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# PARK HOURS PROHIBITED OVERNIGHT OCCUPATION

James C. Kozlowski, J.D., Ph.D.


First Amendment rights of free speech and assembly are subject to reasonable time, place, and manner restrictions by government. Such regulations must also be content neutral. In other words, governmental regulation of free speech and assembly must treat all speakers equally without reference to the nature of the ideas or opinions being communicated. Moreover, the regulations must be "narrowly tailored," i.e., a close relationship must exist between the governmental restriction and the significant governmental interest to be achieved.

Further, governmental restrictions on free speech and assembly must not leave a licensing official with too much discretion to decide which speakers and messages have access to a traditional public forum to express their views. Public parks and streets are considered the quintessential public fora in which all individuals and groups should be able to express their views, subject to reasonable time, place and manner governmental regulations.

## NORMAL PARK HOURS

It is commonplace for public parks to be "Closed at Dark" or "Closed at Midnight." Would such existing commonplace governmental regulation of public access to a public park be considered content-neutral and a reasonable time, place, manner restriction under the First Amendment? That was the issue before the federal district court in the case of *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110; 2012 U.S. Dist. LEXIS 95517 (E.D. Calif. 7/10/2012).

In the first week of October 2011, a group of individuals aligned with the "Occupy Wall Street" movement assembled in Sacramento's Cesar Chavez Park with the purpose of engaging in political expression. Occupy Sacramento planned to maintain a continuous twenty-four hour a day presence in Chavez Park for an indefinite period of time in order to "communicate their message to people in the local area, as well as to communicate with other 'Occupy' groups across the country and around the world." Cesar Chavez Plaza Park is a community park, approximately 2.5 acres in size, in downtown Sacramento located across the street from City Hall. Historically, Chavez Park has been a site for peaceable assemblies and free speech.

Subject to some limited exceptions, Sacramento City Code § 12.72.090 prohibited anyone from remaining in the Park after 11:00 p.m. and before 5:00 a.m. each weekday, and after midnight and before 5:00 a.m. on weekends. With the concurrence of the police chief, the parks and recreation director could "designate extended park hours for any park when the director determines that such extension of hours is consistent with sound use of park resources, will enhance recreational activities in the city, and will not be detrimental to the public safety or welfare."

On October 7, 2011, shortly after 11:00 p.m., and on succeeding nights members of the City's Police Department ordered members of Occupy Sacramento and others out of the Park at the closing times designated in § 12.72.090, i.e., 11:00 p.m. Occupy Sacramento contended the City's enforcement of § 12.72.090 disrupted their "peaceable assembly." As a result, Occupy

Sacramento alleged they were afraid to peaceably assemble and engage in constitutionally protected political speech with "other likeminded citizens in Cesar Chavez Park after the hours set forth in § 12.72.090" for fear of being arrested.

According to Occupy Sacramento, the City had "no standards by which determinations are made and discretion is exercised as to which events are permitted to be held after such hours." Moreover, Occupy Sacramento claimed "the City routinely sponsors and/or co-sponsors events which are held after the hours specified in city code section 12.72.090." Yet, Occupy Sacramento alleged the City had refused their group's request for permission to remain in Chavez Park after park ours.

Occupy Sacramento subsequently petitioned the federal district court for a temporary restraining order (TRO) to prevent the City from "enforcing the City Code as it pertains to illegal camping (Sacramento City Code Chapter 12.52) and loitering in parks between the hours of 11:00 p.m. and 5:00 a.m. (Sacramento City Code Section 12.72.090)." The court refused to issue a TRO, finding restricted park hours did not subject Occupy Sacramento to "irreparable harm." On the contrary, the court found "the demonstration could be held during normal park hours."

The court further noted that Occupy Sacramento had failed to file a timely application for a permit to use the park after hours in October. In November, Occupy Sacramento filed an application for an overnight use permit for the Park with the Department of Parks and Recreation. The Parks Director promised to review the application on an expedited basis and ultimately denied the application for a parks use permit.

FIRST AMENDMENT STANDARDS

As cited by the court, [t]he First Amendment states, in relevant part, that "Congress shall make no law abridging the freedom of speech, the right of people peaceably to assemble." U.S. Const. amend. I. Moreover, the Supreme Court has held that First Amendment's prohibitions also apply to state and local governments through the Fourteenth Amendment.

As characterized by the court, "[t]he protections afforded by the First Amendment are nowhere stronger than in streets and parks," both categorized for First Amendment purposes as traditional public forums.

> In such quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

That being said, the federal district court noted that First Amendment rights in parks are not absolute, but subject to reasonable governmental regulation:

> [E]ven in a traditional public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech,

> that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Moreover, the court further noted that "narrowly tailored does not mean the least restrictive or least intrusive means of achieving a government's legitimate content-neutral interests." On the contrary, the court found "[t]he level of scrutiny depends on whether the challenged ordinance is related to the suppression of free expression."

COMPLAINT & RESPONSE

In its complaint, Occupy Sacramento alleged § 12.72.090 was both "facially" unconstitutional and unconstitutional "as applied" under the First and Fourteenth Amendments. As noted by the federal district court, "a statute is facially unconstitutional if it is unconstitutional in every conceivable application, or it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." Further, [a] facial challenge is a challenge to an entire legislative enactment or provision" while an "as-applied First Amendment challenge contends that a given statute or regulation is unconstitutional as it has been applied to a litigant's particular speech activity." The court acknowledged, however, that "[t]he underlying constitutional standard is the same for both a facial and an as-applied challenge."

In this particular instance, Occupy Sacramento claimed the law effectively abridged "the right to petition the government for redress of grievances protected by the First Amendment." As characterized by Occupy Sacramento, "the law operates to chill protected speech." Occupy Sacramento, therefore, petitioned the court to issue a permanent injunction which would prohibit the City from enforcing Sacramento City Code § 12.72.090.

In response, the City asked the federal district court to dismiss the complaint "on the basis that § 12.72.090 is a facially valid time, place and manner restriction on speech." Consistent with the First Amendment rights, the City contended that "§ 12.72.090 is content-neutral, narrowly-tailored to a significant government interest that leaves open adequate alternatives for Plaintiffs expression and limits the Parks Director's discretion."

CONTENT NEUTRAL?

In determining content neutrality within the context of First Amendment speech cases, the federal district court would determine "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."

In this particular instance, the court found § 12.72.090 was "content-neutral" because it "applies to all Park users who have not obtained a permit to remain in the Park." Further, the law did not regulate speech. Instead, the court found the law's "prohibition against remaining in the parks after certain hours merely regulates the hours that anyone can remain in City parks."

More significantly, the court found § 12.72.090 was content neutral because the law "does not make reference to prohibiting any kind of speech or expression." Moreover, the court noted "the

ordinance at issue here was enacted in the 1970s and has been in its present form since its amendment in 1981."

> § 12.72.090 predates the Occupy Sacramento demonstrations by roughly thirty years, there is no allegation that the City was not enforcing it prior to October 6, when Plaintiffs began congregating in the Park, and there is evidence that the City has been consistently enforcing the ordinance since the demonstrations started.
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> While § 12.72.090 does have the direct effect of limiting speech and expressive activities in City parks during those hours during which people are not permitted to remain or loiter in the parks, the Court notes that "reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid."

Having found no allegation or evidence of any "content-based purpose behind § 12.72.090," the federal district court concluded "§ 12.72.090 is content-neutral."

In reaching this determination, the federal district court distinguished the situation described herein from those faced by "Occupation" demonstrators in some other cities wherein officials allegedly enacted a policy that established a curfew and permit regulations on public land after demonstrators began gathering in a public space. This type of targeted "post-hoc" permitting scheme would be constitutionally suspect because the legislative response would appear to be in reaction to a particular demonstration. Under such circumstances, legislation directed at a particular group would not be "content-neutral." On the contrary, it would appear to be based upon governmental disagreement with the particular message of the demonstrators.

NARROWLY TAILORED?

According to the federal district court, "any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." In addition, the court noted that "[a]ny such regulation of speech or speech-related conduct is overbroad-and therefore facially invalid-if it punishes a substantial amount of protected speech, judged in relation to the regulation's plainly legitimate sweep."

Occupy Sacramento had contended that § 12.72.090 was "either over-broad or under-inclusive and is not 'narrowly tailored' because it denies the public an important venue for free speech and assembly during a substantial part of the night." Moreover, Occupy Sacramento claimed "§ 12.72.090 does not advance a legitimate government interest." Further, Occupy Sacramento argued "a continuous around-the-clock presence in the Park for an indeterminate period of time is a necessity of participation for some Occupy Sacramento protesters."

In the opinion of the federal district court, the purpose of § 12.72.090 was consistent with the text of the City Code "to promote the safety, comfort, and convenience of the public's use and enjoyment of any park." Specifically, the court noted that the text of the law contained "numerous limitations and prohibitions on specified activities in the parks for health and safety

reasons." In addition, the court found a 1981 staff report had established the 1981 amendments to § 12.72.090 were "to better accommodate use and to mitigate interference with the general public's enjoyment of park facilities and buildings."

In particular, the federal district court found "the Parks Director's statement of the purpose for the park use regulations to be persuasive and compelling":

> [the purpose of the challenged City's park use regulations were] to ensure the ability of the general public to enjoy the park facilities, to ensure the viability and maintenance of those facilities, to protect the public's health, safety and welfare, and to protect the City's parks and public property from overuse and unsanitary conditions, including but not limited to, camping and overnight sleeping activities in City parks not specifically designed for those purposes.

On the other hand, the federal district court found Occupy Sacramento's argument that "§12.72.090 is either over-broad or under-inclusive and is not narrowly-tailored is not compelling." In so doing, the court noted that "[t]he ordinance is limited to City parks and limited to five or six hours a day between the hours of 11:00 p.m. and 5:00 a.m":

> Section 12.72.090 does not prevent Plaintiffs from conducting their expressive activities twenty-four hours a day on adjoining sidewalks or in other public spaces if they so choose. It just prevents them from doing so by remaining in City parks after the hours established by the ordinance if they do not have a permit to do so. It is therefore not overbroad. Neither is it under-inclusive. The fact that § 12.72.090 applies to parks and not to sidewalks or other public places does not lead inevitably to the conclusion that the hours restrictions are intended to stifle free expression in City parks, as Plaintiffs imply.

As a result, the federal district court concluded that § 12.72.090 is both narrowly tailored and that it serves a substantial government interest.

> Specifically, the City has a substantial interest in ensuring and protecting the: (1) ability of the general public to enjoy the park facilities, (2) viability and maintenance of those facilities, (3) public's health, safety and welfare, and (4) City's parks and public property from overuse and unsanitary conditions. A regulation that prohibits the public's use of the parks for five to six hours a day - in the middle of the night - serves these interests.

ALTERNATIVES FOR EXPRESSION?

Occupy Sacramento had also contended that "by closing the park to the public for five to six hours every night, they have been deterred from, and must refrain from, engaging in their expressive activities." In particular, Occupy Sacramento contended that "a continuous presence in the Park" needed to be maintained "for the purposes of solidarity, to reach the maximum number of passer-by, as well as to communicate with people around the nation and around the world."

The federal district court disagreed. According to the court, Occupy Sacramento was "not prevented from maintaining a continuous presence in the area, or from continuing their communications around the clock." On the contrary, the court noted that "§ 12.72.090 just prohibits them from remaining in City parks after the hours established by the ordinance if they do not have a permit to do so":

> For eighteen to nineteen hours a day, Plaintiffs may engage in their activities in the Park. After park hours, for five or six hours a night, Plaintiffs may continue their expressive activities on the streets and sidewalks or other public fora.

UNBRIDLED DISCRETION?

As described by the federal district court, Occupy Sacramento had further alleged that "§ 12.72.090 gives the Parks Director 'unbridled discretion' to permit the after-hours use of the Park and contains 'no standards' governing the Park Director's discretion":

> Plaintiffs contend that the Parks Director "may sponsor or cosponsor after-hours park activities, without restriction, and persons attending such activities are exempt from the park closure rules." In addition, with the concurrence of the Chief of Police, the Parks Director may extend park hours when he determines "'that such extension of hours is with sound use of park resources, will enhance recreational activities in the city, and will not be detrimental to the public safety or welfare.'"

As noted by the federal district court, "[w]here the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content":

> The underlying concern is that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.

Accordingly, as cited by the federal district court, a reasonable time, place, and manner regulation must contain "adequate standards to guide the official's decision and render it subject to effective judicial review." On the other hand, "where the official's discretion is limited and is guided by narrowly drawn, reasonable and definite standards," the court found a governmental regulatory scheme "may be upheld." In this particular instance, the court found **"**the Park Director's discretionary authority to grant or deny permits to use City parks is expressly limited by § 12.72.180 which also provides for an appeal process," as well as judicial review of the Parks Director's permitting decision:

> Specifically, City Code § 12.72.180, "Action on Application -Grounds for Denial

> - Procedure" establishes that the Parks Director "shall" grant a park use permit, unless the permit cannot be granted on the basis of any of several enumerated exceptions (e.g., failure to file a timely permit; the proposed activity would violate the law; etc.). Furthermore, Section 12.72.180 explicitly provides that "[a]ny decision of the director may be appealed by the applicant to the city manager pursuant to Section 12.72.190."

CONCLUSION

As a result, the federal district court held "§ 12.72.090 is a reasonable time, place and manner restriction on speech that: (1) is content-neutral; (2) is narrowly tailored to serve a substantial government interest; (3) leaves open ample alternatives to expression; and (4) includes adequate guidelines to appropriately limit the Park Director's discretionary authority." The federal district court, therefore, granted the City's motion to dismiss Occupy Sacramento's lawsuit.

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Similarly, see also "Park 'Occupation' and the Constitution":

http://www.parksandrecreation.org/2012/February/Park-Occupation-and-the-Constitution/

Related YouTube Videos, search term "Occupy Sacramento":

21 Occupy Sacramento Protesters Arrested
http://www.youtube.com/watch?v=HL_by8J1tSQ

'Occupy Sacramento' Demonstrators Return To Park
http://www.youtube.com/watch?v=y2fwGlFlOVo

Protesters Occupy Sacramento Park For Second Night
http://www.youtube.com/watch?v=_kxbVG8VB3A

Occupy Sacramento 10/06/11
http://www.youtube.com/watch?v=fgM-Bqev8D8

Occupy Sacramento Night 2 Arrest
http://www.youtube.com/watch?v=l4ih_nMuUkw

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: jkozlows@gmu.edu Webpage with link to law review articles archive (1982 to present): http://mason.gmu.edu/~jkozlows