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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

STEVEN E. KROLL,

Plaintiff,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, a/k/a I V G I D , a governmental subdivision of the State of Nevada; et al.,

Defendants.

Case No. 3:08-cv-00166-ECR-RAM

Plaintiff's Emergency Motion to Enjoin Defendant IVGID's Policy No. 136 Regulating Speech As Void on its Face under the First Amendment

Memorandum of Points and Authorities in Support of Motion

Exhibit A: Policy No. 136

Affidavit of Steven E. Kroll

Certificate of Service

COMES NOW Plaintiff STEVEN E. KROLL and by and through his attorney undersigned moves this Court as a matter of great urgency to issue an Order permanently enjoining Defendant INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT from enforcing the provisions of a Policy and Procedure known as Number 136 (attached hereto and marked Exhibit A) put into effect by said Defendant on May 1, 2008, which purports to impose restrictions on constitutionally protected speech based among other things on the content of that speech, and grants to IVGID's General Manager limitless power in the complete absence of any articulable standards to choose what speech or other fundamentally protected activity will be permitted by this Nevada public body, and what not; in violation of the First Amendment to the United States Constitution, and to Plaintiff's 42 U.S.C.§ 1983 Privileges and Immunities claimed in the First and Second Causes of Action of his Amended Complaint on file herein.

This Motion is based upon the First and Fourteenth Amendments to the United States

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Constitution; the just-announced 9th Circuit decision of *Long Beach Area Peace Network v. City of Long Beach,* No. 05-55083 (9th Cir. 04/15/2008); upon the Affidavit of STEVEN E. KROLL attached hereto and to Plaintiff's Motion to Strike filed May 3, 2008 and the Affidavit of RONALD L. CODE of the same date attached thereto; and the Memorandum of Points and Authorities in Support which follows; and upon the other records and documents on file herein.

DATED: at Crystal Bay, Nevada this ____6th____ day of May, 2008.

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Memorandum of Points and Authorities in Support of Emergency Motion to Enjoin IVGID Policy No. 136 Regulating Speech

The Facts and Argument in Brief

In an election season of high drama with great questions of war and economic survival, electing a new President, global warming and so much more in the air, the Trustees of defendant INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT have hermetically sealed off their privileged enclave on the North Shore of Lake Tahoe[1] from one of the most central, most revered parts of our national identity, the First Amendment's guarantee against government infringement of Freedom of Speech and Expression.

With its adoption on April 30, 2008 of the draconian "Policy and Procedure Number 136: Policy Concerning Access to District Property and the Use of District Facilities for Expression" (Exhibit A attached), this smallest of public municipalities in the State of Nevada may be taking breathtakingly insupportable positions on the First Amendment, but in doing so it has conceded that the properties IVGID owns really *are* "public" after all, and subject to the same constitutional limitations that every other public body in this country has to abide by.

For *forty years* the INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT has treated itself as if it were a private Homeowner's Association administering private property

[1] The Incline Village zip code of 89451 is the 5th wealthiest in the Nation out of the 100 wealthiest reported by web site Mongabay.com, based on IRS figures for "Salaries and Wages".

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where the writ of the First Amendment and Equal Protection of the Law does not run, with its Incline Village property-holders granted exclusive rights to use the District's tax-exempt parks on the shores of Lake Tahoe as their own "Private Beaches" (see photo marked Exhibit B attached to Plaintiff's First Amended Complaint herein). By its adoption of Policy 136, the District admits for the first time that they no longer dispute that the BEACH PROPERTIES are, in fact, public parks. These parks are by definition "'public places' historically associated with the free exercise of expressive activities," *United States v Grace*, 461 U.S. 171, 177(1983), "the quintessential public forums" described in Grossman v City of Portland, 33 F3d 1200, 1204 (9th Cir 1994). As described by the U.S. Supreme Court so long ago in *Hague v CIO*, 307 U.S. 496, 515 (1939),

> **"[S]treets and parks . . . have immemorially been held in trust for the 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".**

But the old habits of a rich and privileged Homeowner's Association die hard. It has apparently been decided by the defendant Trustees, who have a personal economic interest in the subject matter of Policy 136 (as alleged fully in Plaintiff's Fourth Cause of Action to prohibit further such legislating by self-interested Trustees), that if they simply *must* acknowledge the Beach Properties as covered by the First Amendment they will use their legislative powers to limit the *size of the area* where such rights have to be tolerated, thereby continuing at least to give themselves exclusive use of the green lawns and sandy beaches and waters of the Lake within the Beach Parks without worrying about Non-Members of the Homeowner's Association coming up to talk politics or religion with them. If the First Amendment rights of its residents had to be sacrificed in every *other* IVGID venue to make sure the new Policy 136 appeared equal and even-handed, so be it. The "Private Beaches" had to be preserved, even at the cost of the First Amendment, and Policy No. 136 is the Frankensteinian result.

It is a scheme without precedence in American jurisprudence. With a bare 3-working day notice to the public and without discussion or dissent[2] despite impassioned comments by a few

[2] Everything about the Board's adoption of Policy 136 appears to have been pre-planned and scripted in advance, which would be a violation of Nevada's Open Meeting Law if true. Movant respectfully calls the Court's attention to the Fifth Cause of Action in his Amended Complaint which complains of Defendants' using the cover of attorney-client discussion to legislate the most far-reaching of public issues in secret, robbing the public of the transparency and input mandated by Nevada's Open Meeting Law. It cannot be the case that government may consider and vote upon laws that infringe on the most basic right of Freedom of Speech without adequate notice to the public and behind closed doors, as if the regulation of Speech were just a strategy in a lawsuit. Although not a direct part of this Motion, the Court may wish to address this issue *sua sponte* lest the rights of Incline Village and Crystal Bay citizens of the District continue to be made hostage to defendant IVGID's litigation tactics.

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citizens who had learned about it, the Board of Trustees of defendant IVGID pretended to address a problem that does not exist and which was nowhere ever previously raised for consideration or concern in the public record and on April 30, 2008 adopted its Policy "Concerning Access to District Property and the Use of District Facilities for Expression", to take effect the following day.

Policy 136 divides all IVGID-owned properties into two categories. The first category could be denominated **"First Amendment Partially-Protected Zones"**, consisting of twelve listed municipal properties wherein the Defendants' understanding of First Amendment Rights can be exercised by everybody in the world, but ONLY in "the parking lots, the walkways within and adjacent to the parking lots, and the sidewalks adjacent to any public entrance to any building open to the public located on such listed real properties and facilities." Policy 136 further advises (with a straight face) that exercise of these rights in the parking lots "must not interfere with parking or the flow of vehicular traffic". The District calls these limited areas within their Park and Recreation facilities **"Public Forum Areas."**

The Second Category, which could accurately be called **"First Amendment-Banned Zones"**, is made up of **all portions of the first category which lie outside of the Parking-Area "Public Forum Areas",** such as, at the following IVGID recreational venues: the baseball diamond, children's play park and picnic tables of Preston Field; the swimming pool and surroundings at the Recreation Center and at Burnt Cedar Beach; the non-denominational Sunday religious service area at the top of Diamond Peak's main ski lift; the park benches and picnic tables at Incline Beach and Aspen Grove and the Tennis Complex and Burnt Cedar Beach and along the links of the Mountain Golf Courses, and indeed ***literally everywhere else*** **on the District's facilities that can not be called a parking lot or a sidewalk.** *These* areas – plus ten additional named properties such as "Public Works Building" and "Sewer Pumping Station"[3] — are, in the language of Policy 136: "deemed to be and are designated as **'Non-Public Forum Areas'"**, which are IVGID properties "where public access may be limited or restricted," and where the freedom to speak one's mind and perhaps try to change another's so beneficently permitted by the District Trustees in the "Public Forum Areas" of the First Category are totally denied here.

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[3] As it happens, one of those Sewer Pumping Stations declared "Non-Public Forum Areas" is located on the narrow one-way road where Plaintiff lives in Crystal Bay. "This was the building that was used as a meeting place for the Board of Trustees of the Crystal Bay General Improvement District before it was merged into IVGID in 1995," asserts the Affidavit of Steven Kroll attached hereto, "and I have several times found myself in conversation with neighbors at that very spot about many matters of public concern ranging from Beach Access to Boulder Bay development plans for the old Biltmore Hotel Casino in Crystal Bay, to, most recently why I think Barack Obama needs to be the next President of the United States. Why IVGID would deem this historic site for the exchange of ideas to be a "Non-Public Forum Area" can only be explained by that body's naked assertion of arbitrary power unconnected to anything relating to a legitimate governmental interest."

"Assembly, communicating thoughts between citizens and discussing public questions …"? (*Hague vs CIO,* 307 U.S. 496, 515 (1939): forget about it if you happen to be in the "Non-Public Forum Areas" of defendant District's domain.

At least IVGID has made sure there will always be the "Public Forum Areas" of Category One where the People *can* communicate their thoughts and discuss public questions, and that's a relief.

Not so fast!

Under Policy 136, the "Public Forum Areas" provided in Category One are places where only "the exercise of expression, speech and assembly *in accordance with this Policy*" are allowed to take place. And *that* means, among *so many* other things, that **the speech or other expression permitted there can not contain content[4] which might "result in a violation of the privacy or rights of others[5]."** It **must not be "inappropriate** to the purpose and enjoyment of a specific real property and facility."[6] It must "protect persons entitled to use District real property and facilities" against any "activities or practices which would make them involuntary audiences."[7] **Permissible speech under Policy 136 must "protect the rights of persons authorized to use District real property and facilities** [otherwise known as "the people"] to the unique recreational experiences provided by the natural environment of such real property and facilities", whatever that means.[8] And citizens are allowed to use the "designated Public Forum Areas" only in a manner "consistent with the maintenance and operation of the District real properties and facilities", and only "to the extent permitted by law and this Policy and any rules and regulations which the District may adopt." (All this, do not forget, on top of restricting this "free speech" to the Parking Lots of IVGID's properties, and warning practitioners "not to interfere

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[4] **"[A] content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny."** Boos v. Barry, 485 U.S. 312, 321 (1988). **The government "must show that its regulation is necessary to serve a compelling state interest,"** *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983).

[5] "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. **Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.**" *Cantwell v Connecticut* , 310 U.S. 296, 309 (1940). "**Listeners' reaction to speech is not a content-neutral basis for regulation.**" *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134 (1992).

[6] **Government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.** *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

[7] How someone who is free to leave at any time can ever be said to be a member of a "captive audience" is hard to understand, particularly understanding that the offended person would only have to step out of the parking area under the District's Policy 136.

[8] Public laws and policies seeking to regulate speech can not be so vague; they must be content-neutral and narrowly tailored to serve a significant government interest. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

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with parking and vehicular traffic" while they're doing it!).

And not over yet, Policy 136 also promises "additional rules and regulation for the use of each real property" which may become necessary "in order to preserve the peace" and because "some of the real properties and facilities may have existing practical limitations."

While piously giving lip service to the fact that "public expression, speech and assembly is a fundamental right," the District sternly declares in its Preamble to Policy 136 that **it "must, however, balance the exercise of that fundamental right with its significant interests to satisfy its special purposes."** IVGID-owned properties are used "to fulfill its special purposes" declare the Trustees solemnly, "and those uses by the District take precedence over any other activity or use." It appears that *one* of the District 's "Special Purposes" in particular has made a deep impression on these government officials, being the transport of raw sewage for which they show their enthusiastic embrace in this new legislation. The other two "Special Purposes" which defendant IVGID claims take precedence over First Amendment rights are: supplying water and providing recreation to District residents.

Whatever delusions of grandeur suffered by this General Improvement District concerning the scope of its powers to regulate speech on its properties, however, it, no more than the Congress of the United States itself is permitted under the First Amendment to "balance" its citizens' fundamental rights against the perceived importance of its own "Special Purposes", especially in traditional public fora where ""the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace,* 461 U.S. 171, 177 (1983). In such locations, First Amendment protections are strongest and regulation is most suspect. *Grossman v. City of Portland,* 33 F.3d 1200, 1204 (9th Cir. 1994). "Public fora have achieved a special status in our law" says *NAACP v. City of Richmond,* 743 F.2d 1346, 1355 (9th Cir. 1984), and "the government must bear an extraordinarily heavy burden to regulate speech in such locales."

There can be no doubt that IVGID Policy 136 has failed to sustain the "extraordinarily heavy burden" of justifying its breathtaking infringements on the Freedom of Speech, and said Policy must be struck down in its entirety as unconstitutional.

Although it is not spelled out in Policy and Procedure Number 136 who will police it or make the final call on questions of what might be "inappropriate to the purpose and enjoyment" of a property and the other totally subjective restrictions on speech so fulsomely invoked in the Policy, it is the General Manager of the Improvement District who is undoubtedly finally responsible — before the Trustees themselves — for interpreting and applying the many thorny constitutional dilemmas raised by Policy 136. Currently, this would be an individual named BILL HORN, a man perhaps *particularly* unsuited for such awesome governmental duties holding citi-

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zens' basic rights in the balance. This is the BILL HORN who could not bring himself to read any communications from the Plaintiff KROLL in November of 2006 because of Mr. Kroll's "position on beach access" which had raised Mr. Horn's "emotions as the result of the choice of words and position on the facts" (Paragraphs 67 and 68 of the Amended Complaint). The same BILL HORN that put KROLL on an official Blacklist labeled "adversarial", and imposed a prior restraint on Kroll's communications to the IVGID Board by having them first reviewed by the District's General Counsel (Paragraph 67 of the Complaint). The same BILL HORN who has testified under oath in this case that

> **"at no time since I have been General Manager for IVGID has IVGID ever denied access to any group or individual, including Plaintiff, to access Burnt Cedar Beach, Incline Beach, Ski Beach, or Hermit Beach for the purpose of engaging in First Amendment activities" (Affidavit of BILL HORN sworn to on 30 April 2008, attached to Defendants' Motion to Dismiss Complaint of the same date filed herein).**

Yet more than one witness is prepared to testify at the trial of this matter to their *years-long efforts* to gain such access only to be personally and directly rejected by IVGID's General Manager BILL HORN on behalf of defendant District and the other individually-named defendants herein. (See Affidavit of RONALD L. CODE dated May 3, 2008 attached to Plaintiff's Motion to Strike the Filed Affidavits of Bill Horn and Ramona Cruz herein).

Of course since Mr. HORN's sworn statement was only "to the best of my recollection" it becomes more difficult in the face of Witness CODE's testimony to tell whether the General Manager is telling the truth here or in any future submissions he makes on behalf of his employer in this case.

But there is no need to weigh the credibility of witnesses in order to rule on the Motion for an Injunction now before this Court, no need to balance legitimate concerns of a public body against sometimes competing concerns of the citizenry in our democracy. The fatal defect in the Policy challenged by this Motion is plain on its face, printed unambiguously within the four corners of the paper it's written on and impossibly at odds with the first of our Bill of Rights' admonition that "Congress shall make no law infringing the freedom of speech, or of the press."

A more detailed legal argument supporting that conclusion follows, but Movant respectfully submits that the conclusion of facial invalidity would be inescapable to any High School civics student, any American layperson who understands and takes seriously the specialness of this country and its guarantee of Free Speech and Equal Treatment to all. It should not take "making federal case of it" to have to point that out.

Movant respectfully submits that there is another agenda at play here. IVGID Policy 136 is the work of public officials who have a personal financial stake in three of the twenty one

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District-owned properties listed as exhibits to that Policy, and only someone with *that* agenda could conclude that property owned by this public body can be roped off in whole or in part from the guarantees of the First and Fourteenth Amendments; and that a War of Revolution-won right by Americans to express themselves freely can be rendered meaningless by government censors unrestrained by anything other than their own prejudices and self interest.

Defendants' willingness to twist the Bill of Rights itself to their purpose of trying to preserve what they consider their "Private Beaches" is but another shameful example of the palpable Conflict of Interest alleged against these defendants in the Fourth Cause of Action of the First Amended Complaint. Under color of law they have taken the mighty freedoms proclaimed over decades of jurisprudence to be available in every corner of the Public Forums of America, and with the magic addition of a single word to create a new concept of "Public Forum *Area"*, these Trustees have shrunk that grand promise of freedom and liberty to the boundaries of a parking lot and the sidewalks that adjoin it. "In such cases there is no safety for the citizen except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government professing to act in its name." *Leydon v. Town of Greenwich,* 777 A.2d 552, (Conn. 2001).

The Law In Detail Governing Regulation of Speech from A Single Ninth Circuit Case Hot Off The Presses

A Ninth Circuit decision only three weeks old constitutes a road-map for First Amendment law in this jurisdiction and is directly on point to the motion at bar. Movant relies exclusively here on ***Long Beach Area Peace Network v. City of Long Beach (9th Cir. 04/15/2008)*** to demonstrate that Policy 136 unambiguously infringes rights guaranteed by the First Amendment, and that it is void on its face and must be swiftly and permanently enjoined as prayed for herein. Chunks of that decision relevant to this Motion will be quoted at length below (indicated without quotation marks via the indented text) , with Movant's commentary added where there is a direct connection to the law as stated in *City of Long Beach* and the facts of this case. References are to paragraph numbers in the Ninth Circuit's opinion which has not yet found its way into the Federal Reporter system, and unless otherwise noted, all emphasis is added by this writer.

Nature of the Challenge

> As an initial matter, we conclude that the Peace Network has Article III standing to bring this challenge. **Standing, in the constitutional sense, requires that plaintiffs establish (1) a "distinct and palpable" injury in fact (2) that is "fairly traceable" to the challenged provision and (3) that would "likely . . . be redressed" by a favorable decision for the plaintiff**. Allen v. Wright, 468 U.S. 737, 750-51 (1984) (internal

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quotation marks omitted); see Food Not Bombs, 450 F.3d at 1033. Plaintiffs mounting a facial challenge to an ordinance may establish standing by alleging that they have "modified [their] behavior" as a result of the ordinance, such as "by choosing locations other than [the areas subject to the ordinance]." Id. at 1034. **A plaintiff "need not apply for a benefit conditioned by a facially unconstitutional law,"** United States v. Baugh, 187 F.3d 1037, 1041 (9th Cir. 1999), but must demonstrate a "serious[ ] interest[ ] in subjecting [it]self to" the challenged measure, and must demonstrate that "the defendant [is] seriously intent on enforcing[ ] the challenged measure," NAACP v. City of Richmond, 743 F.2d 1346, 1351 (9th Cir. 1984). [¶ 36 of *City of Long Beach*.

Plaintiff STEVEN E. KROLL's standing to make this Motion and to assert his §1983 claim for the assault on his Privileges and Immunities as a United States citizen under color of law can not be seriously doubted in the face of his more than two-year quest to achieve IVGID'S recognition of his rights to Freedom of Speech, Petition, and Assembly, and to the Equal Protection of the Law as laid out in Paragraph 88 and throughout the 43-page Amended Complaint filed in Nevada State Court on March , 2007, and removed to this Court on April 2, 2008.

General Considerations Involved in Governmental Regulation of Protected Speech and Expression

"[46]
The First Amendment prohibits Congress from enacting laws "abridging the freedom of speech, . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. The Supreme Court has extended the protection of the First Amendment to the states. Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Thornhill, 310 U.S. at 95; Hague v. C.I.O., 307 U.S. 496, 512 (1939). **Three types of speech regulation are presumptively invalid: regulations on speech protesting government action, regulations affecting speech in a traditional public forum, and prior restraints**. By meeting certain criteria, content-neutral time, place and manner restrictions may overcome the presumption of invalidity.
[47]
A. **Presumptively Invalid Regulations**
[48]
1. **Regulation of Speech Protesting Government Action**
[49]
We have recognized that certain types of speech enjoy special status. See, e.g., Nat'l Adver. Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988) ("The first amendment affords greater protection to noncommercial than to commercial expression."). **Political speech is core First Amendment speech, critical to the functioning of our democratic system.** The Peace Network's protest of the United States military action in Iraq is **the type of speech that "rest[s] on the highest rung of the hierarchy of First Amendment values."** See Carey v. Brown, 447 U.S. 455, 467

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(1980); see also Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) **("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.")**; Thornhill, 310 U.S. at 95 (**"Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.** Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.").

Defendants IVGID and the individual Trustees have attempted to regulate Plaintiff's protests of the District's governmental action denying all its residents equal access to all District properties by Blacklisting Plaintiff because of his "position on beach access" (¶67 Amended Complaint), and they have the same unrestrained power of censorship under Policy 136. An "improper censorial motive" is sufficient, but not necessary, to render a regulation content-based and thus presumptively invalid. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). The many standardless restrictions in IVGID's Speech Policy 136 constitute "presumptively invalid regulations".

[51]
2. Regulation of Speech in Traditional Public Fora
[52]
The Supreme Court has established different levels of scrutiny for analyzing alleged First Amendment violations, depending on where the speech takes place. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). **In traditional public fora, "the government's ability to permissibly restrict expressive conduct is very limited."** United States v. Grace, 461 U.S. 171, 177 (1983). **In such locations, First Amendment protections are strongest and regulation is most suspect**. Grossman v. City of Portland, 33 F.3d 1200, 1204 (9th Cir. 1994). **"Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales."** City of Richmond, 743 F.2d at 1355.

[53]
"Public open spaces" such as parks are distinguished from streets because their use for expressive activities rarely implicates other important governmental interests. Food Not Bombs, 450 F.3d at 1042. **Public parks and sidewalks "are uniquely suitable for public gatherings and the expression of political or social opinion."** ACORN v. City of Phoenix, 798 F.2d 1260, 1267 n.5 (9th Cir. 1986). Courts have recognized a somewhat greater governmental interest in regulating expressive activity on city streets because of the public safety concerns raised by vehicular traffic. Id. at 1267. Nonetheless, **we have rejected the proposition that "the Supreme Court's designation of streets as public fora" is limited to "sidewalks and other locales traditionally reserved for public communication."** Id. at 1266. The Supreme Court has recognized that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly

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considered traditional public fora." Frisby v. Schultz, 487 U.S. 474, 481 (1988).

[54]

Traditional public fora gain even more importance when they are host to core First Amendment speech. See, e.g., Hague, 307 U.S. at 515-16. In Grossman v. City of Portland, we explained that the "venerable tradition of the park as a public forum has - as suggested by the attendant image of the speaker on a soapbox - a very practical side to it as well: **parks provide a free forum for those who cannot afford newspaper advertisements, television infomercials, or billboards."**

[55]

33 F.3d at 1205. **Government restrictions on the use of public places such as streets, sidewalks, and parks risk placing speech on topics of public importance within the purview of only the wealthy or those who enjoy the support of local authorities. See id. at 1205 n.8; City of Richmond, 743 F.2d at 1356 (calling for careful examination of restrictions "when their effects fall unevenly on different . . . groups in society")**.

There can be no doubt that IVGID's parks constitute "traditional public fora", and that the District bears "an extraordinarily heavy burden to regulate speech in such locales," a burden far from met in the draconian measures adopted by this municipality in Policy 136. The Court's pointed concern that speech on topics of public importance must not be placed "within the purview of only the wealthy or those who enjoy the support of local authorities" is particularly applicable in the case at bar, where IVGID has created two classes of residents and the Second Class residents are denied entry to the Beach Parks or any meaningful voice in their own local government. (*See also* footnote one of this Memo). As noted above, "careful examination of restrictions [is required] 'when their effects fall unevenly on different … groups in society,'" as here.

[57]

3. Regulation by Prior Restraint

[58]

Prior restraints on speech are disfavored and carry a "heavy presumption" of invalidity. Forsyth County, 505 U.S. at 130. "This heavy presumption is justified by the fact that 'prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights.' " Grossman, 33 F.3d at 1204 (alteration in Grossman) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1975)); accord Rosen v. Port of Portland, 641 F.2d 1243, 1246-47 (9th Cir. 1981). The Supreme Court explained in Ward v. Rock Against Racism, "**[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.'** " 491 U.S. 781, 795 n.5 (1989) (quoting Se. Promotions Ltd. v. Conrad, 420 U.S. 546, 553 (1975)). **A prior restraint need not actually result in suppression of speech in order to be constitutionally invalid**. "The relevant question [in determining whether something is a prior restraint] is whether the challenged regulation authorizes suppression of speech in advance of its expression . . . ." Id.

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IVGID General Manager BILL HORN's side-lining of Plaintiff KROLL's communications to the District's General Counsel before forwarding it on to the Trustees intended to be reached clearly constitutes "prior restraint" under this rubric; but so does his unbridled power to make the same kinds of decisions in administering Policy 136 now in effect. The "heavy presumption of invalidity" of such actions can not be overcome by anything put forward by Mr. HORN or the defendant Trustees to date, particularly in light of the "improper censorial motive" that appears to be governing all actions by the INCLINE VILLAGE IMPROVEMENT DISTRICT in their gratuitous quest to regulate speech within its borders.

B. Reasonable Time, Place and Manner Restrictions

[61]
"**[R]easonable time, place, [and] manner restrictions" on speech are permissible.** Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Such restrictions **can include permitting requirements for core First Amendment speech in traditional public fora**, id., and they are permissible **if they satisfy four criteria.** As the Supreme Court wrote in Clark, "We have often noted that restrictions of this kind are valid provided **[1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information."** Id. (bracketed numbers added). **In Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992), the Court recognized a fourth criterion: a permitting scheme "may not delegate overly broad licensing discretion to a government official."**

[62] **The first criterion is that the restriction be content-neutral. That is, the restriction must be based on something other than the content of the speech.** Grace, 461 U.S. at 177. **A law is content-based rather than content-neutral if "the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face."** ACLU of Nevada v. City of Las Vegas, 466 F.3d 784, 793 (9th Cir. 2006). **Though "an improper censorial motive" is sufficient, such a motive is not necessary to render a regulation content-based.** Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991). **If a regulation "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," it is content-based**. Foti v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir. 1998) (internal quotation marks omitted).

[63]
A content-based regulation is generally subject to strict scrutiny. The government therefore "must show that its regulation is necessary to serve a compelling state interest," Perry Educ. Ass'n, 460 U.S. at 45, and that the regulation uses "the least restrictive means to further the articulated interest," Foti, 146 F.3d at 636. "**[A] content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny.**" Boos v. Barry, 485 U.S. 312,

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321 (1988).
***

[68]
Finally, the fourth criterion is the prohibition on regulations that confer unbridled discretion on a permitting or licensing official. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). **Regulations must contain "narrow, objective, and definite standards to guide the licensing authority,"** id., and must require the official to "provide [an] explanation for his decision," Forsyth County, 505 U.S. at 133. The standards must be sufficient to "render [the official's decision] subject to effective judicial review." Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002). This requirement applies to an official's "authority to condition the permit on any additional terms" not stated in the ordinance. City of Lakewood, 486 U.S. at 772.

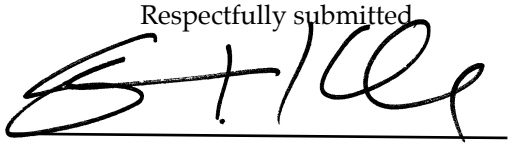
That Policy 136 impermissibly regulates the content of speech within the Incline Village General Improvement District, and that putting the ultimate determination of just what speech fits those amorphous considerations into the hands of General Manager BILL HORN or *any* bureaucrat with not just inadequate standards but NO standards violates the Constitution has been fully argued earlier and will not be belabored here.

CONCLUSION

Based upon the heart-stirring words of the First Amendment to the Constitution of the United States, that "Congress shall make no law prohibiting the Freedom of Speech, or of the Press"; and upon the factual and legal matters set forth above in support of the Motion at bar, Plaintiff STEVEN E. KROLL respectfully prays that this Court find and declare that defendant IVGID's "Policy and Procedure Number 136: Policy Concerning Access to District Property and the Use of District Facilities for Expression" is unconstitutional under the First and Fourteenth Amendments, and order that its continued existence and enforcement by the District be permanently enjoined.

DATED: at Crystal Bay, Nevada this 6th day of May, 2008.

Respectfully submitted,



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Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN E. KROLL,

Plaintiff,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, a/k/a I V G I D , a governmental subdivision of the State of Nevada; et al.,

Defendants.

Docket #3:08-cv-00166-ECR-RAM

Affidavit of Steven E. Kroll

Declaration Under Penalty of Perjury of STEVEN E. KROLL

County of Washoe)
State of Nevada) SS

STEVEN E. KROLL does hereby state under Penalty of Perjury the following:

1. I am the Plaintiff in the above-entitled action and a full-time resident of the Incline Village General Improvement District since the Crystal Bay General Improvement District of which I was previously a resident was merged into IVGID in 1995.

2. The following facts are based upon my own personal knowledge except as to those matters set forth upon information and belief, and as to those matters I believe them to be true.

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3. The copy of IVGID Policy and Procedure No. 136 attached hereto marked Exhibit A was extracted from IVGID's official "Agenda Packet" for its Board of Trustees Meeting for April 30, 2008, not including 11 pages of virtually illegible photos of the IVGID properties covered by Procedure 136. Inclusion of those pages would clutter up the Court file and are not, to my belief, necessary to understanding Policy 136. I attended the April 30th meeting and witnessed the lack of discussion or dissent and the other matters surrounding the adoption of Policy 136 as set forth in the Memorandum of Law herein. The Board adopted Exhibit A as written, except for adding an omitted IVGID venue to the eleven listed under Category One of the Policy, namely the Skate Park.

4. One of those Sewer Pumping Stations declared "Non-Public Forum Areas" in IVGD Policy 136 is located on Gonowabie Road, the narrow one-way road where I have lived in Crystal Bay for more than 25 years now. This was the building that was used as a meeting place for the Board of Trustees of the Crystal Bay General Improvement District before it was merged into IVGID in 1995, and I have several times found myself in conversation with neighbors at that very spot about many matters of public concern ranging from Beach Access to Boulder Bay development plans for the old Biltmore Hotel Casino in Crystal Bay, to, most recently why I think Barack Obama needs to be the next President of the United States. Why IVGID would deem this historic site for the exchange of ideas to be a "Non-Public Forum Area" can only be explained by that body's naked assertion of arbitrary power unconnected to anything relating to a legitimate governmental interest. I protest this violation of my constitutional rights, and the other outrageous violations set forth in Plaintiff's Motion for Injunction herein.

5. I am a supporter of Barack Obama for President of the United States with a feeling of almost evangelical zeal for carrying his message of hope and reconciliation and

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CHANGE to the mostly conservative voters in this District. Policy No. 136 became effective on May 1, 2008, and there is but half a year remaining before the most critical presidential election in my lifetime takes place; and I feel deeply the weight of this Policy in officially closing off my political speech and advocacy literally *everywhere* in the District where citizens gather to talk and exchange ideas, except in the District's Parking Lots which are by nature transitory, not to say dangerous.

6. Time is of the essence in this matter, for every day that passes with my advocacy muted by the government's Speech Policy 136 is a day lost to converting others to my belief in Barack Obama's superior qualifications for the next President of the United States. I feel that loss deeply, and pray for its swift end and the return of Freedom of Speech to my District through an appropriate Order of this Court.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Executed under Penalty of Perjury at Crystal Bay, Nevada this 6th day of May, 2008

Steven E. Kroll

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Exhibit A

INCLINE VILLAGE
GENERAL IMPROVEMENT DISTRICT
ONE DISTRICT – ONE TEAM

Policy and Procedure Number 136
Policy Concerning Access to District Property and the Use of District Facilities for Expression

PREAMBLE

The Incline Village General Improvement District (the "District") is a special purpose district existing under Chapter 318 of the Nevada Revised Statutes for the purposes of providing curbs, gutters, sidewalks, storm drainage, sewer disposal, water supply and recreational facilities.

The District owns real property and facilities that it uses to fulfill its special purposes, and those uses by the District take precedence over any other activity or use.

The District recognizes that public expression, speech and assembly is a fundamental right. The District must, however, balance the exercise of that fundamental right with its significant interests to:

(a) satisfy its special purposes;

(b) assure orderly conduct;

(c) protect the rights of persons authorized to use District real property and facilities to the unique recreational experiences provided by the natural environment of such real property and facilities;

(d) protect and preserve the unique environment on which the various District properties and facilities reside;

(e) reasonably provide an opportunity for access to the District community for expression; and,

(f) reasonably protect persons entitled to use District real property and facilities from activities or practices which would make them involuntary audiences, or which are inappropriate to the purpose and enjoyment of a specific real property and facility.

INCLINE VILLAGE
GENERAL IMPROVEMENT DISTRICT
ONE DISTRICT – ONE TEAM

Policy and Procedure Number 136
Policy Concerning Access to District Property and the Use of District Facilities for Expression

Through this Policy, the District designates public forum areas within its real property and facilities, and encourages any individual or group to use such designated public forum areas for the exercise of expression, speech and assembly, in accordance with this Policy. The District will not further regulate such exercise except as consistent with applicable law. In order to preserve the peace, however, and to promote the significant interests of the District, including those listed above, the District may make reasonable, lawful rules and regulations with respect to the time, place and manner of any use of its real property and facilities for purposes of expression, speech and assembly.

DESIGNATION OF PUBLIC FORUM AREAS

The District designates as public forum areas the following areas of the real properties and facilities listed on Exhibit 1 to this Policy: the parking lots, the walkways within and adjacent to the parking lots, and the sidewalks adjacent to any public entrance to any building open to the public, located on such listed real properties and facilities. A copy of this Policy and Exhibit 1, which Exhibit is made a part of this Policy, shall be available at each such real property and facility, and shall also be available at the District Administrative Office.

The designated public forum areas as described above for the real properties and facilities listed on Exhibit 1 are areas where all persons may exercise the activities of expression, speech and assembly, to the extent permitted by law and this Policy and any rules and regulations which the District may adopt. Such activities must be consistent with the maintenance and operation of District real properties and facilities, and must not interfere with the intended use of such facilities, or with parking, the flow of vehicular traffic, and ingress to and egress from the

property and all buildings and facilities. Such activities must not create an imminent health or safety hazard or result in a violation of the privacy or rights of others. The location and size of the designated public forum areas with respect to each real property and facility listed on Exhibit 1 reflects an appropriate balance of the significant interests of the District with the recognized right of expression, speech and assembly.

While it is the District's intention to assure use of the designated public forum areas as described in this Policy for each real property and facility listed on Exhibit 1 for the purpose of expression, speech and assembly, some of the real properties and facilities may have existing practical limitations. The District may make additional reasonable rules and regulations for the use of each real property and facility as it determines to be necessary.

BOARD MEETING ROOM

The meeting room at the District Administrative Office in which the Board of Trustees of the District conducts its meetings is also available for expression, speech and assembly consistent with the conduct of the Board's business during such meetings and with the provisions of N.R.S. § 241.020(3).

NON-PUBLIC FORUM AREAS

The portions of the District real properties and facilities listed on Exhibit 1 and not designated in this Policy as a public forum area, and all other District real properties and facilities, including without limitation, the real properties and facilities described in Exhibit 2, where public access may be limited or restricted, are deemed to be and are designated as "non-public forum areas."

INCLINE VILLAGE
GENERAL IMPROVEMENT DISTRICT
ONE DISTRICT – ONE TEAM

Policy and Procedure Number 136
Policy Concerning Access to District Property and the Use of District Facilities for Expression

EXHIBIT 1

LOCATIONS AND MAPS OF PROPERTIES

WITH DESIGNATED PUBLIC FORUM AREAS

1. Administration Building
2. **Recreation Center**
3. Tennis Complex
4. **Chateau**
5. Diamond Peak
6. **Preston Field**
7. Mountain Golf Course
8. **Burnt Cedar Beach**
9. Incline Beach
10. **Ski Beach**
11. Aspen Grove—Village Green

INCLINE VILLAGE
GENERAL IMPROVEMENT DISTRICT
ONE DISTRICT – ONE TEAM

Policy and Procedure Number 136
Policy Concerning Access to District Property and the Use of District Facilities for Expression

EXHIBIT 2

NON-PUBLIC FORUM AREAS

1. Public Works Building
2. Water Treatment Plant
3. Wastewater Treatment Plant
4. Wetlands Effluent Disposal Facility
5. Sewer Pumping Station
6. Water Pumping Stations
7. Spooner Effluent Pumping Station
8. Water Storage Reservoirs and Tanks
9. Parks Storage Building
10. Overflow Parking Lot

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 5(b) FRCP, I certify that I am the attorney for Plaintiff in the above entitled action, and that on this date I caused a true and correct copy of the " **Plaintiff's Emergency Motion to Enjoin Defendant IVGID's Policy No. 136 Regulating Speech As Void on its Face under the First Amendment, Memorandum of Points and Authorities in Support of Motion, Exhibit A, being Policy No. 136, and Affidavit of Steven E. Kroll**" herein to be served upon the parties or attorneys by electronically filing the same with this Court pursuant to and in compliance with its CM/ECF filing system, to which the following named attorney for all named defendants is a signatory:

Stephen C. Balkenbush, Esq.
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509

DATED: this 6th day of May, 2008.

STEVEN E. KROLL