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Legal Opinion 2012-006

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Mark Muir, Chief of Police; Mike Brady, Assistant Chief of Police; Mike Colyer, Captain; Chris Odlin, Captain; Scott Hoffman, Captain; Scott Brodie, Lieutenant; Ellen Buchanan, Director of MRA; Chris Behan, MRA; Donna Gaukler, Missoula Parks & Recreation Director; Kathy Mehring, Parks & Recreation

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE June 6, 2012

RE: Legality of time, place, or manner restrictions or limitations applicable to petition signature gatherers at temporarily permitted events occurring on public property

FACTS:

It is generally recognized that a municipality may establish reasonable regulations governing the time, place or manner of free speech activities occurring on public property. Occasionally temporary use permits are issued by a municipal government to private entities to temporarily use public property, such as a portion of a public park for a special event to be sponsored and administered by a private entity. At times citizens attempting to exercise their perceived free speech rights on public property generate conflict with the private entity possessing the temporary use permit. If the private entity attempts to establish time, place or manner restrictions or limitations associated with their temporary special event permit, it is the private entities responsibility to enforce their restrictions or limitations.

ISSUE:

May an entity possessing a temporary use permit for public property restrict or prohibit citizens from utilizing the same public property during the temporary use permit time period even if the public is generally invited to attend the special event?

CONCLUSION:

Yes, reasonable time, place and manner restrictions may be enforced as long as they are content neutral and uniformly applied.

LEGAL DISCUSSION:

The Ninth Circuit U. S. Court of Appeals case *Berger v. City of Seattle* pertained to municipal government (City of Seattle) rules governing conduct of visitors at the 80 acre Seattle Center public park. Initially the Ninth Circuit noted:

The government bears the burden of justifying the regulation of expressive activity in a public forum such as the Seattle Center.

We begin our analysis with one bedrock principle: The protections afforded by the First Amendment are nowhere stronger than in streets and parks, both categorized for First Amendment purposes as traditional public fora. . . .

Despite the broad First Amendment protection accorded expressive activity in public parks, **"certain restrictions on speech in the public parks are valid. Specifically, a municipality may issue reasonable regulations governing the time, place or manner of speech."** To pass constitutional muster, **a time, place, or manner restriction must meet three criteria: (1) it must be content-neutral; (2) it must be "narrowly tailored to serve a significant governmental interest"; and (3) it must "leave open ample alternative channels for communication of the information."**

Berger v. City of Seattle, 569 F.3d 1029, 1035-1036 (9th Cir. 2009) (emphasis added) (citations omitted).

The Ninth Circuit went on to explain:

A narrowly tailored time, place, or manner restriction on speech is one that does not "burden substantially more speech than is necessary" to achieve a substantial government interest. It must "target and eliminate no more than the exact source of the 'evil' it seeks to remedy." *Moreover, although the chosen restriction "need not be the least restrictive or least intrusive means" available to achieve the government's legitimate interests*, the existence of obvious, less burdensome alternatives is "a relevant consideration in determining whether the 'fit' between ends and means is reasonable.

A "State's interest in protecting the 'safety and convenience' of persons using a public forum" is assuredly "a valid government objective." ("Regulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties" We have also held that, under appropriate circumstances, a permitting requirement governing the use of a public open space can further a legitimate interest in the regulation of competing uses of that space.

Berger, 569 F.3d at 1041 (citations omitted).

The recent Sixth Circuit U. S. Court of Appeals decision in *Bays v. City of Fairborn* provides helpful guidance with respect to a third party possessing a temporary special event

use permit to hold a festival at which the public was generally invited to attend. *Bays* involves an annual festival, the Sweet Corn Festival, that the private groups FAA and Lions Club organized and were responsible for conducting in a public park pursuant to a permit. The FAA and Lions Club had a policy of no solicitations at the annual festival.

Initially, it should be noted that the Sixth Circuit in *Bays* indicates:

"It is undisputed that [First Amendment] protections . . . are triggered **only in the presence of state action and that a private entity acting on its own cannot deprive a citizen of First Amendment rights."**

Bays v. City of Fairborn, 668 F.3d 814, 819; (6th Cir. 2012) (emphasis added).

However, the primary problem for the City of Fairborn was that uniformed city police officers enforced the private policy of the FAA and Lions Club. Enforcement by government turned the matter into state action, rather than private party action. The private parties' no solicitation policy had to be enforced by the private parties and not by government in order for the legal principle "a private entity acting on its own cannot deprive a citizen of First Amendment Rights" to apply. If state action is involved, then the no solicitation policy will be reviewed from a regulation of free speech perspective as a government regulation with respect to its reasonableness regulating time, place and manner as well as whether it is content neutral.

The Sixth Circuit court went on in *Bays*:

Because *Bays* and *Skelly* wish to engage in protected speech in a traditional public forum, the applicable principle in this case is that reasonable "[t]ime, place, and manner restrictions may be enforced . . . so long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

Bays, 668 F.3d at 821 (emphasis added).

The Court in *Bays* addressed "content neutrality" stating:

"A major criterion for a valid time, place and manner restriction is that the restriction may not be based upon either the content or subject matter of speech."

"Government regulations of speech are content neutral if they are 'justified without reference to the content or viewpoint of the regulated speech.' The government's purpose is the controlling consideration," and a restriction is content-based if it was "adopted . . . because of disagreement with the message [the speech] conveys."

"Requiring that all [expression take place] from a stationary location is a content-neutral regulation."

Bays, 668 F.3d at 821 (citations omitted) (emphasis added).

The Court addressed the narrow tailoring of any regulation or restriction to serve a significant interest stating:

To be a constitutional time, place, and manner restriction, the solicitation policy must be narrowly tailored to serve a significant government interest.

Here, there is no fence surrounding the Festival at Community Park and no admission fee to enter, as there was in *Heffron*. And Fairborn does little to demonstrate the significance of crowd control at the Festival. Although it consistently argues reduced congestion and smooth traffic flow as the purposes behind the solicitation policy, Fairborn "must do more . . . than 'assert interests that are important in the abstract.'"

Bays, 668 F.3d at 822-823 (citations omitted) (emphasis added).

Since uniformed city police enforced the Festival's private policy, it became government action and in essence reviewed as if it were a government policy. However, the Festival solicitation policy was found to not meet the narrow tailoring standard that must be applied to government actions pertaining to free speech and was declared unconstitutional because it was not narrowly tailored.

Finally, the Court in *Bays* stated:

Therefore, even if Fairborn could demonstrate significant interests served by the policy, the solicitation policy fails to meet the requirements for a reasonable time, place, and manner restriction because it is not narrowly tailored to serve those interests.

The solicitation policy is unconstitutional because it is not narrowly tailored to serve a significant government interest.

Bays, 668 F.3d at 824.

CONCLUSION:

Yes, reasonable time, place and manner restrictions may be enforced as long as they are content neutral and uniformly applied.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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