she had never seen, or even heard of, squabbles between commercial photographers who might be at the same park site at the same time, and that she saw no need for the ordinance.

Haklak testified that having to get a permit in advance of a photo shoot in the Park would make it almost impossible for her to use the Park because sometimes she changes location at the last minute due to weather and lighting. She testified that a wedding party was most commonly comprised of about 15 people, although on occasion, there could be as many as 30 people, and that a shoot never lasted more than one hour. On cross examination, Havlak acknowledged that the high school senior in the photograph on the bridge, noted above, was standing on the outside of the guard rail of the bridge, having climbed over the rail to pose for the picture, at Havlak's direction. The evidence was undisputed that a fall from the bridge could cause serious injury. Havlak also admitted that the subject changed her clothes in the bushes in the Park for the different portraits Havlak took of her that day.

Havlak acknowledged that the Professional Photographers of America, a professional organization of which she was a member, has taken the position that a permitting process for commercial photography in public parks is appropriate.

Slama testified that the purpose of Ordinance No. 459 is to ensure that the Village is aware of activity taking place in the Park, so that proper planning and security can be arranged, and to ensure that no harm is done to the landscape. He explained that people using the Park congregated primarily in the area of the bridge, favored also by commercial photographers. He witnessed up to eight commercial photographers with wedding parties at the same time competing for space in this area, obstructing pathways, "taking over the gazebo," and placing subjects in dangerous places. The perfect example of this last problem was Havlak placing the high school senior on the outside of the bridge's guard rail. Slama testified that he also witnessed the subjects of commercial photographers using the Park's bathroom facilities to change clothes during a shoot, to the point where "they were taking over the restroom facilities," especially before 2014 when the facilities were enlarged. He testified that he received complaints from other park users about congestion in the park due to the presence of commercial photographers and their subjects.

Slama described the decision-making process of the Board of Trustees in adopting Ordinance No. 459. The Board wanted to balance the interests of the commercial photographers and the people wanting their photographs taken in the Park, with the

interests of the other patrons of the Park enjoying it per its intended use. The amount of \$100 for the permit fee was arrived at by canvassing other such ordinances, and in light of the cost of approximately \$100 for having a police officer at the Park for about two to three hours. Slama explained that the Village had an annual contract with St. Louis County to pay for one county police officer to work for the Village 40 hours a week, Monday through Friday. It is the Village's policy when a commercial activity permit is granted, to have the officer at the Park for the time in question; if the activity was scheduled for a Saturday or Sunday, which was often the case with commercial photographers, the Village would pay the officer separately at \$35 per hour (or if he were not available, would hire a different officer). The Board did not discuss the impact the fee would have on individual photographers. The Board did consider not requiring a permit for smaller groups of three to four people, but realized that multiple smaller groups would pose similar problems as one large group.

Slama testified that the Board directed the Village Clerk to grant permits meeting the conditions in the ordinance, and explained that the 14-day advance notice requirement was to allow the Board, which met every other Monday or Wednesday, to review an application, when necessary, under the ordinance.

Marion, a professional photographer since 1971, testified that in the past, he used Twin Oaks Park three or four times a week in seasonal times, but now the \$100 fee per session was prohibitive for him and his customers, and so he goes to other parks

for his outdoor shoots. Marion's testimony comported with Havlak's with respect to the need for spontaneity due to weather, and with respect to never having experienced squabbles with other photographers or users of a park. Like Havlak, Marion believed his photography was a form of artistic expression. He believed that a policy requiring a permit at a yearly fee, for use of the park anytime, would have the advantage of keeping nonprofessional photographers out. Marion did not understand how there was a correlation between the \$100 fee and any cost to the Village due to a commercial photographer using the Park.

Contrary to Havlak's and Marion's testimony, Shy, also a commercial photographer, testified that he experienced conflicts between commercial photographers and the general public in the Park, and described one occasion when over six photographers and their subjects were in the area near the bridge and "took over." He also realized he was in the way of "the foot traffic" in the Park during his photography sessions, noting that professional photographers tend to get very focused on their work when they are attempting to capture the proper shots. Shy believed that Ordinance No. 459 was a fair way to deal with the competing interests, and that the \$100 fee may be fair, although it deters him from using the Park. Like Havlak and Marion, Shy considered himself a creative artist insofar as his photography was concerned.

Eisenhauer testified that as the mother of three young children, she frequently went to the Park and, especially on weekends, regularly

encountered three or four commercial photographers and their groups of subjects, whose presence made it difficult, for example, to walk a lap around the lake because they would be in the way. She stated that Park users would not want to bring their bikes to the Park because they could not get through on the paths, due to professional photographers setting up equipment and taking photographs of a group. Eisenhower testified that going into a professional photographer's space was inhibiting, and that the issues posed by other walkers or amateur photographers were different because they were easy to maneuver around or might break for you.

Eisenhauer recounted an instance when she was in the Park in the fall of 2013 at a family gathering that was disturbed by a commercial photographer who set up bales of hay nearby as props and took photographs of one family after another for several hours. She testified that like Slama, she saw the subjects of professional photographers using the Park's bathroom facilities for changing clothes. She confirmed that she had seen commercial photographers using large circular reflectors, as depicted in Defendants' Exhibit D.

Eisenhauer then described the process leading to the passage of Ordinance No. 459 and its precursor. In the summer of 2013, when the ban on commercial activity was in place, a commercial photographer (purportedly representing himself and Marion) approached the Board of Trustees and suggested a permitting process rather than a ban, believing such a process would limit amateur photographers whom he believed were the problem.

At about the same time, the ACLU contacted the Board and expressed concern that the ban, as it affected commercial photographers, might be violative of the First Amendment. Eisenhauer and another member of the Board met with two ACLU representatives at the Park. According to Eisenhower, after the ACLU representatives saw the situation at the Park, the Board received no further communication from the ACLU. The Board began looking at all options for balancing the competing interests at issue, such as a permitting process for commercial photographers only on weekends, or only for larger groups. But none of these options addressed all the problems that arose from commercial photographers attempting to take photographs of people within the small, confined area that conflicted with other Park users. These options also did not address the safety concern evidenced by Havlak having placed a subject on the outside of the railing of the bridge.

Eisenhauer testified that she was involved in the decision to set the fee for a permit at \$100, and that there was a “direct correlation” between this amount and the cost incurred by the Village due to use of the Park by commercial photographers.

Defendants entered into evidence copies of nine ordinances or written policies from municipalities/cities across the county, for use of a public park for wedding and event commercial photography, requiring a permit that ranged in cost from \$35 to \$260, to \$400 for an annual pass; and not mentioning advance notice, or requiring advance notice of 10 business days to 14 days. (Exs. to Doc.

No. 63.) Defendants also admitted into evidence an undated article of the Professional Photographers of America that discusses obtaining a permit for commercial photography on public lands, and advises photographers to check on permit requirements, to pay any applicable fees, and in the case of small parks, to be sure to apply for a permit early to guarantee use of the space.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Is Protected Speech Involved?

The First Amendment, applied to the states through the Fourteenth Amendment, prohibits laws “abridging the freedom of speech.” U.S. Const. amend. I. For purposes of First Amendment coverage, “the Constitution looks beyond written or spoken words as mediums of expression,” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), extending its protection to include, inter alia, “pictures, films, paintings, drawings, and engravings,” *Kaplan v. California*, 413 U.S. 115, 119–20, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973). In *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), the Supreme Court explained as follows:

It goes without saying that artistic expression lies within this First Amendment protection. The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their

expressive character, which falls within a spectrum of protected “speech” extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our “cultural life,” just like our native politics, rests upon the ideal of governmental viewpoint neutrality. *Finley*, 524 U.S. at 602, 118 S.Ct. 2168 (footnote & citations omitted). Moreover, “the degree of First Amendment protection” to which speech is entitled “is not diminished merely because the ... speech is sold rather than given away.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n. 5, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *see also Mastrovincenzo v. City of New York*, 435 F.3d 78, 92 (2d Cir.2006).

To achieve First Amendment protection, a plaintiff must show that he or she possessed: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed. *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338. But, “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ ... would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *Id.* at 569, 115 S.Ct. 2338; *see also Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir.2012) (holding that wedding ceremonies are protected expression under the First Amendment); *White v. City of Sparks*, 500 F.3d 953, 957 (9th Cir.2007) (holding that an artist's sale of his original paintings “which

communicate his vision of the sanctity of nature” constituted protected speech).

“Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

Defendants cite three cases which suggest that taking commissioned photographs intended for private use is not an expressive activity covered by the First Amendment: *Porat v. Lincoln Towers Community Association*, No. 04 Civ. 3199 (LAP), 2005 WL 646093 (S.D.N.Y. Mar. 21, 2005); *Larsen v. Fort Wayne Police Department*, 825 F.Supp.2d 965, 979 (N.D.Ind.2010); and *State v. Chepilko*, 405 N.J.Super. 446, 965 A.2d 190, 199 (2009). *Porat* held that an individual's “purely private recreational, non-communicative photography” of buildings under construction was not protected under the First Amendment because the self-proclaimed “photo hobbyist” did not have a communicative purpose or any intended audience for his photos. 2005 WL 646093, at *4–5. *Larsen* concluded that a father's videotaping of his daughter's school performance for “personal archival purposes” and “family documentation” also did not qualify for First Amendment protection. 825 F.Supp.2d at 980. And *Chepilko* reasoned that the taking of photographs of people walking on the boardwalk and offering the photographs for sale to the subjects was not entitled

to First Amendment protection because the conduct did not serve “predominantly expressive purposes.” 965 A.2d at 202.

Other authority would suggest that Plaintiffs' photographic activity is covered by the First Amendment. *See Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir.1996) (holding that paintings, photographs, prints, and sculptures, are visual forms of art that “always communicate some idea or concept” and are therefore presumptively covered by the First Amendment); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir.2010) (holding at summary judgment stage that tattoos and the process of tattooing are “expressive activity fully protected by the First Amendment”; “tattoos can express a countless variety of messages and serve a wide variety of functions including decorative; religious; ... and as an indication of identity”) (citation omitted).

The Court need not resolve this question, however, because the Court concludes that even if Plaintiffs met their burden of showing that the First Amendment applies to their conduct at issue in this case, Ordinance No. 459 is constitutional.

Constitutionally of Ordinance No. 459

Parks are traditional public forums, historically associated with the free exercise of expressive activities, *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), and Ordinance No. 459 requiring a permit to engage in commercial photography in the Park is a prior restraint on such conduct, carrying a “heavy

presumption” against the Ordinance’s validity, *see Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Nevertheless, the Supreme Court has recognized that “government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to” engage in protected speech in that forum. *Id.* at 130, 112 S.Ct. 2395; *see also Thomas v. Chic. Park Dist.*, 534 U.S. 316, 322, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (“Regulations of the use of a public forum that ensure the safety and convenience of the people are not ‘inconsistent with civil liberties but ... [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.’”) (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049 (1941)).

Such a [permit] scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. 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. *Forsyth Cty., Ga.*, 505 U.S. at 130, 112 S.Ct. 2395; *see also Douglas v. Brownell*, 88 F.3d 1511, 1521 (8th Cir.1996); *Pence v. City of St. Louis, Mo.*, 958 F.Supp.2d 1079, 1083 (E.D.Mo.2013).

“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly

tailored to serve compelling state interests.” *Reed v. Town of Gilbert, Ariz.*, —U.S. —, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). In contrast, content-neutral regulation of speech is subject to a lower, intermediate, standard of scrutiny. Such regulation survives First Amendment scrutiny if it is “‘narrowly tailored to serve a significant governmental interest’” and allows for “‘ample alternative channels for communication.’” *Phelps–Roper v. City of Manchester, Mo.*, 697 F.3d 678, 686 (8th Cir.2012) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed,” or if a law, though content neutral on its face, “cannot be justified without reference to the content of the regulated speech,” or was “adopted by the government because of disagreement with the message the speech conveys.” *Reed*, 135 S.Ct. at 2227. “For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.” *Id.* at 2230.

Here, the Court finds unpersuasive Plaintiffs’ argument that the fact that amateur photography in the Park, and photography by the Village itself in the Park, are not regulated makes Ordinance No. 459 akin to a content-based permit scheme. In treating commercial and amateur photographers differently, the ordinance in no way reflects a “content preference,” and can be justified without reference to

the content of the regulated conduct. Rather, the evidence shows that the different treatment here is based on different levels of interference with use and enjoyment of the Park by all. The evidence shows that commercial photographers' sessions last for longer periods of time, use more large equipment, are more intrusive, and likely involve more subjects in one group, than amateur photographers' photographing conduct. *Cf. id.* at 2230–31 (holding that a town's signage code was content based because it singled out specific subject matter for differential treatment, even if it did not target viewpoints within that subject matter). Thus, the Court applies intermediate scrutiny to Ordinance No. 459.

The Court concludes that the Ordinance is narrowly tailored to serve significant government interests. The requirement that the regulation be narrowly tailored “does not mean that it need be the least restrictive or least intrusive means of” serving a significant government interest; rather, “the requirement of narrow tailoring is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward*, 491 U.S. at 798–99, 109 S.Ct. 2746 (citation omitted); *see also Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1038 (9th Cir.2006).

Given the size and configuration of the area of the Park that Plaintiffs and other commercial photographers wish to use for their photography, the Village has a significant interest in coordinating when and how many commercial photographers use the Park at any given time. The Court credits the

testimony of Slama and Eisenhower that professional photographers and their subjects would often block other Park users from enjoying the bridge and nearby areas of the Park. The task faced by the Village here is much like the task of the Park District in *Thomas*, 534 U.S. 316, 122 S.Ct. 775. In upholding a content-neutral permit scheme requiring individuals to obtain a permit before conducting more-than-50-person events in municipal parks, the Supreme Court wrote:

[T]he object of the permit system ... is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event. *Id.* at 322, 122 S.Ct. 775.

\$100 Fee Requirement

Generally, the government may not tax the exercise of a constitutionally protected right. *Ne. Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir.1997). Nevertheless, “an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest.” *Id.* at 1109–10. Such a fee is not excessive, even if it is more than nominal, where the fee is imposed “to meet the expense incident to the administration of the [statute

requiring a license for engaging in protected activity] and to the maintenance of public order in the matter licensed.” *Cox*, 312 U.S. at 577, 61 S.Ct. 762.

Demonstrating the relationship of the permit fee and its legitimate purpose “does not present a high evidentiary hurdle.” *Parks v. Finan*, No. C2–03–94, 2003 WL 23412981, at *11 (S.D.Ohio June 4, 2003), *aff’d*, 385 F.3d 694 (6th Cir.2004). Here the fee correlates to the expenses incurred for an officer, and Defendants have presented sufficient credible evidence that the amount of the permit fee is reasonably related to the legitimate goal of assuring the safety and enjoyment of the Park by all its users. *See Sullivan v. City of Augusta*, 511 F.3d 16, 35 (1st Cir.2007) (the provision of a city's parade ordinance requiring a permit that cost \$100, plus the costs of traffic control per city collective bargaining agreement and clean-up, was a reasonable time, place and manner restriction); *The Nationalist Movement v. City of York*, 481 F.3d 178, 183 (3d Cir.2007) (holding that a permit fee of \$50 for residents and \$100 for non-residents for conducting an event involving more than 25 people on public land was reasonable). The Court notes that the amount of the fee is not variable, so the danger of discretionary abuse by the permitting authority is absent. *See Sullivan*, 511 F.3d at 35–36; *The Nationalist Movement*, 481 F.3d at 183.

Discretion and Standards

“[E]ven content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing

official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.” *Thomas*, 534 U.S. at 323, 122 S.Ct. 775. Thus a regulation must “contain adequate standards to guide the official's decision ...” *Id.* Here, the Court concludes that the criteria set forth in Ordinance No. 459 to guide the determination of whether to grant a permit, including the three criteria specifically challenged by Plaintiffs, as noted above, are reasonably specific and objective, and do not leave the decision “to the whim of the administrator.” Nor do they allow for the consideration of the content of the expression involved. *See id.* (upholding an ordinance providing that the park district “may” deny a permit, required for conducting a more-than-50 person event in a municipal park, when, among other things, a permit had been granted to an earlier applicant for the same time and place, or when the intended use would present an unreasonable danger to the safety of park users and grounds); *Douglas v. Brownell*, 88 F.3d 1511, 1523 (8th Cir.1996) (holding that a parade ordinance that required the chief of police to issue a permit unless the time, route, or size of a parade would disrupt use of a street ordinarily subject to significant congestion or traffic, did not give the chief of police too much discretion in violation of First Amendment; the exception was based on objective factors and did not allow the chief of police to consider the content or purpose of a parade).

The Court notes that a content-neutral permitting ordinance “need not include either a deadline for consideration by the governing body or a

provision for prompt judicial review.” *S. Or. Barter Fair v. Jackson Cty., Or.*, 372 F.3d 1128, 1138 (9th Cir.2002); *see also Granite State Outdoor Advert., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1281–83 (11th Cir.2003) (holding that absence of time limits for municipality to process permit applications does not render content-neutral sign ordinance unconstitutional).

Alternative Channels of Communication

Kaahumanu v. Hawaii, 682 F.3d 789, cited by Defendants, supports the proposition they advance—that the fact that there are other public parks in the St. Louis area, if not in the Village, that offer attractive landscape for outdoor wedding and portrait photography satisfies the ample-alternative-channels requirement to pass intermediate-level scrutiny. In *Kaahumanu*, the Ninth Circuit examined regulations that required a permit, at a cost based on the amount of space desired, in order to hold commercial weddings on Hawaii's public beaches. Commercial weddings were defined as weddings which had any component that involved the receipt of compensation for services or goods, other than the services of a photographer, even if the only person paid was a minister, priest, rabbi, or other religious person. The court had “no difficulty” concluding that such wedding ceremonies were protected expression under the First Amendment. But the Court concluded that, with one exception not relevant here, the regulations did not violate the First Amendment because they were narrowly tailored to serve the significant governmental interest in not allowing such weddings to interfere

unduly with activities of other beachgoers, the limitations were content neutral, the government had a significant interest in regulating land uses of state beaches, and there were ample alternative channels for beach weddings. With respect to the issue of ample alternative channels, the Ninth Circuit reasoned as follows:

The “entire medium” of a beach wedding is clearly not foreclosed. A person need not obtain a permit to conduct a commercial beach or beach-related wedding on sites other than a state beach. These alternative sites include county beaches or private property next to any beach. 682 F.3d at 805; *see also United States v. Nenninger*, 351 F.3d 340, 346 (8th Cir.2003) (“[T]he regulations leave ample alternative channels for expressive activity. If the Rainbow Family wishes to avoid the special-use authorization requirement, they may hold their gatherings on private property or other lands. If they wish to gather en masse in the National Forests, they must obtain a special-use authorization.”).

Based on this authority, in the context of this case, where commercial photographers (1) may use Twin Village Park by obtaining a permit, and (2) have available, as the evidence established, numerous other parks in the area with landscapes that would allow for the photographers' full artistic expression, such as the parks Havlak herself testified she used over the years, the Court concludes that Ordinance No. 459 satisfies the ample-alternative-channels requirement. “The First Amendment...does not guarantee [speakers] access to every or even the best channels or locations for their expression.”

Carew-Reid v. Metro. Transp. Auth., 903 F.2d 914, 919 (2d Cir.1990).

48 Hour/14 Day Advance Application Requirement

The Court concludes that the evidence that on some rare occasions commercial photographers may change, at the last minute, the location of a session set with their customers, does not render unconstitutional the advance application provision of Ordinance No. 459 for obtaining a permit (48 hours, unless activity involves more than ten people or lasts more than one hour, or conflicts with any of the factors listed in the ordinance to be considered by the decision maker, in which cases, 14 days). The situation at issue here is quite different from classic First Amendment activity such as political protests where spontaneity is crucial. *See, e.g., Douglas*, 88 F.3d at 1523 (“Timing is of the essence in politics....[W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.”) (citation omitted).

Here, where the time for the protected expression is almost always planned in advance, the Court believes that having to provide the Village with 48 hours advance notice, and, at the most, 14 days advance notice, is reasonable in order to allow the Village fair opportunity to review an application, and is not an undue burden on Plaintiffs' First Amendment rights. *See, e.g., CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1281 (11th Cir.2006) (upholding a 90-day advance application requirement in content-neutral ordinance requiring a permit to hold an outdoor festival in the city).

CONCLUSION

In sum the Court concludes that to the extent Ordinance No. 459 applies to protected expressive activity engaged in by Plaintiffs, the ordinance is content neutral, and does not violate the First Amendment.

Accordingly,

IT IS HEREBY ORDERED that declaratory judgment is entered in favor of Defendants and against Plaintiffs, and Plaintiffs' request for permanent injunctive relief is denied.

APPENDIX D, VILLAGE OF TWIN OAKS

CODE §220.020

- A. *Park Hours.* Use of the park shall be restricted to the hours of 6:00 A.M. – 10:00 P.M., unless permission is granted for use outside such hours by permit issued by the Board of Trustees, or their designated representative(s).

- A. *Injuring Trees, Shrubbery, Natural Life and Other Property Prohibited.* It shall be unlawful for any person to disfigure, damage or in any way injure or destroy, either in part or in whole, or carry away any tree, shrub, plant, flower, stone or stone work, bench chair set, stand, structure, fence or property, fish, or animal or anything belonging to or kept therein, or to post or affix or inscribe any handbill, poster, card, device, or inscription to or on any tree, fence, or structure, within the park.

- B. *Obstruction of Walkways, Sidewalks, Pathways and Bridges.* It shall be unlawful for any person to block hinder or obstruct unreasonably the use of any walkway, sidewalk or bridge located within the park.

- C. *Prohibitions involving Rocks and Waterfalls.* No person shall walk, stand, sit or climb in or on any of the waterfalls, or on the rocks, wall or stone formations adjoining the waterfalls, and around or under the bridge.

- D. *Entry into Garden Areas Prohibited.* It shall be unlawful for anyone to walk, step or enter in the garden areas located within the park.
- E. *Hunting Prohibited.* No person shall pursue, trap or kill any wildlife in any manner on park land. Firearms, guns or weapons of any kind are strictly prohibited on park land.
- F. *Operation of Motor Vehicles.* Motor vehicles are prohibited on park land with the following exceptions and under the conditions stated:
1. Vehicles utilizing disabled parking spaces.
 2. Service vehicles.
 3. Emergency vehicles.
 4. Other vehicles approved by the Board of Trustees or their designated representative(s).
 5. The speed limit within the Park shall be a maximum of five (5) MPH.
- G. *Parking in Designated Areas Only.* The parking of vehicles on grassy areas is prohibited. Parking for handicapped vehicles is permitted in areas designated for that purpose adjacent to Multi-Purpose Court. Parking for park visitors is permitted in designated spaces marked along the east side of Twin oaks Court.
- H. *Possession Of Alcohol Prohibited In Park.* No person shall possess any alcoholic beverage on park land, nor carry, transport, or otherwise bring

any alcoholic beverage onto park land except when expressly authorized by the Board of Trustees or their designated representative(s) in conjunction with an approved reservation for a specific area. The Board of Trustees or their designated representative(s) may revoke authorization of alcoholic beverages at any time. To see specific regulations regarding special permits for alcohol use when reserving the park, see **Section 220.040(C)(2)** below.

- I. *Swimming And Ice Skating Prohibited.* Swimming, diving or wading in any lake, pond or stream within the park is prohibited. Ice skating is also prohibited.
- J. *Location of Fires.* Fires may be built only in barbecue grills or fireplaces provided by the Village, and must be extinguished before leaving the park.
- K. *Camping.* Camping of any kind is prohibited within the park limits.
- L. *Disposal Of Trash.* Trash, rubbish and debris of all kinds shall be deposited in the containers provided for that purpose. All areas shall be left in a clean and orderly condition. Dumping or depositing trash, rubbish or debris in or on any part of the park land or facilities other than in the receptacles provided is strictly prohibited.
- M. *Glass Containers Prohibited.* Glass containers of any type are not permitted in the park.

N. *Animals.* No person shall bring onto park land a dog or other domestic animal unless such animal is restrained at all times on a leash no greater than six (6) feet in length. Any person bringing a dog or other domestic animal into the park shall have with them an instrument and container to remove any wastes deposited by their animal. No person shall allow a dog or other domestic animal into any park waters or waterways for any purposes. No person shall permit the running of a dog or other domestic animal at large. All domestic animals are prohibited in and around all playgrounds located on park grounds and restrooms with the exception of service dogs. No vicious animal of any kind shall be brought onto park land at any time even if restrained as described above.

O. *Regulation of Solicitations and Commercial Activities.* Solicitation of any business or service is prohibited. No person, firm, or corporation is permitted to offer or advertise merchandise or other goods for sale or hire. Excepting Village-sponsored events and activities, the maintaining of a concession or the use of any park facility, building, trail, road, bridge, bench, table or other park property for commercial purposes is prohibited unless a permit is issued by the Board of Trustees or its designated representative(s). Such permit shall be clearly displayed by the person(s) seeking to conduct commercial activities within the park. The permitting process will help to ensure that the Village is aware of the activity taking place within the park, that the proposed date/time/location does not conflict with scheduled

activities/events/operations, and that no harm is done to the landscape of the park. In its review of the permit request, the Board of Trustees or its designated representative(s) should consider.

6. The risk of damage and injury as set forth in Sections 220.020(B)-(E);
7. The disruption of or conflict with the public's use and enjoyment of the park;
8. Whether the issuance of such permit may result in crowded or congested conditions due to the anticipated number of attendees for a planned event.
9. The nature of the requested activity, including whether such activity involves:
 - a. The sale of products or items, which is prohibited unless it is a First Amendment protected activity;
 - b. The use of furniture, tents (as that term is defined in Section 220.040(D)) or large "prop" amenities, which is prohibited; or
 - c. The use of models or equipment.
10. The time and duration requested for such commercial purposes, including:
 - a. Whether the activity will exceed one (1) hour;
 - b. Whether the number of people involved exceeds two (10); or

- c. Whether the time requested conflicts with a period of peak visitation to the park or other scheduled events, activities, or operations.

Any permit request involving less than ten (10) people, lasting for less than one (1) hour, and complying with the above, will be granted by the Village Clerk/Controller or a designee. All permit requests must be submitted at least forty-eight (48) hours before the proposed activities. Any permit request involving more than ten (10) people, lasting more than one (1) hour, or otherwise conflicting with any of the above factors must be submitted at least fourteen (14) days in advance of the proposed activities so that the Board of Trustees may review the request and the permitted authority may be limited to certain designated areas. Each permit issued by the Village shall only be effective on the date and time specified on the permit. Specific permit fees shall be set by the Board of Trustees from time to time and shall be posted on the Village's website.

- P. *Smoking.* Smoking is prohibited in the restrooms and on or within ten (10) feet of the playground.
- Q. *Skateboarding.* Skateboarding is prohibited upon or about the park stairs or railings at the northern (church) entrance to the park and within or upon all pavilions or decks and the railings or furnishings contained or incorporated therein.
- R. *Stop Locations.* All traffic entering the park shall stop at the northbound stop sign approaching the flag pole of Twin Oaks Court. All traffic shall

stop and drive no further than the gate approaching the playground.

- S. *Fishing.* Fishing is allowed in waters or waterways in the park, but all fish taken must be returned alive to the waters. The Village will follow all State of Missouri Conservation regulations for fishing in regard to fishing licenses needed.
- T. *Playground/Surface Area.* Skateboarding, high heels, cleats, pets and smoking are prohibited.