

CITY OF RED LODGE

1 PLATT AVENUE SOUTH, P.O. BOX 9, RED LODGE, MONTANA 59068



TO: Mayor Larson

FROM: Rebecca Narmore

DATE: August 25, 2020

RE: Free Speech in Public Forums

In response to the influx of emails of individuals complaining about a Back the Blue/Trump rally held in Red Lodge on August 16, 2020, I have researched more on traditional public forum law as I did this time last year when individuals were upset over “two church ladies” set up a Pride Park with two large displays of their literature. The research is much the same as it was this time last year as to what a government may or may not do with regard to requiring permits/license to speak in a “public forum”.

In 1946, the United States Supreme Court heard arguments in the case of *Marsh v. Alabama*, 326 U.S. 501 (1946) where the issue was if a sidewalk in a company owned town was public forum. The *Marsh* case involved a town on the Gulf Coast of Alabama named Chickasaw, Alabama. A shipbuilding company owned and operated the “town”. Alabama residents who were not residents of the Gulf neighbors were free to use the company owned streets and sidewalks to access town businesses and facilities. Ms. Marsh was a Jehovah’s Witness who stood near the post office one day distributing Jehovah’s Witness literature. Ms. Marsh was told that she needed a permit to do so, and she had not been issued one. When asked to leave, Ms. Marsh refused. She was arrested and charged with Alabama’s criminal code trespassing equivalent.

During her trial, Ms. Marsh asserted that the statute could not be constitutionally applied to her as it would violate her rights under the First and Fourteenth Amendments to the US Constitution. She was convicted and appealed her case to the Alabama Court of Appeals. Her conviction was affirmed at the appellate level with the reasoning that the statute was constitutionally applied to her case because the title to the sidewalk was in the corporation’s name. Alabama Court of Appeals went on to say that the public use of the sidewalk did not give rise to the presumption that it was an irrevocable dedication to the public. Ms. Marsh filed a writ of certiorari to the Alabama Supreme Court who denied her writ. Ms. Marsh appealed her case to the United States Supreme Court.

The United States Supreme Court ruled that a state trespassing statute could not be used to prevent a person from distributing religious information on a town’s sidewalk even if that sidewalk was part of a privately-owned company. The US Supreme Court based it’s ruling on the First Amendment and Fourteenth Amendment to the Constitution.

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Jumping ahead to the 21st century, the abortion issue has been a heated topic for both the pro-choice supporters and pro-life supporters. Due to protesters around abortion clinics, a number of states passed laws creating “buffer zones.” The buffer zones prevented pro-life supporters from coming within a number of feet of abortion clinics. In 2007, the State of Massachusetts established a 35 feet buffer zone from the entrance or driveway of reproductive health facilities. The buffer zone encompassed private property and public sidewalks. The Massachusetts law prohibited anyone from lingering in the buffer zone unless they were employees of the facility, patients going in or out, law enforcements or first responders, or other public employees. If someone was just walking through to reach a destination, they were allowed to do so.

The Justices all had differing reasons, but reached the same conclusion in that case. In *McCullen v. Coakley*, 134 S. Ct. 2518, 189 L. Ed. 2d 502, 573 US 464 (2014), the United States Supreme Court unanimously agreed that the State of Massachusetts could not limit the First Amendment rights of people who wish to weigh in on a public matter. People have the First Amendment right to weigh in on a public issue on a public street or public sidewalk. In fact, the Court held as follows:

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,” ...this aspect of traditional public fora is a virtue, not a vice.

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government’s ability to restrict speech in such locations is “very limited.”

Public streets and sidewalks are one of the last remaining places where free speech might encounter a dissenting audience because of the age of the internet. The Court differentiated between a close-quarters speech and a bullhorn. Sidewalks and streets allow for uniquely valuable form of speech and that is close-quarters conversation between two people where someone might actually change their mind. In this case, the Petitioner argued that the 35 feet buffer zone did just that. It prohibited her from having an up close/personal conversation with women who were on their way to the abortion clinic. The Petitioner wanted to be in close enough proximity to hand pamphlets to people who had an open hand.

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The US Supreme Court continued by stating that both the “normal conversation and leafletting” have historically been closely associated with the sharing of ideas and that the public forum is central to both. The Court emphasized that public streets and sidewalks are venues for the sharing of ideas. The Court stated that even today sidewalks remain the one place where the speaker may find himself not be “preaching to the choir”. In the world today, an individual can change the channel, flip a page, or turn off a broadcast that they don’t want to listen to. That is not so with the public forum. The public forum is meant “a to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” The US Supreme Court considers that a virtue and not a vice.

In the Massachusetts case of *McCullen v. Coakley*, 134 S. Ct. 2518, 189 L. Ed. 2d 502, 573 US 464 (2014), the Respondents addressed to the Court that the protestors were free to chant and display signs past the “buffer zone.” The US Supreme Court stated that the Respondents totally missed the point. The Petitioners were not protestors, but were individuals who wanted to inform women of alternatives and to provide help in pursuing the alternatives. This could only be accomplished through close, personal conversations. The US Supreme Court stated that it is easier to ignore someone chanting slogans or waving a sign than to ignore a direct greeting or outstretched hand.

The American Civil Liberties Union (ACLU) advises that an individual generally does not need a permit/license to pass out literature or give a speech in public places like a sidewalk or city park. Sidewalks and city parks are considered “traditional public forums”. These are two areas where free speech rights are protected the most. Government can limit the time, place and manner of speech in some ways. A government can limit the loudness, but has to be reasonable and cannot regulate the content of the speech.

The ACLU states that not all public property is considered a “traditional public forum”. For example, national parks and airports do not have the same protection as a public sidewalk or streets. A local farmer’s market held on sidewalks, parks and streets is an area protected by the First Amendment as a traditional public forum. However, one held on private property would be subject to differing rules of speech. A national park is not a “traditional public forum” for protection, but areas around visitor centers or other public gathering place might be subject to protection. The First Amendment protects soliciting for contributions for a religious or charitable organization in a traditional public forum. Political speech in traditional public forum is also protected.

Thus, a city cannot require a permit to sell political or religious items in traditional public forums and permits cannot be required for activity related to political or religious activities. Commercial speech has less protection in a traditional public forum. The City can impose reasonable restrictions on time, place or manner of protected speech provided the restrictions are justified without reference to the content of the speech.



In conclusion, the individual or group utilizing a traditional public forum does not have to have a permit. The person or group is protected in the traditional public forum by the First Amendment.

The ACLU “Know Your Rights Guide: Speech in Public Places” is attached to this memo. In addition to the ACLU guide, I have attached Montana Code Annotated sections that apply to pedestrian traffic. This applies to all groups demonstrating, marching or driving in a rally, etc.

61-8-501 Pedestrians subject to traffic regulations.

- (1) A pedestrian shall obey the instructions of any traffic control device that is specifically applicable to the pedestrian unless otherwise directed by a police officer.
- (2) Pedestrians are subject to traffic control signals and pedestrian control signals at intersections as provided in [61-8-207](#) and [61-8-208](#).
- (3) At all other places, pedestrians are accorded the privileges and are subject to the restrictions provided in this part.
- (4) Local authorities may by ordinance prohibit pedestrians from crossing a roadway within a local government’s jurisdiction, except in a marked crosswalk or in an unmarked crosswalk at an intersection.
- (5) Except as provided in [61-8-506\(3\)](#) and except when provisions by their nature can have no application, a person operating a manually or mechanically propelled wheelchair or other low-powered, mechanically propelled vehicle designed specifically for use by a physically disabled person is accorded the privileges and is subject to the restrictions applicable to pedestrians provided in this part.

61-8-502 Pedestrians’ right-of-way in crosswalk — school children.

- (1)
 - (a) Except as provided in subsection (1)(b), when traffic control signals are not in place or not in operation, the operator of a vehicle shall yield the right-of-way, slowing down or stopping if necessary, to a pedestrian crossing the roadway within a marked crosswalk or within an unmarked crosswalk at an intersection, but a pedestrian may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impossible for the operator to yield. This provision does not apply under the conditions provided in [61-8-503\(2\)](#).
 - (b) When a vehicle is stopped at a marked crosswalk or at an unmarked crosswalk at an intersection, the operator of a vehicle may make a right-hand turn if the pedestrian is in the opposite half of the roadway and is not in danger.
- (2) When a vehicle is stopped at a marked crosswalk or at an unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the operator of any other vehicle approaching from the rear may not overtake and pass the stopped vehicle.
- (3) A person may not operate a vehicle through a column of school children crossing a roadway or past a school crossing guard while the crossing guard is directing the movement of children across a roadway and while the crossing guard is holding an official sign in the stop position.



61-8-503 Crossing at other than crosswalks.

- (1) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.
- (2) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.
- (3) Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk.

61-8-504 Operators to exercise due care.

Notwithstanding [61-8-501](#) through [61-8-503](#), an operator of a vehicle shall exercise due care to avoid colliding with a pedestrian or with a person propelling a human-powered vehicle or using an assistive mobility device upon a roadway, shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing a child or an obviously confused, incapacitated, or intoxicated person upon a roadway.

61-8-505 Pedestrians to use right half of crosswalk.

Pedestrians shall move, whenever practicable, upon the right half of crosswalks.

61-8-506 Pedestrians on roadways and highways — wheelchair use on highways.

- (1) Where sidewalks are provided and their use is practicable, a pedestrian may not walk along and upon an adjacent roadway.
- (2) Where sidewalks are not provided, a pedestrian, other than an intoxicated pedestrian referred to in [61-8-508](#), who is walking along and upon a highway may walk only on the shoulder, as far as practicable from the edge of the roadway.
- (3) A person using a wheelchair or other vehicle designed specifically for use by a physically disabled person shall use sidewalks if use of sidewalks is practicable. If use of sidewalks is unsafe or not practicable, the person may use the wheelchair or other vehicle on a highway, as far as practicable from the center of the roadway.



61-8-507 Pedestrian soliciting rides, business, or contributions.

(1) A person may not stand on a roadway for the purpose of soliciting a ride.

(2) A person may not stand on a highway for the purpose of soliciting employment, business, or contributions from the occupant of a vehicle unless the solicitation is authorized by the proper jurisdictional authority.

61-8-508 Intoxicated pedestrian.

Except in an authorized crosswalk, a person who is under the influence of alcohol or any drug may walk or stand in the public right-of-way, as defined in [60-1-103](#), but not on a roadway or a shoulder as is otherwise permissible under [61-8-506\(2\)](#).

61-8-509 Pedestrian's right-of-way on sidewalks.

The driver of a vehicle crossing a sidewalk shall yield the right-of-way to any pedestrian and all other traffic on the sidewalk.

61-8-311 **Minimum speed** regulations.

(1) A person may not drive a motor vehicle at a speed slow enough to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law.

(2) On a two-lane highway where passing is unsafe because of oncoming traffic or other conditions, the operator of a slow-moving vehicle behind which four or more vehicles are formed in line shall turn off the roadway at the nearest area where a sufficient and safe turnout exists in order to permit the vehicles following it to proceed. If the shoulder of the highway to the right of the slow-moving vehicle is wide enough and is in a condition allowing safe travel, the operator of the slow-moving vehicle may drive onto the shoulder and proceed at a safe speed until passed. As used in this section, a slow-moving vehicle is one that is proceeding at a rate of speed less than the normal flow of traffic at the particular time and place. The department of transportation is authorized to designate and construct turnouts and to erect official traffic control devices at appropriate places advising motorists of this statute.

(3) If the department of transportation or local authorities within their respective jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway impede the normal and reasonable movement of traffic, the commission or the local authority may set a **minimum speed** limit below which a person may not operate a vehicle except when necessary for safe operation or in compliance with law.

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61-9-403 Mufflers — prevention of noise.

(1) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cutout, bypass, or similar device upon a motor vehicle on a highway.

(2) The engine and power mechanism of every motor vehicle shall be so equipped and adjusted as to prevent the escape of excessive fumes or smoke.