



NEW HAMPSHIRE MUNICIPAL ASSOCIATION



# *The First Amendment and Municipal Regulation*

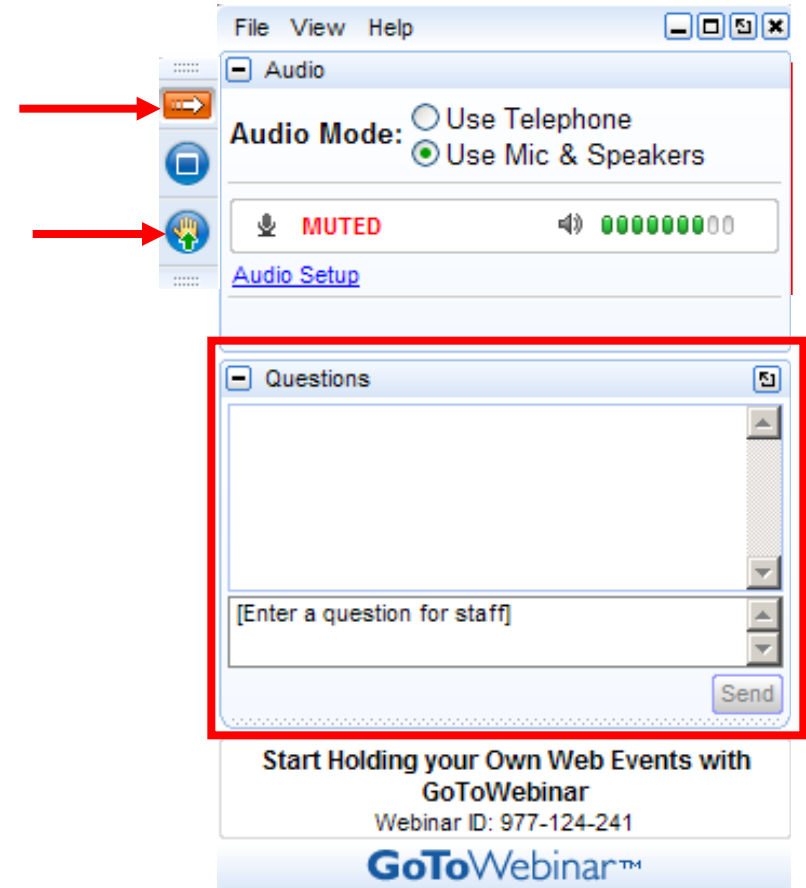
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*November 19, 2014*

# How to Participate Today

- Open and close your Panel
- Submit text questions
- Q&A addressed at the end of today's session
- Two *Poll Questions* today



# Agenda

1<sup>ST</sup> Amendment

Pt. 1, Art. 22 NH Constitution

Basic Concepts

Door-to-Door Solicitation – Political & Religious

Door-to-Door Solicitation – Time, Place, and Manner

Panhandling

Park Curfew Ordinances

Video Taping Police Activities

Electioneering



# U.S. Constitution - First Amendment

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



# Pt. 1, Art. 22

## New Hampshire Constitution



- [Art.] 22. [Free Speech; Liberty of the Press.] Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

# Basic Concepts

- Content control – strict scrutiny.
- Time, place and manner regulation:
  - (1) is content-neutral;
  - (2) serves a legitimate governmental objective;
  - (3) leaves open ample alternative channels of communication; and,
  - (4) is narrowly tailored to serve the governmental objective.



# Door-to-Door Solicitation – Political & Religious

- Select Board receives multiple citizen complaints about persons visiting homes in the evening, knocking on doors and interrupting people at dinner time or otherwise disturbing the normal peace and quiet of the home. In particular, Jehovah's Witnesses are very active visiting homes in the early evening hours.



# Door-to-Door Solicitation – Political & Religious (cont.)

- 31:91 Soliciting Funds. – The right to grant permits for soliciting funds for charitable purposes and for the sale of tags, flowers or other objects for charitable purposes shall be vested in the mayor and aldermen of a city or the selectmen of towns.





# Door-to-Door Solicitation – Political & Religious (cont.)

- The Select Board adopts an ordinance that requires all charitable organizations, religious groups, churches, or non-profit organizations first register with the Town before undertaking charitable solicitation.
- Mandatory pre-registration with the Police Department.
- All door-to-door solicitations or sales shall occur between the hours of 9:00 am and 9:00 pm.



# Door-to-Door Solicitation – Political & Religious (cont.)

- Watchtower Bible & Tract Society v. Village of Stratton, 536 U.S. 150 (2002).
- Town solicitation ordinance that requires pre-registration for all non-commercial religious or political solicitors is per se unconstitutional.
- “Had the provision [by the Village of Stratton] been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village’s interest in protecting the privacy of its residents and preventing fraud.” (Justice Stevens)



# Door-to-Door Solicitation–Time, Place, and Manner

- Residents of Town apprehensive about canvassers approaching their homes after dark.
- Subdivisions were built far apart, lack sidewalks, and, contain few streetlights.
- Residents value their privacy, and prefer not being interrupted during the evening hours.
- No specific complaints or concerns involving fraud or any other illegal activities by persons going door-to-door.



# Door-to-Door Solicitation–Time, Place and Manner (cont.)

- Select Board uses RSA 31:102-a and adopts hawker and peddler bylaw that imposes \$50 initial application fee, \$50 per person per week fee with permit good for 1 week only.
- Limit hours for door-to-door solicitation to 9:00 am - 8:00 pm or dusk, whichever is earlier.



# Door to Door Solicitation–Time, Place and Manner (cont.)

- The United States Supreme Court has long recognized substantial First Amendment protection for door-to-door soliciting, canvassing, and pamphleteering.
- Municipalities may impose time, place, and manner restrictions on solicitors, canvassers, and pamphleteers "so long as the regulation is in furtherance of a legitimate governmental objective."
- To sustain a time, place, and manner restriction on First Amendment activities, the government must establish that the restriction: *(1) is content-neutral, (2) serves a legitimate governmental objective, (3) leaves open ample alternative channels of communication, and (4) is narrowly tailored to serve the governmental objective.*



# Door to Door Solicitation–Time, Place and Manner (cont.)

- A complete ban on evening solicitation is not narrowly tailored to achieve the Town's legitimate interest in the privacy of its residents.
- Unwilling listener's interest could be easily accommodated through “no solicitors signs.”
- Without evidence establishing an increase in the crime rate due to door-to-door solicitation, the Town fails to show how canvassing after sunset but before 9:00 p.m. poses any greater threat to its citizens than any other person who may come to a resident's door after dark. Citizens Action Coal. of Indiana, Inc. v. Town of Yorktown, Ind., No. 1:13-CV-422-RLY-DKL, 2014 WL 4908098 (S.D. Ind. Sept. 30, 2014).



# *The First Amendment and Municipal Regulation*



# *The First Amendment and Municipal Regulation*

Who among the following NHMA staff graduated from one of the seven sisters?

- A. Judy Silva
- B. Barbara Reid
- C. Margaret Byrnes
- D. Judy Pearson





# Panhandling

- In one year, City has 181 incidents of aggressive behavior by individuals who were panhandling, resulting in five arrests.
- Over a period of six months, City uses team of case workers and an outreach worker educating 38 panhandlers about the resources and services available to them from the City.
- Nonetheless, City still resolves to adopt two ordinances to address safety risks of panhandling.



# Panhandling (cont.)

- City adopts Ordinance prohibiting aggressive begging, soliciting and panhandling in public places making it unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner.
- Second ordinance is also adopted that prohibits walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or a designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or for some other lawful purpose.



# Panhandling (cont.)

- Regular panhandlers and an elected member of school board who uses traffic islands/median strips to display political signs challenge both ordinances.
- Combined speech and physical activity performed to deliver the messages occur in public forums. Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks.
- Are the regulations content neutral?



# Panhandling (cont.)

- A regulation that has an incidental effect on some speakers or messages but not others may still qualify as content-neutral so long as the regulation is justified without reference to the content of the regulated speech.
- Sufficient basis in text, common experience, and evidence of the City's intent to conclude that the ordinances were not designed to suppress messages expressed by panhandlers, Girl Scouts, the Salvation Army, campaigning politicians, or anyone else subject to restriction. The ordinances are therefore subject to scrutiny as content-neutral time, place, and manner regulations.



# Panhandling (cont.)

- Content-neutral time, place, and manner must be narrowly tailored to serve a significant governmental purpose while leaving open adequate alternative channels of communication.
- The standard of narrow tailoring, in turn, requires that a regulation promote the governmental objective more effectively than the law would do in its absence, without burdening substantially more speech than necessary in serving the chosen interest.



# Panhandling (cont.)

- Although the aggressive panhandling and safe street ordinances may raise some constitutional concerns, there is no basis to conclude that any unjustifiable applications will be "substantial" when compared to the many instances of appropriate application of the ordinances. Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014).



# Park Curfew Ordinance

- Occupy NH protesting foreign wars, limiting the influence of money on elected officials, protesting the lack of jobs, challenging bank bailouts, and eliminating inequality in the distribution of wealth.
- Refuse to leave park in Manchester at 11pm curfew.
- Police issue summonses for violation City ordinance that has parks closed from 11pm to 7am.



# Park Curfew Ordinance (cont.)

- Occupy protestors argue park curfew ordinance suppressed free speech protected under Part I, Article 22 of the NH Constitution the First Amendment.
- To determine whether government restrictions impermissibly infringe on free speech, we "(1) assess whether the conduct or speech at issue is protected by the [State Constitution], (2) identify the nature of the forum in order to determine the extent to which the government may limit the conduct or speech, and then (3) assess whether the justifications for restricting the conduct or speech satisfy the requisite standard."





# Park Curfew Ordinance (cont.)

- "[T]he standards by which limitations on speech must be evaluated differ depending on the character of the property."
- Government property generally falls into three categories: traditional public forums, designated public forums, and limited public forums.
- A traditional public forum is government property, which by long tradition or by government fiat has been devoted to assembly and debate.



# Park Curfew Ordinance (cont.)

- To be valid, the park curfew ordinance must be a reasonable time, place, and manner restriction.
- There is no doubt that Manchester may restrict the hours that city parks are open as a means of achieving the governmental interests of protecting public safety and welfare and maintaining the condition of the parks.
- Occupy NH was able to communicate its message in the manner that it wished during the sixteen hours the park was open. The eight hours when the park was closed was not an unreasonable restriction on their protected speech. State v. Bailey, No. 2012-781, 2014 WL 3883281 (N.H. Aug. 8, 2014).



# *The First Amendment and Municipal Regulation*



# *The First Amendment and Municipal Regulation*

What was the original name of the Town of Jackson?

1. Adams
2. Jefferson
3. Washington
4. Tinsletown

# Videotaping Police Activities

- Bystander walking past the Boston Common caught sight of three police officers arresting a young man. Bystander stopped roughly ten feet away and began recording video footage of the arrest on his cell phone.
- Bystander arrested for video and audio taping allegedly in violation of state wiretap ordinance.



# Videotaping Police Activities (cont.)

- Is there a First Amendment protected right to videotape police carrying out their duties in public?
- The First Amendment goes beyond protection of the press. First Amendment also protects the self-expression of individuals and prohibits government from limiting the store of information available to members of the public.



# Videotaping Police Activities (cont.)

- First Amendment protects the filming of government officials in public spaces.
- The First Amendment right to gather news is not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press.
- Peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation. Glik v. Cunniffe, 655 F.3d 78 (1<sup>st</sup> Cir. 2011).



# Licensing as Potential Censorship

- NH resident applied for a vanity registration plate reading " COPS LIE."
- Resident stated on his application that the intended meaning of the requested vanity registration plate was " cops lie."
- That same day, the petitioner's application was rejected because several DMV employees believed the text to be insulting.



# Licensing as Potential Censorship (cont.)

- DMV director denied resident's appeal, citing the NH Admin. Code, Saf-C 514.61(c)(3) which says " [a] vanity ... registration plate shall ... [n]ot be ethnically, racially or which a reasonable person would find offensive to good taste."
- NH Supreme Court assumed that the speech at issue is private speech and that vanity registration plates are government property.



# Licensing as Potential Censorship (cont.)

- In evaluating government regulations concerning private individuals' speech on government-owned property, the Supreme Court has identified three categories of forums—the traditional public forum, the designated public forum, and the nonpublic forum and—has developed a body of law called “forum analysis.”
- Court declines to decide what type of forum a vanity registration plate is.



# Licensing as Potential Censorship (cont.)

- Court concludes that the DMV regulation is unconstitutionally vague because it is so loosely constrained that it authorizes or even encourages arbitrary and discriminatory enforcement.
- A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the associated dangers of arbitrary and discriminatory application.



# Licensing as Potential Censorship (cont.)

- Because the "offensive to good taste" standard is not susceptible of objective definition, the restriction grants DMV officials the power to deny a proposed vanity registration plate because it offends particular officials' subjective idea of what is good taste. Montenegro v. New Hampshire Div. of Motor Vehicles, 93 A.3d 290 (N.H. 2014).



# Electioneering

- Concerns are raised by the Town's moderator that political campaign workers are interfering with voters.
- Town meeting adopts regulation pursuant to RSA 31:41-c prohibiting display or distribution of political campaign materials within 500 feet of the Town's principal polling place.



# Electioneering (cont.)

- As stated in the US Supreme Court decision of Burson v. Freeman, 504 U.S. 191 (1992), a campaign-sign free zone of 100 feet around a polling place is permissible. However, in Anderson v. Spear, 356 F. 3d 651 (6th Cir. 2004), an electioneering ban covering 500 feet around a polling place was found unconstitutional.



# Electioneering

- "In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case. Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise." Burson v. Freeman, 504 U.S. 191, 211 (1992).



# Conclusion

- **NHMA:** The Service and Action Arm of New Hampshire Municipalities
- **Our Mission:** The New Hampshire Municipal Association is a non-profit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.

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