Memo

To: Skip Randolph
From: Brett Lashley
Date: January 28, 2022
Subject: Special events and public forums memo

Brief History

The Town of Palm Beach ("Town") has recently upgraded many of its public parks. Town Ordinance 106-256 requires a permit for special events on Town property. The recent upgrades have attracted a large number of permit requests for use of the Town's parks. This increase in usage has spurred concern as it relates to wear and tear on the Town's parks, an increase in traffic during large events and adverse impacts on the communities surrounding the parks.

Issues

1. Can the Town limit special events on public forums to Town residents only?

Brief Answer: Probably not, but the Town may be able to charge non-residents a higher application fee.

2. Can the Town prevent all special events on certain public forums?

Brief Answer: Probably, but the ordinance will need to pass strict scrutiny. Meaning, the Town must have a substantial justification for doing so, the ordinance must be narrowly tailored to the substantial justification and there must be alternative channels for public demonstrations.

3. Are public demonstrations different than special events under the Code?

Brief Answer: Yes, but the difference between special events and public demonstrations may need to be more defined in the Town's ordinances.

Relevant Case Law

A state's police power has been defined as the authority to provide for the public health, welfare, safety and morals. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The police power is restricted by the state and federal constitutions designed to protect private rights from arbitrary and oppressive government action. *Eccles v. Stone*, 183 So. 628 (Fla. 1938). The first step for a court is determining which test to apply – rational basis, strict scrutiny or somewhere in between – all depending upon how fundamental the right is and how compelling the state interest is. The standard or test to apply in evaluating whether a restriction of speech in a public forum violates the First Amendment depends on whether the restriction is content-based or content-neutral. *See Solantic LLC v. City of Neptune Beach*,

410 F.3d 1250, 1258 (11th Cir. 2005). A regulation will be "content-neutral" if it "is justified without reference to the content of the regulated speech." *DA Mortgage*, 486 F.3d at 1266 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 228, 293 (1984)).

Where a restriction is content-based, the government "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). That is not the case here as the Town is seeking to limit certain events at public parks regardless of the content of the event.

If the exclusion is content-neutral, the state may enforce time, place, and manner restrictions that [1] "are narrowly tailored to serve [2] a significant government interest and [3] leave open ample alternative channels of communication." *Id.*; *see also U.S. v. Grace*, 461 U.S. 171, 178 (1983). Essentially, the restrictions must survive "intermediate scrutiny." *See Burk v. Augusta-Richmond County,* 365 F.3d 1247, 1251 (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989); *U.S. v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000)); *see also Silvio Membreno & Florida Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13, 19–20 (Fla. 3d DCA 2016) ("there are two prongs to the rational basis test, requiring the Court to consider both whether the statute serves a legitimate governmental purpose and whether the Legislature was reasonable in its belief that the challenged classification would promote that purpose.").

The Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *see Cox v. New Hampshire,* 312 U.S. 569, 574–576, 61 S. Ct. 762, 765–766, 85 L.Ed. 1049 (1941). Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, 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. *See United States v. Grace,* 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983).

Relevant Provisions of the Town's Codes

Town Ordinance §106-256 ("special events ordinance") defines special events as "any meeting, activity, walk/run, or gathering of a group of persons having a common purpose, design or goal, upon any public street, sidewalk, alley, park, beach or other public place or building, which special event substantially inhibits the usual flow of pedestrian or vehicular travel or which occupies any public area or building, which results in preempted use by the general public or which deviates from the established use."

Subsection (1) of the special events ordinance reserves the right to limit the use of public spaces at any time to prevent overuse and/or adverse impacts to adjacent neighborhoods. Town Ordinance §106-218(10), which governs parade permits, provides:

> Nothing herein shall preclude picketing or demonstrations on the public streets, sidewalks or parks of the town, which is otherwise permitted by state and federal law, so long as the picketing or demonstration otherwise complies with all town ordinances and the picketers or demonstrators are situated in a manner so as not to obstruct, impede, hinder or otherwise interfere with the orderly movement of pedestrian or vehicular traffic.

This is relevant because the Town may need to add similar language to the special events ordinance. That issue will be more fully addressed below.

Analysis

1. The Town probably cannot limit special event to Town residents only.

In *City of Maitland v. Orlando Bassmasters Ass'n of Orlando, Florida, Inc.*, the plaintiff sough to invalidate a municipal ordinance that prohibited non-residents of the defendant city from obtaining parking permits for boat trailer spaces in a municipal park. 431 So. 2d 178, 179 (Fla. 5th DCA 1983). The city's stated justification for favoring its residents, as recited in the ordinance, was "[T]raffic congestion, access to the park, constraints of limited parking spaces for boat trailers (13), and proximity of the park location to adjacent residential dwelling units." *Id.* The court held that the ordinance was unconstitutional and invalid:

> insofar as such ordinance discriminates between residents and non-residents in the use of the trailer parking facilities at Fort Maitland Park, no substantial reason for such discrimination having been shown or that use by non-residents created a peculiar evil attributable to the non-residents.

The court ultimately held that there was no substantial government interest, but rather was intended solely to give residents preference over non-residents for the use of the parking spaces. *Id.* at 179-180. *But see County Board of Arlington County, Va. v. Richards,* 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977) (upholding an ordinance which ordered permits be issued to residents for areas designated as crowded because it reduced air pollution and other environmental effects).

As such, absent a substantial justification, the Town will not be able to limit special events and parades to Town residents. Merely stating that there is traffic congestion due to non-residents events may not be enough to meet this substantial justification threshold. One argument non-residents may make is that there may be less special events overall if non-residents are prohibited from acquiring permits, but the traffic congestion and other issues will remain the same on the days an event is held for a Town resident. Accordingly, if the Town decides to limit the permits to residents only, the Town must be prepared to show a substantial justification for limiting the permits to its residents, that the new ordinance is narrowly tailored to achieve that interest and that there are alternate channels for communication.

2. The Town may be able to charge non-residents higher application fees for special event permits.

Although *City of Miami v. Haigley*, 143 So. 3d 1025, 1034 (Fla. 3d DCA 2014), is premised on an equal protection claim, the court's holding may be useful to the Town's present situation. In *City of Miami*, the court upheld an ordinance that charged non-residents $100 more than residents for use of the City's emergency medical transportation services. *Id.* The court held that an equal protection claim on the basis of residency status was subject to the rational basis test and found that there was a rational basis for requiring non-residents to pay an additional $100 for use of the City's emergency medical services. *Id.* The court noted that the residents already contributed to the payment for the medical services through ad-valorem tax. *Id.* at 1035. The non-residents did not. *Id.* In order for the City to have adequate resources, there was a legitimate reason to charge non-resident's the additional $100. *Id.* Thus, the court determined the ordinance passed the rational basis test:

> The City's residents, users and non-users of emergency medical transportation services alike, more than make up for the additional $100 surcharge charged non-resident users by contributing a far greater amount to the City's overall emergency services budget. The base rate paid by individuals using the City's emergency medical transportation services is insufficient to cover the total cost, and the City could have properly determined that an extra $100 was necessary to offset that additional cost since non-residents do not contribute through the payment of ad valorem taxes. Thus, the ordinance satisfies the rational basis test, and therefore, there is no equal protection violation.

Id; see also AGO 87-58 (finding the department of natural resources could implement a higher fee for non-residents of the state of Florida for access to Florida parks upon the passage of the rational basis test); *but see* AGO 76-124 ("Although a municipality may charge a fee for individual use of a municipally owned park or other municipal recreational facility which is reasonably related to the expense incurred in operating and maintaining the park or facility, the municipality may not charge a higher fee to nonresidents than residents unless all relevant economic factors establish a rational foundation for such differentiation.").

Here, the Town may not be able to exclude non-residents from using its parks for special events, but under *City of Miami*, it may be able to charge a higher application fee to non-residents. A challenge to the ordinance would likely be on the basis of residency status and would only require the ordinance pass the rational basis test. Similar to the residents in *City of Miami*, the residents of the Town already pay a share of the funds required to maintain the parks through taxes. Thus, an ordinance requiring non-residents to pay a higher application fee due to the increase in maintenance it costs the Town should pass the rational basis test. (Note, per Florida's AGO 76-124, the Town may have to show other economic factors that necessitate the higher fee charged to the non-residents other than the paying of taxes).

If the Town decides to raise application fees for non-residents, non-residents may have a first amendment claim on the basis that the higher fee violates freedom of speech. To counter this potential argument, the Town will need to make sure that non-residents have alternate channels for communication and that the Town parks are available for demonstrations/picketing (which do not require permits).

3. The Town's ordinance will need to pass strict scrutiny to bar all special events from certain public forums. Meaning, the Town will need a compelling interest, a narrowly tailored ordinance and alternative forums for communication.

"In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983). A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 115–16 (1972). Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment. *Id.* Because these are public forums and an absolute bar on all special events may be a violation of the First Amendment (a fundamental right), the Town must ensure that there is a substantial interest for prohibiting all special events at certain public forums and that an absolute ban is narrowly tailored to that substantial interest.

As mentioned above, the Town's special events ordinance reserves the Town's right to deny permits for special events to prevent overuse and adverse impacts. Also, the Town's parade ordinance mentions that nothing in the Town's codes prevents picketing or demonstrations in public parks. As such, the Town's parade ordinance implicitly acknowledges that demonstrations/picketing are different than parades and specials events. Because both residents and non-residents have a constitutional right of access to public forums, residents and non-residents need to have the ability to picket and gather at the parks for public demonstrations (events that do not require a permit) to be constitutional.

Thus, the Town may want to adopt a similar provision in the special events ordinance which indicates that public demonstrations/picketing, which does not require a permit, are allowed at these forums. The definition of public demonstrations/picketing should be defined so it is clear how these events differ from special events. Based on the provision in the parade ordinance, it seems that public demonstrations/picketing only differ in that they do not affect the flow of pedestrian or vehicular traffic.

Therefore, the Town may prohibit special events from certain public forums as long as there is a substantial reason for doing so, the ordinance is narrowly tailored, there are alternate forums for communication, and public demonstrations/picketing are allowed at these locations.

Based on the foregoing, the definition of parade, special events and public demonstrations/picketing should be more fully defined in the code in order to avoid a potential first amendment violation.

4. Other factors to consider when amending the Town's ordinances.

When implementing a fee for permits on public forums, the fee should be "a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (invalidating an ordinance which imposed an arbitrary fee of "no more than $1,000").

The court in *Pritchard v. Mackie*, 811 F. Supp. 665, 668 (S.D. Fla. 1993), held that requiring a one million dollar insurance policy for issuance of a permit was not a "nominal fee" and was an unconstitutional restraint on the first amendment. Town Ordinance 106-257(10) requires the applicant acquire an insurance policy of at least one million dollars. This type of requirement has been held unconstitutional.