FEBRUARY 2012 LAW REVIEW

PARK "OCCUPATION" PROTEST PROTECTED SPEECH OR CAMPING?

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As the "Occupy Wall Street" protest movement became more widespread, many cities faced the prospect of scores of protesters effectively taking up residence in public parks. While many protesters claimed an unfettered First Amendment right to "occupy" these public parks and places indefinitely, city officials rightfully maintained such rights of free speech and assembly do not necessarily include 24/7 "occupations" in the form of establishing permanent camp sites to house protesters. In 1984, the U.S. Supreme Court addressed a similar situation in the case of *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 82 L.Ed.2d 221, 104 S.Ct. 3065. In this case, the Supreme Court distinguished between protected symbolic speech and constitutional regulations established by the National Park Service which prohibited camping in conjunction with a proposed demonstration on the National Mall in Washington, D.C.
See "Regulating Constitutionally Protected Symbolic Speech In Parks," *Parks & Recreation*, September 1989
http://classweb.gmu.edu/jkozlows/lawarts/09SEP89.pdf

The case described herein, *Occupy Fort Myers v. City of Fort Myers*, 2011 U.S. Dist. LEXIS 131778 (M.D. Fla. 11/15/2011), is one of the early published federal court opinions arising out of the Occupy protest movement with many more expected. In this particular case, plaintiff Occupy Fort Myers (OFM) claimed certain city ordinances violated the First Amendment rights to free speech, assembly and association. As a result, OFM filed an emergency motion in federal district court requesting a preliminary injunction to prevent the City of Fort Myers from enforcing the challenged ordinances.

FACTS

OFM described itself as an unincorporated association of individuals who have gathered in Fort Myers, Florida "to bring visibility to the influence of private money into the nation's political process" and "attempt to bring visibility to the insidious influence of money into the U.S. political process, and to inform members of the general public on political issues such as social justice and economic equality." A core purpose of OFM is to "bring awareness to the concerns about the U.S. political process and economic policy through symbolic, around-the-clock, peaceful protests referred to as 'occupations.'"

In response to a planned symbolic occupation of Centennial Park, the Fort Myers Police Department (FMPD) advised OFM to contact the City's Recreation Division for a permit for overnight occupation. Following a noon rally and march on October 15, 2011, OFM began "occupying" Centennial Park that evening without a permit. From October 15, 2011, through October 19, 2011, members of OFM were allowed to "occupy" Centennial Park overnight without a permit.

On October 18, 2011, the City provided OFM with a "Special Events" pamphlet which included information and an application for a permit to remain in the City parks overnight. OFM completed the permit application and submitted it to the City's Recreation Division on the same

day. On October 19, 2011, the City informed OFM that before its permit application could be reviewed it was necessary for it to obtain a $1 million liability insurance policy and bring the insurance certificate to the City.

OFM was also informed that the City intended to enforce an ordinance which prohibits setting up tents and overnight camping in a park beyond closing hours if OFM did not comply with the insurance requirement. Under that ordinance, city parks are open from 6:00 a.m. until 10:30 p.m.

On October 19, OFM informed the City that it could not comply with the insurance requirement because it had no funds to pay for insurance even if it was available. On October 20, 2011, OFM continued to negotiate with the City for a permit, but the City would neither issue a permit nor identify any procedure for requesting either waiver or appeal. Accordingly, on the evening of October 20, 2011, at approximately 10:45 p.m., the FMPD began issuing citations to individuals for violating City ordinances.

The Chief of Police stated that as of October 26, 2011, seventy-three (73) citations had been issued. According to OFM, the citations were issued based upon unconstitutional ordinances for their involvement in "symbolic First Amendment-protected speech".

FIRST AMENDMENT NOT ABSOLUTE

As cited by the federal district court, the First Amendment to the U.S. Constitution provides in pertinent part that "Congress shall make no law abridging the freedom of speech or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const. amend. I. Further, the U.S. Supreme Court "has long held that the First Amendment applies to the States through the Fourteenth Amendment." Moreover, "municipal ordinances adopted under state authority constitute state action and are within the prohibition of the First Amendment". In this particular instance, there was no dispute that "the First Amendment applies to the City of Fort Myers ordinances." On the other hand, the federal district court further acknowledged that "First Amendment protection of speech and assembly is not absolute" and "a city government need not permit all forms of speech on property that it owns and controls."

Having found "the First Amendment applies to the City's conduct," the federal district court had to determine "whether the First Amendment protects the speech at issue" and "whether government restrictions are valid under the First Amendment." In so doing, the court recognized "one of the primary purposes of the First Amendment is to protect the free discussion of governmental affairs because the maintenance of a responsible democratic government depends upon it."

> Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and

> is entitled to special protection.
>
> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

In this particular instance, the court noted that there was "no dispute that much of the conduct by Occupy Fort Myers and its participants falls within the protection of the First Amendment." Specifically, the City did not dispute that OFM's activities "involving rallies, marches, distribution of literature, displaying signs and posters, and engaging in conversations regarding the topics which prompted the 'occupation' are matters of public concern and are well within the protection of the First Amendment." In the opinion of the court, however, "more problematic" was OFM's "claim to First Amendment protection for what are essentially sleeping and camping activities."

As noted by the court, OFM described "the current conduct in Centennial Park as setting up 10-12 tents, with four or five people staying within the tents twenty-four hours a day and the remaining participants 'rotating' in and out." Further, "participants eat food brought in by others, but do not cook food at the location." In the opinion of the court, OFM's description appeared to be "inherently fluid" since "[n]o fixed numbers of people or fixed duration of the occupation have ever been specified." The City maintained the activities described by OFM were mere conduct, rather than speech, and, therefore "outside the protection of the First Amendment." OFM, however, claimed their "occupation" was "symbolic expression" which was "protected by the First Amendment."

SYMBOLIC CONDUCT

As described by the federal district court, the "First Amendment protects symbolic conduct as well as pure speech." According to the court, "[s]ymbolic expression delivers a message by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative." Citing precedent case law from the federal courts, the federal district court noted that "sleeping out-of-doors is not a fundamental right *per se* [i.e., in and of itself]." On the contrary, the court noted case law precedent which had held "[t]he act of sleeping in a public place, absent expressive content, is not constitutionally-protected conduct." That being said, the court acknowledged that "sleeping and/or camping could be expressive conduct under appropriate circumstances."

Applying these principles to the facts of the case, the federal district court found "the tenting and sleeping in the park" as described by OFM was "symbolic conduct which is protected by the First Amendment."

> The conduct of tenting and sleeping in the park 24 hours a day to simulate an "occupation" is intended to be communicative and in context is reasonably understood by the viewer to be communicative. This expressive conduct relates to matters of public concern because it can be fairly considered as relating to matters

> of political, social, or other concern to the community and is a subject of general interest and of value and concern to the public.
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> While the conduct may change over time, the Court addresses only the current conduct of plaintiffs. Changed conduct can be addressed if and as it occurs.

PUBLIC PARK FORUM

The federal district court then considered the "validity of restrictions on protected First Amendment expression." In so doing, the court would consider the "type of speech and the type of forum being regulated." In this particular instance, the federal district court noted a public park, like Centennial Park, is "among those venues which have historically been considered public forums closely associated with the free exercise of expressive activities."

As cited by the court, the U.S. Supreme Court had found "streets 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." Further, the court found "regulation of speech on government property that has traditionally been available for public expression is subject to the highest [judicial] scrutiny." Specifically, the court noted "[s]uch regulations survive only if they are narrowly drawn to achieve a compelling state interest."

On the other hand, the court acknowledged that "the First Amendment does not guarantee access to property just because it is owned by the government." Instead, the court recognized that "conduct protected by the First Amendment is "subject to reasonable time, place, or manner restriction." According to the court, constitutional restrictions further "depend largely on whether the restrictions on the activities are content-based or content-neutral."

> Content neutral restrictions on conduct protected by the First Amendment in a public forum are proper if they are narrowly tailored to serve a significant governmental interest, and they leave open ample alternative channels for communication of the information.

Further, in determining whether an ordinance is content-neutral, the federal district court would consider "the terms of the ordinance to see if the ordinance distinguishes favored speech from disfavored speech on the basis of the ideas or views expressed."

> If content neutral, the government restriction need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.
>
> To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to

> advance its goals.
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> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

Moreover to "demonstrate the significance of its interest," the federal district court noted "the City is not required to present detailed evidence, but is entitled to advance its interests by arguments based on appeals to common sense and logic." Accordingly, in determining whether an ordinance is "narrowly tailored," the court would simply consider "whether there is a 'reasonable fit' between the governmental interests and the ordinance." While "a content-neutral restriction must allow ample alternative channels of communication," the court found the City could "satisfy this requirement even if the other channels may be less effective than plaintiffs would prefer."

EXTENDED PARK HOURS

In this particular instance, OFM alleged the City's "Park Regulation" ordinance (Ordinance Section 58-156) was "unconstitutional on its face as an impermissible prior restraint, containing terms which provide for targeted regulation of core political speech while allowing the Recreation Manager to make accommodations by extending park hours for sporting, cultural or civil events." Specifically, OFM challenged Section 58-156(a) which provided as follows:

> Except for unusual and unforeseen emergencies, parks shall be open to the public every day of the year during designated hours. The opening and closing hours shall be posted for public information. Normal park hours are 6:00 a.m. to 10:30 p.m. unless posted otherwise by the recreation manager. Such hours shall be deemed extended by the recreation manager as necessary to accommodate athletic sports events, or cultural or civic activities.
> Fort Myers, Fl., Code of Ordinances § 58-156(a).

OFM did not claim that "a public park has to be open twenty-four hours a day, and were not challenging the hours of operation set forth in the ordinance." Instead, OFM challenged the portion of the ordinance providing for extended hours, specifically the sentence stating: "Such hours shall be deemed extended by the recreation manager as necessary to accommodate athletic sports events, or cultural or civic activities." According to OFM, this ordinance section was a "content-based provision" which provided "unbridled discretion to the recreation manager and thus on its face violates the First Amendment."

In response, the City maintained that the challenged ordinance was "content-neutral because the park hours apply equally to everyone, and the fact that the hours can be extended does not render

it content-based." In so doing, the City interpreted the phrase "civic activities" to "simply relate to activities by its citizens, and therefore effectively means any activities," including OFM's "protest activities." The federal district court rejected the City's interpretation.

> The City wants the Court to interpret the sentence as if it was "Such hours shall be deemed extended by the recreation manager as necessary." This is not what the City Council wrote, and the City Council presumably meant something when it restricted the recreation manager to a necessary accommodation of only "sporting events, or cultural or civic activities."

As a result, the federal district court found "the plain language of this provision requires the recreation manager to examine the nature of the activity in making a decision to extend park hours." The court, therefore, determined this provision was "content-based, and therefore subject to strict scrutiny." Upon further review, the court concluded "this provision cannot withstand either content-based or content-neutral scrutiny."

> Under a strict scrutiny evaluation, there has been no showing of a compelling governmental interest in restricting the extension of park hours to only sporting events, cultural activities or civic activities. Even if content-neutral, there has been no showing of a significant governmental interest in restricting the extension of park hours to only sporting events, cultural activities or civic activities, and no showing that such restriction is narrowly tailored.

As a result, the federal district court found this particular provision in the ordinance was most likely "unconstitutional on its face." The federal district court, therefore, prohibited the City from enforcing the extended hours provision of the ordinance.

OVERNIGHT CAMPING

OFM further alleged that the following "overnight camping" section of the City's Park Regulation ordinance was unconstitutionally vague.

> No unauthorized person in a park shall: Set up tents, shacks, or any other temporary shelters for the purpose of overnight camping. No person shall live in a park beyond closing hours in any movable structure or special vehicle to be used or that could be used for such camping purpose, such as a tent, house-trailer, camp-trailer, camp-wagon or the like. Fort Myers, Fl., Code of Ordinances § 58-153(3).

OFM argued this section was unconstitutionally vague because it failed to "provide notice of what precise conduct it prohibits and authorizes arbitrary and discriminatory enforcement due to its lack of precision." As described by the federal district court, an ordinance is "void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." However, in this particular instance, the court found OFM had failed to show the overnight camping prohibition was unconstitutionally vague.

> By the express terms of the ordinance, it is clear to the public that it may not set up tents, shacks, or other temporary shelters to camp in the park overnight, and may not live in the park beyond closing hours in any movable structure or vehicle. Persons of ordinary intelligence are not left to guess at what conduct is prohibited, and the ordinance does not create the risk of arbitrary application.

In so doing, the court further acknowledged that OFM had "a constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally." On the other hand, the court noted that '[t]his liberty interest does not include sleeping or camping in a public park, and in any event can be forfeited by trespass or other violation of the law." Accordingly, under the circumstances of this case, the court concluded that OFM had "not established that they are likely to succeed on their claims to a fundamental right to lounge where, when, and for how long they wish in a public park or to meet in a public park during hours it is closed to the public." As a result, the federal district court denied OFM's "liberty claims" alleging a right to occupy and effectively take up residence in a public park.

"PROTRACTED LOUNGING" PROHIBITION

OFM also claimed that another section of the Park Regulation Ordinance violated "liberty interests" protected by the Fourteenth Amendment "to lounge on public benches and places according to their inclination and to meet with others in open air places within the City limits." In pertinent part, this particular ordinance prohibited "unauthorized persons in a park" from engaging in the following:

> Loitering and boisterousness. Sleep or protractedly lounge on the seats, benches, or other areas, or engage in loud, boisterous, threatening, abusive, insulting or indecent language, or engage in any disorderly conduct or behavior tending to a breach of the public peace. Fort Myers, Fl., Code of Ordinances § 58-154 (6).

OFM argued that this provision was unconstitutionally vague because it "creates uncertainty as to the type of loitering or boisterous behavior which would be considered offensive conduct, and which conduct would fall within the sweep of the ordinance."

In response, the City claimed OFM had failed to state a claim under this particular code section because OFM had not been charged with any violations of this ordinance, and the City did not intend to enforce this ordinance against OFM. The federal district court rejected this argument because the City had "not ruled out enforcement of this ordinance" against OFM. Moreover, in the opinion of the court, a portion of this ordinance was unconstitutionally vague because the scope and application of the term "protractedly lounge" was unclear:

> While the meaning of sleeping on seats, benches, and other areas is clear, there is no established meaning to "protractedly lounge" which would advise a person of ordinary intelligence when he or she was required to vacate the seat, bench, or other area in a City park.
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> Because the ordinance fails to define this crucial term, and it is not clear from the

> ordinance as a whole that the vast majority of its intended application is clear enough, it is likely to be unconstitutionally vague on its face.

While the meanings and application of both "disorderly conduct" and "breach of the public peace" were "well established under Florida law," the court found the term in the ordinance "behavior tending to a breach of the public peace" had "no established meaning, and is not comprehensible to persons of ordinary intelligence." Accordingly, the federal district court found OFM was likely to succeed on its constitutional challenge "to the provisions which prohibits 'protracted lounging' and conduct 'tending' towards breach of the public peace." The court, therefore, granted a preliminary injunction as to this portion of the ordinance.

CONCLUSION

In the opinion of the federal district court, a preliminary injunction was, therefore, warranted because OFM had satisfied their burden to show irreparable injury stemming from these unconstitutional ordinances.

> [E]ven a temporary infringement of First Amendment rights constitutes a serious and substantial injury, and the city has no legitimate interest in enforcing an unconstitutional ordinance. For similar reasons, the injunction plainly is not adverse to the public interest. The public has no interest in enforcing an unconstitutional ordinance.

As a result, the federal district court issued a preliminary injunction prohibiting enforcement as to those portions of the challenged ordinances which the court had found to likely violate the First Amendment. Further, proceedings would determine whether this preliminary injunction becomes permanent, and possibly modified, affirmed or reversed on appeal.

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