

PARK PLAYGROUND BAN ON ADULTS UNACCOMPANIED BY CHILDREN

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On January 7, 2015, the City of Hollywood, Florida became the latest city to adopt a municipal ordinance which effectively bans adults unaccompanied by a minor child from entering and/or remaining in a park playground. In creating “Designated Children Play Areas,” the Hollywood ordinance provides: “It shall be unlawful for any adult to enter and remain in a designated Play Area, where signage is posted, unless the adult is supervising and/or accompanying child(ren) who is/are then visiting the Play Area.” The ordinance defines an “adult” as anyone over 18 and “children” as persons age 12 or younger. “Play Areas” are defined in the ordinance as: “Any portion of an area within a city park that contains playground equipment for use by children, and has been posted with signs identifying the designated area as a children’s play area.”

The proposed sign from the “City of Hollywood Florida” states: “Notice: Designated Children’s Play Area - Adults allowed in this area only when accompanied by a child of 12 years of age or younger. Violators subject to enforcement pursuant to Section 103.04, Code of Ordinances.” Section 103.04 subjects “the offender, upon conviction, to a fine not to exceed \$500, or imprisonment for a period not to exceed 60 days, or by both such fine and imprisonment.”

According to the stated rationale for the ordinance, “play areas are intended to furnish and provide age appropriate recreational play equipment and open space to accommodate the needs and play behavior of minor children in the City who are supervised by parents, guardians, caretakers, or other appropriate adults.” Moreover, in order to provide “safe play areas for children,” the ordinance is further intended to “maximize play area equipment available for children and minors for whom the City’s play equipment and play areas are specifically designed.”

This stated legislative rationale for the ordinance regarding “age appropriate” playground equipment is not necessarily consistent with media reports. According to Hollywood’s mayor, the ordinance responds to the concerns of parents with young children who see “really strange people walking around everywhere” and have been “unnerved by some adult who just does not look right.”

One Hollywood commissioner “wondered whether the new rule might draw legal challenges,” but claimed the ordinance “will put a little dent into getting rid of the undesirables in the park,” but it “won’t get rid of them.” While existing legislation in many jurisdictions already bans sex offenders from playgrounds, another commissioner claimed the ordinance will protect “our kids” from sex offenders “that have not been caught yet.”

This Hollywood Florida ordinance is based on a similar 2010 Miami Beach Florida ordinance, Sec. 82-6. - Designated children play areas, which provides as follows:

Adults are allowed in designated children play areas in the city only when accompanied by a minor. Children play areas where this section is applicable will be specifically designated and signs will be posted informing the public of the

designation.

## NYC PLAYGROUND RULE

Similarly, the rules and regulations for New York City Parks provides for “Exclusive Children’s Playgrounds” in which adults are “allowed in playground areas only when accompanied by a child under the age of twelve (12).”

This provision is just one part of Section 1-05 in the NYC park rules which describe “Regulated Uses” to include “Exclusive Areas” as “designated by the [Parks] Commissioner for exclusive use.” In addition to children’s playground areas, these exclusive uses also include “Senior Citizen Areas” whereby the Commissioner can set aside certain areas of any park “for citizens aged sixty-five (65) and older, for their quiet enjoyment and safety.” Violations of these NYC park rules constitute a misdemeanor punishable by not more than ninety days imprisonment and/or by a fine of not more than \$1,000.

In particular, enforcement of the exclusive playground rule has generated some adverse media publicity for the NYC Parks Department. In one instance, seven men were cited for playing chess in a playground park. In another, a woman was ticketed for eating a doughnut in a park playground. In retrospect, in the interest of good public relations, it probably would have been better for the police officers involved to exercise discretion and simply warn these adults, as opposed to citing them for violating a park rule which many view as criminalizing rather innocent behavior.

<http://nypost.com/2010/11/18/cops-bust-seven-men-playing-chess-in-upper-manhattan-park/>

[http://gothamist.com/2011/06/06/ticketed\\_for\\_eating\\_a\\_doughnut\\_in\\_a.php](http://gothamist.com/2011/06/06/ticketed_for_eating_a_doughnut_in_a.php)

## REASONABLE RESTRICTION

If challenged, the issue is whether this type of ordinance will pass constitutional muster. While the Due Process Clause of the Fourteenth Amendment guarantees the right to enter certain public places, including city parks, this right is not absolute. There is no constitutional right to use public parks under all conditions and at all times. Instead, the individual’s constitutional right to use parks made available to the general public are subject to reasonable time, place, and manner restrictions. Further, these restrictions must be narrowly tailored to advance a compelling governmental interest.

Accordingly, from a constitutional law perspective, the issue is whether the creation of such exclusive use areas for playgrounds is a reasonable time, place and manner restriction which is based upon a rational governmental objective. Since the exclusion of unaccompanied adults does not involve a suspect class (i.e., a classification based on race, creed, color or natural origin), the courts will generally uphold such a rule given a reasonable connection between the regulation and a legitimate governmental objective. In constitutional law, this standard of judicial review for governmental actions is referred to as the rational basis test.

In so doing, judicial review will apply a more deferential rational basis test which generally presumes constitutionality and does not second guess the judgment and policies of lawmakers.

In the Hollywood, Florida, the stated objective of the ordinance is to “maximize play area equipment available for children and minors for whom the City’s play equipment and play areas are specifically designed.” Accordingly, if and when challenged, a court would more than likely uphold the constitutionality of an ordinance banning adults unaccompanied by children from park playgrounds. In other words, while reasonable minds may differ, most would agree that there may be a rational connection between the ban on certain adults and maintaining an age appropriate environment in public playgrounds for children.

In so doing, however, constitutional due process would require proper notice of the prohibited conduct. Thus, the placement and clarity of the playground signage message to the reasonable adult observer is a significant factor. Moreover, due process would also provide a procedure to appeal a violation of the ordinance.

Further, an ordinance which bans adults unaccompanied by a child from entering certain playgrounds may be viewed as a reasonable time, place and manner restriction when viewed within the context of a myriad of other park facilities routinely set aside for various exclusive uses (e.g., little league ballfields, picnic areas, and dog parks, etc.) wherein some adults are excluded and not others in certain places and certain times.

However, when an otherwise constitutional restriction is applied in a discriminatory manner, there may be some constitutional due process problems associated with selective enforcement of this type of ordinance. Such legal problems arise when these types of park rules effectively targets the homeless or other “undesirables,” effectively criminalizing the innocent behavior of “some adult who just does not look right,” In other words, selective enforcement of an otherwise constitutional ordinance may impose an unconstitutional “status” crime on certain individuals based on their appearance, not their conduct. That being said, in the absence of free legal services and representation, such individuals are unlikely to bring a constitutional challenge when cited for violating the ordinance.

#### DISORDERLY EXERCISE?

The case of *Galbreath v. City of Oklahoma City*, 2014 U.S. App. LEXIS 10824 (10<sup>th</sup> Cir 6/11/2014) describes one such situation involving “some adult who just does not look right” to some adults supervising children in a nearby playground. This case illustrates the notice requirement of constitutional due process. In this particular instance, plaintiff Allen Galbreath was arrested for disorderly conduct while performing his morning ballet exercises in an Oklahoma City park.

Galbreath is a "former dancer with the Oklahoma Ballet." Because of a debilitating hip condition, Galbreath regularly performed ballet exercises as a form of "physical therapy" at Goodholm Park in Oklahoma City to improve his ambulatory function. In June 2010, Galbreath went to Goodholm Park to perform his morning physical therapy exercises. He wore "[o]versized gray pants, a fitted gray T-shirt, . . . a red bandanna," and "high-heel shoe[s]." He also carried a

walking cane roughly 3 feet in length and a large red handbag.

Upon arriving at the park, Galbreath began singing and performing dance moves using his cane. Shortly thereafter, Galbreath fielded a call from a friend and began laughing loudly. A woman called 911 to report she was at the park with her grandchildren and concerned about a "man in high heels with a big stick and a purse."

Officer Kevin Parton of the Oklahoma City Police Department responded to the 911 call. After arriving, he found Galbreath wearing high heels and carrying a cane. When the officer asked Galbreath what he was doing at the park, Galbreath explained that he was doing his "morning exercises" and demonstrated a short choreographed ballet sequence using his walking cane.

According to Galbreath, Officer Parton "grabbed" Mr. Galbreath's arm, twisted it up "above [his] head to where it hurt" and escorted Galbreath to the police car. Officer Parton searched Mr. Galbreath's red bag and found an air pistol. After handcuffing Galbreath as a "precautionary measure" and running a warrant check, Officer Parton learned that Galbreath had no outstanding arrest warrants or any criminal background

Officer Parton recounted that, save for two tennis players, the other people in the park had gathered by the playground equipment and were no longer involved in "open play." He presumed they were afraid of Galbreath. Nothing in the arrest report, however suggested Officer Parton spoke with any of these individuals to confirm whether they were in fact alarmed.

Officer Parton arrested Galbreath for "disorderly conduct" under Oklahoma City Municipal Code § 30-81(b), which defines the offense as "caus[ing] public alarm without justification." Although the City initially charged Galbreath under the ordinance, it later dismissed the charge.

In his civil right claim against the City, Galbreath alleged "Officer Parton arrested him without probable cause" and "the City's disorderly conduct ordinance was unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment."

The federal district court granted summary judgment in the City's favor. In rejecting Galbreath's due process vagueness claim, the district court determined Galbreath had sufficient notice that his behavior could have fallen within the ordinance's description of prohibited conduct.

Galbreath appealed.

As noted by the federal appeals court, to satisfy due process, "a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

As cited by the court, the City's ordinance provides: "A person is guilty of disorderly conduct, a Class 'a' offense, when such person: . . . causes public alarm without justification." City of Oklahoma City, Ordinance No. 22210, § 30-81(b) (adopted May 6, 2003).

According to the court, the ordinance did not define "public alarm" or "without justification." Further, the court found no Oklahoma case construing these terms. The court would, therefore,

apply the ordinary dictionary meaning of these terms.

On appeal, Galbreath argued the language in the disorderly conduct ordinance was “unconstitutionally vague as applied to his activity in the park because it failed to give adequate notice to a person of ordinary intelligence that his conduct was unlawful.” The federal appeals court agreed.

In the opinion of the court, “nothing in the plain language of the ordinance suggests that singing and performing choreographed ballet moves in the park with a 3-foot cane while wearing high heels would cause ‘public alarm’.” Moreover, the court found “the ordinance's plain language failed to give Galbreath notice that any public alarm caused by these morning exercises would be ‘without justification’”:

Galbreath testified he was singing and doing ballet exercises in high-heel shoes as a form of physical therapy to relieve pain from a hip disorder. He exercised with the assistance of a roughly 3-foot-long cane. He twirled his cane for a few seconds in a choreographed dance move when Officer Parton confronted him. At that time, Galbreath had been at the park about five minutes.

Accordingly, the federal appeals court found “a reasonable jury could conclude he lacked fair notice that his conduct in the park could lead to criminal sanctions under the City's disorderly conduct ordinance.” The federal appeals, therefore, reversed the summary judgment of the district court in favor of the City and remanded (i.e., sent back) this case for further proceedings. On remand, a jury would determine whether a reasonable person in Galbreath's position would have had “fair notice that the particular conduct which he engaged in was punishable.”

(NOTE: This federal appeals court decision reverses the opinion of the lower court described in the February 2013 Law Review column entitled “Park Arrest for Flamboyant Ballet Exercise” <http://www.parksandrecreation.org/2013/February/Park-Arrest-for-Flamboyant-Ballet-Exercise/>)

In the playground ordinances described above, signage is used to provide the required notice. That being said, depending upon the placement and number of signs, along with the design and delineation of a particular playground space, it might not be apparent to ordinary people, including men playing chess and or woman eating a doughnut on a park bench, that they have actually entered a prohibited playground area.

#### PARKS LIBERTY INTEREST

Similarly, in the case of *Catron v. City of St. Petersburg*, 658 F.3d 1260; 2011 U.S. App. LEXIS 19746 (11<sup>th</sup> Cir. 9/28/2011), the City’s “trespass” ordinance may have been too vague and overbroad, providing enforcement officials with too much discretion in determining who gets to enter and remain in a public park. In this particular instance, a number of homeless individuals claimed the ordinance was unconstitutional because it selectively excluded them from the city parks.

The trespass ordinance at issue authorized certain city employees, including police officers, to

issue a "trespass warning," which warns persons on public property to depart from that property and not to return. In pertinent part, the trespass ordinance gave authority to issue a trespass warning as follows:

City employees or officials, or their designees, having control over a facility, building, or outdoor area, including municipal parks may issue a trespass warning to "any individual who violates any city ordinance, rule or regulation, or state law or lawful directive of a city employee or official for the public property where the violation occurred.

After a person had received a trespass warning, if the person is found on the pertinent public property "in violation of a trespass warning" that individual could be "arrested for trespassing."

Section 20-30 required trespass warnings -- as exclusions -- to be for a limited time. For first-time violations, the trespass-warning period could not exceed one year; for all other violations, the trespass-warning period could not exceed two years. Section 20-30(c).

A copy of the trespass warning -- it is a writing -- issued pursuant to the trespass ordinance had to be provided to the warning-recipient, but no formal procedures had been set out by which the recipient of a trespass warning could challenge the basis of the warning or the terms of the warning.

The trespass warning form attached to the City Police Department's instructional order on trespassing read, in pertinent part: "You are hereby notified that your presence is no longer welcome on the [municipal] property/premises described below, unless such prohibition is rescinded in writing by the City official having control over the premises."

Plaintiffs argued that the trespass ordinance was unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment. As described by the federal appeals court: The Due Process Clause requires "that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Moreover, the court noted that "[t]he government must provide the required notice and opportunity for a hearing at a meaningful time and in a meaningful manner, although the notice and hearing may be postponed until after the deprivation has occurred."

Citing U.S. Supreme Court precedent, the federal appeals court acknowledged "Plaintiffs have a constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally." *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 1858, 144 L. Ed. 2d 67 (1999)

An individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage," or the right to move to whatsoever place one's own inclination may direct.

In this particular instance, plaintiffs alleged that the City prohibited them from being in city

parks in general and Williams Park in particular.

In the opinion of the appeals court, plaintiffs had sufficiently alleged that “the City has deprived them of liberty interests” in the following two ways:

- 1) enforcing the trespass ordinance to prohibit them from having access to a specific park (Williams Park) as ordinarily used by the public; and
- 2) carrying out a policy of enforcing the ordinance to prohibit their use of all parks in the City open to the public generally.

The appeals court found these allegations were sufficient to establish a procedural due process claim for deprivation of a constitutionally protected right, i.e., the right to enter and remain in city parks. That being said, the court acknowledged that “[t]his right, to use a city park or parks, of course, is not absolute.” On the contrary, the court found “St. Petersburg residents do not have a constitutional right to use public parks under all conditions and at all times.” Instead, the court simply acknowledged “a resident of St. Petersburg has some federal right to use St. Petersburg parks under the ordinary conditions in which these parks are made available to the general public.” In so doing, the court also recognized the City had a substantial interest “in discouraging unlawful activity and in maintaining a safe and orderly environment on its property.”

However, in this particular instance, the appeals court found it was too “easy for the City -- through a variety of agents -- to issue a trespass warning.” Moreover, there was “no procedure is provided for the recipient of a trespass warning to challenge the warning or for the warning to be rescinded.”

Section 20-30 provides a lot of discretion to many different city agents to issue trespass warnings for a wide range of acts. Given that these warnings operate like some kind of injunction, this situation creates a substantial risk of erroneous deprivation of liberty...

In addition, a wide range of acts could constitute a violation of "any city ordinance, rule or regulation, or state law or lawful directive of a city employee or official" and might result in a trespass warning: public indecency, littering, and even disobeying the lawful directions (for example, do not run around the pool) of a lifeguard in a public pool would seemingly all be included in that description.

Most importantly, the appeals court found “Section 20-30 provides no guidance to city officials (or their designees) or police officers in exercising their discretion to determine whether a person has actually committed a violation that permits issuance of a trespass warning.” In the opinion of the court, “this lack of specificity suggests that whenever an authorized city employee thinks a violation has occurred, he may issue a trespass warning.”

Accordingly, as currently written, the appeals court found the trespass ordinance did not provide plaintiffs with sufficient procedural due process because there was “no way to contest the trespass warning or at least the scope of the warning.”

## MARCH 2015 LAW REVIEW

Depending upon the particular circumstances, the playground ordinances described above may similarly also be subject to a variety of due process challenges, particularly when targeted at social “undesirables’.” Stay tuned.

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