

Reply to: manderson@murphypllc.com
(617) 227-5720

July 12, 2013

Jennifer Dopazo Gilbert
Brookline Town Hall
333 Washington Street
3rd Floor
Brookline, MA 02445
By Mail and Fax (617) 264-6463

Re: City policy against sidewalk chalk art

Dear Ms. Gilbert:

This office represents Norah Dooley, a prominent local artist. We write to clarify City policy on expressive chalk art on public sidewalks.

After initially approving Ms. Dooley's request for a permit to make a temporary chalk drawing at Coolidge Corner, Town officials have communicated a policy forbidding public chalk art that appears to be an unconstitutional restriction on speech.

As we discuss further below, a water-soluble chalk drawing is protected speech, just like a picket sign or a newsrack. Federal courts will grant §1983 relief to chalk artists threatened with arrest for expressive designs on public sidewalks. *See Jackson v. Williams*, 2013 WL 150032 *1-2 (E.D.Mich. 2013) (Flint, MI); *Osmar v. City of Orlando*, 2012 WL 1252684 *3-5 (M.D.Fla. 2012) (Orlando, FL); *Mackinney v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995).

We hope to resolve this issue without litigation. Ms. Dooley is prepared to comply with any reasonable permit requirement.

Background

Norah Dooley has drawn sidewalk chalk art integrating text and design at several points in greater Boston, including Athol and Cambridge. Her work has been well-received, and has never resulted in any interference with traffic on the sidewalk. The chalk washes away immediately with water.

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Ms. Dooley plans to create a chalk drawing at the sidewalk at Beacon and Harvard Ave. at Coolidge Corner to honor Nelson Mandela. She will incorporate quotes of dead presidents (Lincoln, FDR, Dwight Eisenhower and JFK). The words will be placed a mandala-like design in chalk. I have enclosed copies of designs she has executed in Central Square, Cambridge. She will comply with any directions to prevent any interference with sidewalk traffic. She normally works in the early dawn hours to avoid any interference.

On Friday, June 29, 2013, Ms. Dooley called the Town Clerk to inquire about permits, who transferred her to Building Inspector Michael Yanovitch. Ms. Dooley asked what permissions, if any were needed. Ms. Dooley then sent him samples of her past chalk work in Central Square Cambridge.

While Mr. Yanovitch initially reserved judgment, he told Ms. Dooley on July 2 that the drawing was fine with him. He referred to matter to DPW. Peter Ditto responded on July 2 on behalf of the DPW that his main concern was not to block traffic and leave a four- foot-wide space for handicap access. On July 10, however, Mr. Ditto responded by email with a different message: "It has come to my attention that the work you propose to do within the public way would be in violation of the General By-Laws of the Town, hence, permission will not be granted. I wish you good fortune in your endeavors."

We have reviewed the Town Bylaws, and we have not identified any Bylaw that forbids temporary chalk art on public sidewalks. Absent approval from the Town, Ms. Dooley interprets Mr. Ditto's response to mean that she will be subject to arrest if she executes chalk art. If I have misunderstood the facts, please let me know.

Constitutionality

The policy outlined by Mr. Ditto is unconstitutional, and would be subject to injunction under 42 U.S.C. §1983.

- Chalk art is free speech

First, chalk art is free speech, no different than holding a sign. Multiple federal courts have applied this principle to chalk art. Chalk washes away immediately. It does not amount to defacement of the pavement As a result, chalk artists on public sidewalks are entitled to federal §1983 relief where cities forbid such art. *See Mackinney v. Nielsen*,

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69 F.3d 1002, 1005 (9th Cir. 1995); *Jackson v. Williams*, 2013 WL 150032 *1-2 (E.D.Mich. 2013); *Osmar v. City of Orlando*, 2012 WL 1252684 *3-5 (M.D.Fla. 2012).

In a traditional public forum like a public sidewalk, visual displays are presumptively protected. *Snyder v. Phelps*, ___ U.S. ___, 131 S.Ct. 1207, 1218 (2011); *United States v. Grace*, 461 U.S. 171, 180 (1983). “[W]e have repeatedly referred to public streets as the archetype of a traditional public forum, noting that ‘[t]ime out of mind’ public streets and sidewalks have been used for public assembly and debate.” *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (cit om.). A Town ordinance that required city permission to display a sign on the sidewalk would clearly be unconstitutional. See *Snyder*, 131 S.Ct. at 1218; *Thornhill v. Alabama*, 310 U.S. 88, 91 (1940).

- **Discrimination in favor of other chalk art and newsracks**

The Town of Brookline allows citizens to draw on public sidewalks in chalk, as children do in drawing hopscotch or other designs on sidewalks. The Brookline Recreation Department sponsored “sidewalk chalk” as a family activity in Larz Anderson Park on September 23, 2012. The All Saints Church of Brookline held a “Peace Party” in October 2012, where students declared Lenox Street a peace zone and created murals with side-walk chalk. <http://ssypbready.wordpress.com/2012/10/31/all-saints-parish-of-brookline-party-with-a-purpose/> I have enclosed the relevant materials.

The Town also allows news agencies to place newsracks on the public right of way. Brookline Town Bylaws, Article 7.6. It would be indefensible discrimination to ban a temporary chalk drawing that washes away instantly with water on the same sidewalk where the Town permits physical commercial newsracks. See *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993).

The Town may not selectively permit some speakers to use the sidewalks for expression while denying that right to others. *Rosenberger v. University of Virginia*, 515 U.S. 819, 829 (1995); *R.A.V. v. St. Paul*, 505 U.S. 377, 384 (1992). Discrimination among speakers (in this case, allowing All Saints Church or the Boston Globe while forbidding Ms. Dooley) makes the regulation unconstitutional.

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Conclusion

We believe this issue may be resolved reasonably, with due regard for the Town's and Ms. Dooley's respective rights. Ms. Dooley wishes to exercise her right to expressive chalk art under reasonable conditions and permits. If the City intends to forbid her from doing so on pain of arrest, please let me know as soon as possible.

Please contact me at manderson@murphypllc.com or (617) 227-5720 to discuss.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Anderson", written over a horizontal line.

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cc: Norah Dooley

MTA:sm
Encl.