

To: Boston City Council
From: Stephen H. Baird, Director of Community Arts Advocates,
Director of Street Arts and Buskers Advocates
Date: May 3, 2016
Regarding: Proposed Street Performers Ordinance:

Introduction and Background of Stephen H. Baird:

My name is Stephen H. Baird. I live in Jamaica Plain, MA. I am the Director of Community Arts Advocates, Director of Street Arts and Buskers Advocates, Co-founder of Friends of Jamaica Pond, former Director of Jamaica Plain Arts Council, Club Passim and Folk Arts Network. I have worked as an advocate for the arts and environmental issues since 1967. Past programs included Jamaica Plain Open Studios, Roslindale Open Studios, Roslindale Porch Fest, Boston Harbor Revival with Pete Seeger, Bread and Roses Labor Day Heritage Festival, MusicConnects music educational programs in the Chittick (Mattapan) and Sumner (Roslindale) Boston Public School, Jorge Arce's Humano Multicultural Project (Puerto Rican and Afro-Caribbean) community performances and artist in residence program in New Mission and Brighton High Schools, Tai Chi classes for seniors in collaboration with Friends of Symphony Park, to name just a few.

I have been involved with street performance public policy issues since 1972 when the Boston Police arrested members of my own street audience during a performance on Boston Common. I challenged aspects of the old Police Rule 75 and reached agreement with the Attorney John A. Fiske, First Assistant Corporation Counsel, City of Boston Law Department in June 1973 that allowed street performers the ability to receive donations without police interference.

The street artists organized in the spring of 1978 as the Street Performers Guild to negotiate performances at Faneuil Hall Marketplace. Street Performers' Festivals were developed with the Cambridge Arts Council and Faneuil Hall Marketplace in 1983 and 1984 with support from foundations and corporations. The Subway Artists Guild was formed in 1986 to negotiate performance spaces in the Boston subway platforms. The Street Artists' Guild was formed in 1988, as a street artists advocacy organization under the umbrella of the Folk Arts Network and passed new street performance regulation in Cambridge, MA. The Street Arts and Buskers Advocates was formed in 1996, as an international advocacy organization under the leadership of street artist, Stephen Baird. It became a program of Community Arts Advocates, Inc., a nonprofit organization founded by Stephen Baird, in 2002. The Street Arts and Buskers Advocates have consulted with city officials and artists in Chicago, Saint Louis, New Orleans, Spokane, Iowa City, Kansas City, Hartford, Worcester, Cambridge and numerous other locations to develop ordinances and street performing programs. Street Arts and Buskers Advocates led the battles to stop the curtailment of street performances on MBTA subway platforms in 2003, through media, petition and legal campaigns. The Street Arts & Buskers Advocates and Stephen Baird filed a Federal lawsuit and repealed archaic and restrictive laws

curtailing street performances and art exhibits on Boston sidewalks and parks in 2004-2006. Street Arts and Buskers Advocates developed a research and information resource center web site in 1999 with over 30,000 site visits from around the world.

I have been featured in Time, Newsweek, People, National Law Review, American Bar Association Journal and many other national magazines, a PBS documentary, a Discovery Channel documentary, and at the Kennedy Center for the Performing Arts in Washington, DC. I have performed at over 2,000 universities, colleges, arts centers and festivals internationally. I have been an expert witness or consultant in Federal Court cases about street performances in Boston, New York City, Washington DC, Chicago, Saint Louis, New Orleans, Kansas City, and Las Vegas.

I oppose the enactment of the proposed street performance regulations:

- A. A growing legal consensus conclude that small gatherings of people exercising their First Amendment rights for speech and assembly should not be regulated. I assert the language of this regulation will require the following people to first obtain a permit: a visiting Girl Scout troop singing on a Freedom Trail tour or three Boston University students playing guitar on Commonwealth Ave park bench. The Supreme court said:

"...requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views. As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official."

"Third, there is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission. In this respect, the regulation is analogous to the circulation licensing tax the Court invalidated in *Grosjean v. American Press Co.*, 297 U. S. 233 (1936). In *Grosjean*, while discussing the history of the Free Press Clause of the First Amendment, the Court stated that "[t]he evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Id.*, at 249-250

(quoting 2 T. Cooley, *Constitutional Limitations* 886 (8th ed. 1927)); see also *Lovell v. City of Griffin*, 303 U. S. 444 (1938)." [Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton](#), 536 U.S. 150 (2002)

- B. Magic Mike Berger, a balloon twister and magician won a 9th Circuit Court of Appeals (11 Judges) invalidating street performers permits in Seattle. Also note the issue of anonymity. Common Sense was first published anonymously. The Federalist Papers were written anonymously. The detailed court filings in the Berger case included the need by women street performers to perform anonymously to reduce incidences of sexual harassment.

"The presumptive invalidity and offensiveness of advance notice and permitting requirements stem from the significant burden that they place on free speech. "Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers." Grossman, 33 F.3d at 1206. Registration requirements also dissuade potential speakers by eliminating the possibility of anonymous speech. See *Watchtower Bible*, 536 U.S. at 166; see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) ("[A speaker's] decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."). And, critically, advance notification requirements eliminate "spontaneous speech." See *Watchtower Bible*, 536 U.S. at 167; see also Grossman, 33 F.3d at 1206 (noting that "because of the delay caused by complying with the permitting procedures, '[i]mmediate speech can no longer respond to immediate issues.'") (alteration in original) (quoting *NAACP v. City of Richmond*, 743F.2d 1346, 1355 (9th Cir. 1984)); see also *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir. 1981). " *Berger v. City of Seattle*, 569 F. 3d 1029, 1038-1039 – Appeals Court 9th Circuit 2009
https://scholar.google.com/scholar_case?case=12021124308690069166&q=569+F.3d+1029+%289th+Cir.+2009%29&hl=en&as_sdt=40000003

- C. The language of this proposed ordinance retreats to unconstitutional concepts of the old Police Rule 75 that dates back to the 1850s. The definition of street artists does not include visual artists, painters, photographers, caricature artists, balloon sculpture artists. There are many cases in State, Federal and Supreme Courts giving a broad definition of First Amendment expression protections including: *White v. City of Sparks* 500 F.3d 953 (9th Cir. 2007) giving First Amendment protection to the display and sale of visual art work; *Berger v. City of Seattle*, 569 F. 3d 1029 giving First Amendment protection for balloon sculpture artists and magicians. The Boston Law Department Legal Memorandum July 12, 2006 signed by Thomas R. Donohue, Assistant Corporation Counsel, stated "drawing and painting" as part of the activities included in the definition of "Street Performers." See:

<http://www.buskersadvocates.org/images/SAABostonPics/BostonLegalDoc.pdf>

Note: Visual artists including naturalist John Audubon have been displaying and selling paintings in Jackson Square in New Orleans since the early 1800s.

- D. The language of this proposed ordinance retreats to unconstitutional concepts that date back to the 1930s. **Perform shall not include the production of items for sale.**

The Boston Law Department Legal Memorandum July 12, 2006 signed by Thomas R. Donohue, Assistant Corporation Counsel, stated: "Performers may request and accept contributions of money or property at a performance. Further, performers may offer for sale representations and recordings of their own performances, including records, cassettes, videotapes, compact disks or digital videodiscs." See: <http://www.buskersadvocates.org/images/SAABostonPics/BostonLegalDoc.pdf>

Ben Franklin, as a young apprenticeship printer, wrote, sang and sold broadsides on Boston streets. The U.S. Constitution was printed sold with a published and fixed price during the ratification process (Copies of the first printing of the U.S. Constitution by The Pennsylvania Packet and Daily Advertiser on September 19, 1787, with a (Price Four-Pence.) at the top left corner at Library of Congress); The Federalist Papers, were printed and sold by J. and A. McLean (Library of Congress); and Poughkeepsie Country Journal details of "Debates of the convention" for sale for 5s. In *Murdock v Pennsylvania* 319 US 105, 110-111 (1943) the court noted: "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Common Sense* was printed and Sold by R. Bell, Third Street Philadelphia in 1776. Thomas Paine donated some of the publication sales profits to support the Continental Army. President George Washington was so grateful that he asked the first Congress to purchase and give a New Rochelle, New York estate to Thomas Paine. All these activities by the founders of the country would be prohibited by this ordinance.

Question: Will the Boston City Council ban political campaign buttons, bumper stickers and t-shirts because they are unprotected items for sale or will the Boston City Council claim they are protected by the First Amendment while the street performers items are not?

"Speech likewise is protected even though it is carried in a form that is 'sold' for profit. *Smith v California* 361 US 147 150 (1959) (books); *Joseph Burstyn Inc. v Wilson* 343 US 495, 501 (1952) (motion pictures)"

"Last term in *Bigelow v Virginia*, 421 US 809 (1974) the notion of unprotected 'commercial speech' all but passed from the scene."

Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, 425 US 748, 761, 759 (1975). <http://laws.findlaw.com/us/425/748.html>

- E. The language of this proposed ordinance retreats to unconstitutional concepts that date back to the 1850s. **Performances may take place in public areas except within hundred feet of an elementary and/or secondary school, library, or church while in session, a hospital at anytime...**

A few questions: Does this concept apply to public employee unions picketing a library? Does this concept apply to the nurses union picketing a hospital? Does this concept apply to the teachers union picketing a school? Does this mean Copley Square is eliminated for all First Amendment activity because of Trinity Church? Does this mean most of Boylston Street is eliminated for all First Amendment activity because of the Boston Public Library and numerous churches located on it? What is the definition of church while in session: Does this include weekday morning and noon chapel services, counseling sessions, weddings? Will the Boston City Council ban the priest sexual abuse victims from demonstrations near churches while in session? Is there anyplace in Boston that is not within 100 feet of a school, church or hospital?

Churches also served as city halls in the colonial and revolutionary eras. All the great issues of the day were debated at Old South Church, Old North Church, Arlington Street Church, Trinity Church... Now the Boston City Council wants to exclude them all by making them First Amendment Free Zones?

Buildings now have air conditioning; many also have soundproof walls with soundproof triple pane glass windows. The background street ambient noise levels exceed 80db in most commercial districts and exceed the sound levels produced by a vast majority of street artists.

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. CIO.*, 307 US 496, 515-516 (opinion of Mr. Justice Roberts, joined by Mr. Justice Black)" *Shuttlesworth v. Birmingham*, 394 US 147, 152 (1968) <http://laws.findlaw.com/us/394/147.html>

"...we have repeatedly referred to public streets as the archetype of a traditional public forum." "Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." Frisby v. Schultz, 487 U.S. 474, 480 (1988)
https://scholar.google.com/scholar_case?case=482676064630549656&q=Frisby+v.+Schultz,+487+U.S.+474,+480+%281988%29&hl=en&as_sdt=40000003

F. Privatization of Public Spaces: Faneuil Hall Marketplace and Downtown Crossing

Rouse Company malls have been sued in civil court numerous times for First Amendment violations. The case in Boston was decided in Federal Court on August 27, 1990 ([**Citizens to End Animal Suffering v Faneuil Hall Marketplace, Inc., 745 F. Supp. 65 \(1990\)**](#)) and determined that animal rights activists had a right to picket and protest at Faneuil Hall Marketplace (They were arrested for passing out leaflets to restaurant patrons to not eat veal). Judge Tauro stated Faneuil Hall Marketplace must be considered within its historical context and cannot be considered private property.

The Faneuil Hall Marketplace Street Performing audition and censorship of performances has been unconstitutional since the 1990 court decision. The management booked so many corporate events they started to schedule the auditioned performers into Dock Square (Sam Adams Park) in front of Faneuil Hall. All other street performers were threatened with arrest by the Boston Police if they tried to perform in this public park.

I filed a federal civil law suit in 2004 to stop the privatization of this public park. The Boston Police even tried to arrest me for street performing at Dock Square after the city agreed to stop this illegal practice while I was doing an interview with a Boston newspaper.

Faneuil Hall Marketplace has been struggling economically since the fiscal crisis of 2008. The flower market building has been vacant for over 5 years and many of the vendors are unable to pay the rental fees. The merchant association tried to charge the auditioned performers a \$2,500 annual permit fee plus instituted direct censorship of their performances.

Downtown Crossing has struggled economically since the closing of Filenes department store. The new building construction was completely stopped by the 2008 fiscal crisis. Downtown Crossing Merchant Association, now

reorganized as Downtown Crossing Partnership (BID), created a push cart vendor program and started to harass street performers by claiming they needed a permit to perform. I filed a federal lawsuit in 2004 against the Downtown Crossing Merchant Association to stop the illegal enforcement practices. They settled and stated to the Federal Court they do not issue permits for street performers and they will respect the artists' rights to perform on the streets and parks of Boston.

The economic crisis also impacted the street artists. Many of the artist converged to Dock Square to avoid the illegal enforcement practices in other areas of the city and seeking economic sustaining audiences and patrons. The large number of street artists in this one park has caused friction. The Boston Police stopped all performances in the park in August 2008. I recruited an attorney and supported a second federal lawsuit by Bruce Peck aka Chance to confront this illegal enforcement practice. The City of Boston paid financial damages to settle the case.

G. Illegal Enforcement practices greatly impact Artists of Color

Cyrus Brooks is one of Boston's best artists. He has been a featured artist of Wheelock Family Theater, New England Repertory Theater, Black Nativity, Urban Nutcracker and Broadway Shows from Boston to Miami to Cleveland. Cyrus has won the highest artistic achievement award in Boston, The Eliot Norton Award for his dance choreography.

Cyrus was arrested for street performing without a permit while break dancing with three friends in Downtown Crossing. At the time of his arrest he had copies of the Boston Law Department Legal Memorandum stating he did not need a permit, an affidavit of Captain Bernard O'Rourke of downtown Boston Police District A-1 stating he did not need a permit, and the legal stipulation by Downtown Crossing Association aka Downtown Crossing Partnership stating he did not need a permit. The police officer did not read the documents, the prosecutor did not read the documents, the public defender did not read the documents and the judge did not read the documents. All four dancers were convicted for street performing without a permit even though there are no permits required. All four artists have a Criminal Offender Record Information (CORI) that can hinder future employment.

I am still speechless for the total corruption from top to bottom of the Boston criminal justice system. The City of Boston owes these artists a profound apology.

Boston Law Department Legal Memorandum:
<http://www.buskersadvocates.org/images/SAABostonPics/BostonLegalDoc.pdf>

Downtown Crossing Stipulation:

<http://www.buskersadvocates.org/images/SAABostonPics/DCAstipulation.pdf>

Captain Bernard O'Rourke Affidavit:

<http://www.buskersadvocates.org/images/SAABostonPics/ORourkeAffidavit.pdf>

H. The Illegal Enforcement practices continue

I have received documents from three street artists who have been stopped from performing repeatedly over the last two years for playing saxophone, singing opera and playing Latin jazz guitar in Downtown Crossing, the Back Bay Station area, the North End and Jamaica Plain. The Boston Police Officers and Downtown Crossing Ambassadors have stated permits are required when there are no permits available.

I am actively seeking attorneys to confront the City of Boston for the third time in Federal Court. I will ask the attorneys to seek jury trials and substantial financial damages from the City of Boston, Downtown Crossing Partnership (BID) and the Faneuil Hall Marketplace Merchant Association for the repeated illegal enforcement practices.

I will ask the attorneys to file criminal complaints with the United States Attorney, District of Massachusetts, Carmen M. Ortiz, for violation of the street artists' civil rights by the Boston Police Department and the Downtown Crossing Partnership (BID) Ambassadors.

One of the artists called the mayor's office to complain about the illegal enforcement practices. The artists also sent a copy of the Boston Law Department 2006 Legal Memorandum. The mayor's office stated the document was old and they would get back to him in a couple of weeks. I strongly suspect if it was a union member who called the mayor's office that their First Amendment right to demonstrate was illegally stopped by the Boston Police that the response would not take a couple of weeks. First Amendment constitutional violations require an immediate response. I will ask the attorneys to seek additional financial damages specifically for this arrogant response by Mayor Martin J. Walsh.

An equally alarming aspect of the illegal street performing enforcement practices is the violation of the community's First Amendment right to listen.

"There is a First Amendment right to peacefully assemble to listen to speakers of one's choice, which may not be impaired by state legislation any more than the right of speaker may be impaired."

Snyder v Board of Trustees of University of Illinois, 286 F. Supp. 927, 928, (ND Ill. 1968).

The Supreme Court has recognized that hearers and readers have rights under the First Amendment.

"(T)he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. (citing cases) I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." Lamont v. Postmaster General, 381 US 301, 308 (1965) (Brennan, J., concurring)
<http://laws.findlaw.com/us/381/301.html>

I. Conclusion

The proposed street performer ordinance has numerous issues. I oppose the enactment and I will immediately challenge the unconstitutional provisions in federal court if it is enacted for the reasons stated in this letter.

I draft ordinances where the city arts department or cultural council control the permit process so the artists are treated as people and the artists are integrated into the cultural planning and events of the city. The artists have an advocate in the city government that can screen and dissipate complaints because the artists are not perceived as totally powerless and always wrong. Cities are now setting up voluntary permit systems to help protect artists from discretionary police abuse, while at the same time allowing artists and community members to create spur of the moment spontaneous celebrations without bureaucratic interference.

The city could have set up a content neutral lottery system at the public safety office at Faneuil Hall to share the performance locations and times in Dock Square years ago. The noise ordinance could be enforced consistently and fairly (The police and firemen union picket demonstration in the past were 10 times louder than any performers at Dock Square). I assert the majority of complaints could have been mitigated with thoughtful public policies and constitutional enforcement practices.

From Ben Franklin to Tracy Chapman, Louis Armstrong to the Violent Femmes, the streets of this country have been the avenues of self-expression for emerging artists and musicians. Entire art forms such as tap dancing to break dancing, jazz to blues, rock n' roll to rap singing have risen from the fusion of diverse artists who have performed on the streets of New York City, Boston, Chicago and New Orleans. The history of popular culture has direct

roots in the history of street performances. Today the streets are still a dynamic stew of sounds and rhythms from around the world.

The emancipation of the slaves after the Civil War resulted in a flood of new artistic expression on the streets. The blues migrated up the Mississippi from Memphis to Chicago. Jazz migrated from Saint Louis to New Orleans. Eubie Blake performed on the streets of Baltimore and New York City. The legendary Blind Lemon Jefferson toured picnics and fairs from Texas to North Carolina.

Waves of immigrants from 1870 to the present day have found their voices and audiences on the streets and subway platforms. Irving Berlin and Eddie Cantor are the forebears of the recent multitude of artists arriving from Eastern Europe after the fall of the Iron Curtain. Musicians from Central and South America can be found on the streets of New York City, Boston, Seattle and San Francisco filling the air with the lilt of pan-pipes and Latin jazz.

Contemporary jazz guitarist Stanley Jordan who developed the "touch-technique-playing-style" performed on the streets of Milwaukee and Madison, Wisconsin before moving on to the streets of Boston and New York and greater recognition. Both Martin Sexton and Tracy Chapman performed on the street corners of Cambridge's Harvard Square, much like Joan Baez did three decades earlier. Paul Simon and James Taylor plied the streets of London with their songs to earn cash for demo tapes.

The legendary "hurdy gurdy man" Marino Persechini performed all over the City of Boston from 1899 until 1974. He loved to play at Haymarket, Washington and Tremont Streets, Arlington and Boylston Streets. Marino was a joyous spirit and personified the immigrant perseverance. He supported his wife and six children with his street performances.

Irish immigrant poets and street musicians such as Jack Whyte and Shay Walker graced the streets and parks of Boston. The late great Irish Fiddler, Larry Reynolds adopted many of the buskers into Comhaltas Ceoltóirí Éireann to enliven Boston Irish celebrations and festivals including the St. Patrick's Day Breakfast.

Street Performing and Busking traditions are as old as the city and should be celebrated.

Sincerely,
Stephen H. Baird
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