COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 11-4152-G

OCCUPY BOSTON, KRISTOPHER MARTIN,
SASHA SAGAN, NOAH MCKENNA, AND JENNIE SEIDIWAND,
Plaintiffs,

vs.

CITY OF BOSTON, CITY OF BOSTON POLICE DEPARTMENT, by and through
POLICE COMMISSIONER EDWARD DAVIS, and the ROSE FITZGERALD
KENNEDY GREENWAY CONSERVANCY, INC.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Introduction

This proceeding arises out of the demonstration known as Occupy Boston, which occupied Dewey Square in Boston on September 30, 2011. Protesters have been living on the site since, and hope to continue to do so, and govern themselves as an exemplary democracy. Plaintiffs claim that their occupation of the site and the community they have established thereon are protected by the First Amendment. They seek a preliminary injunction against their removal by the defendants.

But the injunction is denied because, while Occupy Boston protesters may be exercising their expressive rights during their protest, they have no privilege under the First Amendment to seize and hold the land on which they sit. The distinction is key.

The *occupation*, that is, the seizing and holding of land of the Commonwealth is separate and distinct conduct from the *living activities*, that is, the setting up of tents, sleeping overnight, eating and governing on the site. "Occupation" speaks of boldness, outrage, and a willingness to take personal risk but it does not carry the plaintiffs' professed message. Essentially, it is viewed as a hostile act, an assertion of possession against the rights of another. The act of occupation, this court has determined as a matter of law, is not speech. Nor is it immune from criminal prosecution for trespass or other crimes.

However, the setting up of the tents, sleeping, and governance on Dewey Square is expressive conduct and symbolic. Nevertheless, it is subject to City and Park regulations and restrictions. Thus, the Conservancy's prohibition on sleeping overnight and other restrictions on Dewey Square are valid, and applicable to Occupy Boston. The protesters are obligated under the law to abide by those regulations, as well as the orders of the City of Boston, the Boston Police Department, and the Rose Fitzgerald Kennedy Greenway Conservancy.

This decision clears the way but does not order the plaintiffs and other protesters to vacate the site and request permission to set up tents or other equipment for expressive purposes, should Occupy Boston wish to continue its association with the Rose Kennedy Greenway Conservancy. Overnight sleeping and living at Dewey Square are not options under the Conservancy guidelines, however.

For these reasons and those that follow, the plaintiffs' Motion for a Preliminary Injunction is **DENIED**.

PROCEDURAL BACKGROUND

After a hearing on November 16, 2011, this court granted the plaintiffs' motion for a temporary restraining order.[1] The text is in the margin.[2] Plaintiffs now seek a preliminary injunction extending that order to prevent the City of Boston and Boston Police Department from removing them from Dewey Square. Filed with this motion was the plaintiffs' complaint in which they seek a declaratory judgment. In addition to a permanent injunction, they seek a declaration of law that they are entitled to continue to peacefully occupy Dewey Square, that the trespass and unlawful assembly statutes do not apply to them, and that the Conservancy's Park Use Guidelines violate their First Amendment rights.

A limited evidentiary hearing was conducted on December 1, 2011. All parties filed affidavits which are evidence in the case; the affidavits are largely undisputed. The court makes factual findings below and then explains the pertinent law relied upon in reaching a decision.

FACTUAL BACKGROUND

Occupy Boston aspires to create a more perfect democracy on public land. Developed as parkland, the *locus in quo* is a hundred-foot wide median strip, which covers an interstate highway tunnel and is bounded by an exit ramp and heavily trafficked streets. It is operated by the Rose Fitzgerald Kennedy Greenway Conservancy, Inc. and is known as Dewey Square.[3]

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[1] When this judge issued the temporary order, it was on a preliminary showing, on less than twenty-four hours notice to the defendants, and with only the plaintiffs having argued the First Amendment issues at play. The situation on the ground has evolved considerably since then and the legal issues have now been fully briefed by all parties.

[2] The City of Boston and the City of Boston Police Department are ordered to refrain from any police action which would remove the individuals, tents, and personal belonging of the Occupy Boston protesters from Dewey Square, absent emergency circumstances including but not limited to medical circumstances, fire, or outbreak of violence, at any time before this court has decided the motion for a preliminary injunction brought by these plaintiffs.

[3] The Rose Fitzgerald Greenway Conservancy is a private, non-profit corporation and is designated by statute to operate and maintain the Rose Fitzgerald Kennedy Greenway and other parks and open spaces in Boston. The Greenway is a chain of five public parks extending approximately one mile through downtown Boston between

Affiliated with the Occupy Wall Street movement, Occupy Boston took over Dewey Square on September 30, 2011. No permit was requested or granted from any official before the protest moved in. There is scant evidence as to how the occupation began. Presumably, plaintiffs and a large number of people simply marched to the site and seized it by their presence and numbers. Neither the police nor the Conservancy challenged them.

However, Occupy Boston soon established itself on the square with a number of small tents, which were set up side-by-side and have remained in place. More tents and protesters have joined the group. Participants have inhabited Dewey Square on a twenty-four hour basis since.

The Mayor, Conservancy, and the Boston Police Department have been restrained in their treatment of the protest. There has been no police action against Occupy Boston but for the events of October 10, 2011.

On that night, Occupy Boston spilled northerly onto the next nearest plot of parkland. After many efforts to notify the leaderless occupiers, police cleared the second encampment early the following morning. This resulted in the arrest of 126 protesters. The plaintiffs describe this police action as chaotic and frightening. Protesters locked arms and formed a human circle in order to protect the second encampment because they believed they were entitled to defend and hold their turf. Considerable police force was required to clear the area, and people were thrown backward off the circle and assaulted.

New Sudbury Street in the North End and Beach Street in Chinatown. It includes, among other things, the public parks located in the North End, the Wharf District, Chinatown, and Dewey Square. Before being subsumed into the Massachusetts Department of Transportation in 2010, the Massachusetts Turnpike Authority ("MTA") owned the land and operated the highway beneath the Greenway.

The Massachusetts Legislature, in Section 10 of Chapter 306 of the Acts of 2008 authorized the Conservancy to operate, manage, improve, and maintain the Greenway and directed the MTA to enter into a lease with the Conservancy in order to effectuate the intent of the legislation. Accordingly, the Conservancy entered into a lease, dated December 1, 2008 with the MTA to, among other things, ensure that the Greenway and the other open space parcels shall always be open to the general public. The lease provides for an initial term of five years, with up to five extension terms of ten years each. Both Section 10 of Chapter 306 of the Acts of 2008, as well as the lease terms, provide that the Greenway is to be treated as a public park and as a traditional open public forum.

By law, Dewey Square is a traditional public forum, meaning that it is community space understood to be a spot where any and all citizens may meet and express their minds, like any public square. It sits within Boston's financial district, across a wide street from the Federal Reserve Bank.

Dewey Square itself is a trapezoid-shaped parcel about one hundred feet wide and four hundred feet on its long side. Before its occupation, it was a manicured lawn with well-developed trees on the perimeter. There are sidewalks on two sides of the plot and a large ventilation building to the rear. It consists of 63,292 square feet of space, a fair portion of which is devoted to the ventilation building. The remaining 12,400 square feet of lawn are now taken up by 136 dome shaped tents, of varying heights but none more than roughly six feet; most of the tents are covered with bright blue tarps.

The tents are set cheek-to-jowl with stakes, guy ropes, and space only for three walkways. One walkway consists of wooden pallets and plywood and runs down the center of the encampment. There are two cross-walkways. The site does not appear to be handicapped accessible. Some tents are assigned to individuals but others are generally available. The population varies; while as many as 200 people have been on the site as protesters, it is thought that about 100 to 150 people have now taken up residence in Dewey Square.

The Occupy movement has brought attention to a perceived increasing disparity of wealth and power in the United States. The movement aims to persuade that the wealthiest 1% of the poulation are writing the rules of an unfair global economy. The local participants claim they are expressing their message through their presence in Boston via a tent city. Specifically, they seek to "take back the city" and demonstrate their vision of a more just and economically egalitarian society. Occupy Boston has drawn participants and adherents from across the

spectrum: from union members, the ranks of the homeless, the intelligentsia, and it is alleged, a few criminals, as well. The group has sharpened its message to this: a more just, democratic, and economically egalitarian society, responsive to people rather than corporations, is possible.

A community has developed with rules of order that fit a leaderless horizontal democracy. Matters of governance are decided by a General Assembly. Emphatically, no one is in charge. No individual can be ejected by any internal authority; all are welcome. There is no question that the protesters' belief in their message is sincerely held. Many people have toured the site and been exposed to the teaching and practices of Occupy Boston.

A library, newspaper, spirituality, and medical tents have all been established. Electricity to the site is being donated by the Conservancy, and runs through the camp via outdoor-type extension cords. Donated food is provided daily. No fires or heating sources have been allowed on the site, which is worrying now that winter is coming on. There is no running water to the site. Toilets are available at South Station about two hundred feet away but there is evidence in the record that not all occupants make that trip.

Having viewed the many photographs presented by the parties, this court finds that Dewey Square can be put to no other useful public purpose for the duration of its occupation. The density of people occupying one-quarter acre of land is extraordinary. While it is surely true that any citizen who chooses to make a speech or carry a placard at Dewey Square would find a hospitable audience, parents with young children, vendors, and wheelchair-bound people cannot access this space as presently used. The sanitary arrangements alone convince me that the Farmers' Market, which traditionally used the square, has suffered loss of sales due to the occupation.

The Conservancy has established Park Use Guidelines, which include Park Rules and Regulations. The Park Rules state that the "parks in the Greenway are open 7:00 a.m. through 11:00 p.m.", but that "[p]ublic access and movement throughout the parks will be permitted on a 24 hours/7 days a week" basis. The Park Rules further state that "[n]o overnight sleeping is allowed." Additionally, the Park Rules require a permit for events where tables, tents, and other "set-up" are needed. The Conservancy considers proposals for events in the park in light of its commitment to ensure that the Greenway is a thriving and welcoming public amenity that is open to all. Chapter 306 expressly states that the "the greenway shall be treated as a public park and a traditional open public forum without limiting free speech . . ."

The expression of the Occupy Boston message by the plaintiffs through meetings, signage, oratory, poetry, chanting and every other creative form at Dewey Square is obviously pure speech protected by the First Amendment. That principle has unquestionably been honored by all three defendants, and the plaintiffs' right to engage in those activities at Dewey Square is not at issue in this lawsuit.

No removal or eviction action has been undertaken nor has the assistance of the court in removing the protesters been sought. Further factual findings are made in the discussion below.

PRELIMINARY LEGAL ISSUES

The law dictates that Occupy Boston is not properly a party before the court. It is a well-established principle that an unincorporated association cannot be a party to litigation. Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 675 (1975). For legal purposes, an unincorporated association is treated as a partnership. Diamond v. Pappathanasi, 78 Mass. App. Ct. 77, 88 n.14 (2010). A partnership can appear in a lawsuit if all members are joined as parties. Shapira v. Budish, 275 Mass. 120, 126 (1931) (all partners must be parties to suit involving

partnership rights). In addition, such associations may sue or be sued if action is brought in equity by named persons who will fairly and adequately protect the interests of the association and its members. Maria Konopnicka Soc'y of the Holy Trinity Polish Roman Catholic Church v. Maria Konopnicka Soc'y, 331 Mass. 565, 568 (1954). That approach is incorporated in Mass. R. Civ. P. 23.2.

Here, the named plaintiffs have failed to plead in their complaint that they represent the interests of Occupy Boston. Moreover, the court understands that the General Assembly deliberated and decided not to endow the four named plaintiffs with any representative capacity. That decision is consequential. Where the named plaintiffs do not represent the interests of the association and the association has no live person to advance its interest before this court, it cannot be a party to the litigation.

Thus, as a practical matter, the court is only required to determine the rights of the individual plaintiffs. In an effort to ameliorate this judge's concerns, however, over seventy persons have signed affidavits indicating they will obey a final order of the court to disperse Occupy Boston. In consideration of that, and to bring a peaceful resolution to a matter of intense local concern, this court will determine Occupy Boston's rights insofar as they are unified with those of the individual plaintiffs.

As a further preliminary, defendants have not undertaken any removal action and the question arises whether this matter is ripe for a declaration. The court acknowledges that declaratory relief is generally unavailable where no actual controversy exists. Gay and Lesbian Advocates & Defenders v. Attorney General, 436 Mass. 132, 134 (2002). However, in certain cases, an actual controversy may be found where a plaintiff's rights have not yet actively been impaired. See District Attorney for the Suffolk District v. Watson, 381 Mass. 648, 659 (1980)

(constitutionality of the death penalty). This court concludes that the circumstances attending this dispute are analogous to Watson.

At the outset of the case, the circumstances plainly indicated that the potentially antagonistic claims of these parties would immediately and inevitably lead to litigation. Id. Any removal action would likely trigger the criminal prosecution of individuals who would claim to be exercising their constitutional rights. "Ordinarily declaratory relief will not be granted during the pendency of a criminal prosecution." Id. Thus, entertaining the question at this early juncture may assist the orderly administration of the criminal law, and avoid risking the abridgment of important civil rights. Id. To consider the controversy as ripe for declaratory judgment is consistent with the position taken by the United States District Court for the Middle District of Florida in an Occupy case. Occupy Fort Myers v. Fort Myers, 2011 WL 5554034 at 15 (M.D. Fla. 2011).

As to the substance of the motion, injunctive relief "is an extraordinary remedy never awarded as a matter of right." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008). The court must consider several factors to determine whether such relief is warranted here: (1) the plaintiffs' likelihood of success on the merits; (2) the irreparable harm to the plaintiffs' in the absence of relief, and (3) the balance between the harm and the harm the relief would cause the defendants. Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001). See also Packaging Indus. Group, Inc., v. Cheney, 380 Mass. 609, 617 n.12 (1980)("Since the goal is to minimize the risk of irreparable harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction."). "When, as here, a party

seeks to enjoin governmental action, the court also considers whether the relief sought will adversely affect the public." Tri-Nel Mgmt., Inc., 433 Mass. at 219, citing Commonwealth v. Massachusetts CRINC, 392 Mass. 79, 89 (1984).

LEGAL DISCUSSION

I. Likelihood of Success on the Merits

"[A]s a threshold matter, we must ask whether the First Amendment protects the conduct at issue." DA Mortgage, Inc. v. Miami Beach, 486 F.3d 1254, 1265-166 (11th Cir. 2011). "The inquiry into the protected status of speech is one of law, not fact." Connick v. Myers, 461 U.S. 138, 148 n.7 (1983). "[T]he criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution." Colo v. Treasurer & Receiver Gen., 378 Mass. 550, 558 (1979).

No effective argument has been made that the rights under Article XVI are greater in this case than the rights under the First Amendment. No applicable material difference is apparent from the text of the provision.

Thus, the court must look to whether the plaintiffs' occupation and living activities are protected under the First Amendment and articles XVI of the Massachusetts Declaration of Rights.

The arguments presented to the court require analysis of the two components of Occupy Boston's conduct at issue. Primary is the occupation, that is, the taking over and holding possession of the land at Dewey Square; but for the occupation, there would be no habitation on the site. The secondary component is the collective living activities; the expressive aspects of

these are considered so that all of the parties' questions can be answered. Both analyses bring the plaintiffs to the same result.

A. Occupation, as defined, is Not Conduct Protected by the First Amendment

It has long been clear that speech within the meaning of the First Amendment protects more than mere verbal or written communication. University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200, 1203 (D. Utah 1986). Protected speech under the First Amendment may be expressive and symbolic. Id. In Spence v. Washington, 418 U.S. 405, (1974), the United States Supreme Court articulated standards to determine whether symbolic expression or conduct is protected under the First Amendment. In Spence, a college student attached a peace symbol to a United States flag and then hung the flag upside down out of his apartment window. Id. at 406. Police officers viewed the flag from the street, and arrested the student for violating a city ordinance prohibiting extraneous materials attached to a United States flag. Id. The United States Supreme Court determined that the student's conduct was protected symbolic expression, as the student had the intent to convey a particularized message, and in the surrounding circumstances, there was a great likelihood that the message would be understood by those who viewed it. Id. at 409-411.

The plaintiffs argue that Occupy Boston's occupation and habitation of Dewey Square is expressive conduct and a symbol. They claim that their message of economic equality and more perfect democracy can only be effectively communicated through the "literal occupation of Boston in the financial district." Their lawyer has argued that "the occupation is the message."

This begs the question: can a group take over and occupy public property in the name of the First Amendment? No controlling opinion has been offered that has considered the seizure of a public forum as a First Amendment exercise. The court grasps the nettle and states that

occupation, defined as taking possession by settlement or seizure, is not a symbol or expressive conduct that is constitutionally protected.

"[N]ot everything that communicates an idea counts as 'speech' for First Amendment purposes. The Supreme Court has consistently rejected the 'view that an apparently limitless variety of conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" Anderson v. Hermosa Beach, 621 F.3d 1051, 1058 (9th Cir. 2010), citing United States v. O'Brien, 391 U.S. 367, 376 (1968) (analyzing criminal prosecution for symbolic burning of draft card to protest draft). See also Cohen, 403 U.S. at 18 (noting important distinction between "conviction resting solely upon 'speech' [and one based] upon . . . separately identifiable conduct which allegedly was intended . . . to be perceived by others as expressive of particular views but which on its face, does not necessarily convey any message").

Applying the Spence factors, did Occupy Boston have an intent to convey a particularized message? In the surrounding circumstances, was there a great likelihood that their message would be understood by those who viewed it?

The name the group has chosen for itself, Occupy Boston, indicates the intended message. The standard sense of "occupy" is "to take possession of by settlement or by seizure." *Webster's New World Dictionary and Thesaurus* (2nd ed.) (2002). The movement's name and professed intention are taken quite literally, for plaintiffs seek a "literal" occupation. The evidence presented establishes that it is Occupy Boston's intention to seize and hold public land, albeit peacefully, in order to make certain points.

To the extent that the act of occupation, as defined, communicates, it speaks of boldness, outrage, and a willingness to take personal risk. But the plaintiffs' occupation of Dewey Square

to the effective exclusion of others is the very antithesis of their message that a more just and egalitarian society is possible. It does not send the message the plaintiffs profess to intend.

There is little likelihood that Occupy Boston's professed message can be understood from their act of occupation, either. It has not generally been perceived as benign by those occupied. Essentially, occupation is received as a hostile act, an assertion of possession against the right of the true owner. Municipalities across this country have responded in kind to the act of occupation, frequently by police force. I take this as a showing that the act of occupation is not understood to communicate plaintiffs' intended message of egalitarian democracy; it does not survive the Spence test. Thus, occupation, defined as seizing or holding possession of land, is not shown here to be expressive or symbolic.

Plaintiffs appear ready to defend their turf. The testimony of the plaintiff, Kristopher Martin, was that he lived at Dewey Square and intended to keep doing so. The plaintiffs have signaled that they plan or hope to occupy Dewey Square indefinitely. The spillover to the second encampment was defended by locked arms and resistance to police who sought to reassert control over the Pearl Street Park; that attempted takeover resulted in many arrests and some trauma and injury. Other Occupy camps in other cities have required the use of force to clear them.

This court doubts that a seizure of land, which invites the use of force in response to the attempt to hold possession of the land, would ever be sanctioned as expressive of a particularized message. Notwithstanding the protesters' profession of non-violence, confrontations and the use of force are inevitably provoked by the seizure and holding of public parkland and defense of the land held. Proof is the events at Dewey Square on October 11, 2011. Little in the way of

expression is outlawed under the United States Constitution, but an act which incites a lawful forceful response is unlikely to pass as expressive speech.

Moreover, the Constitution provides these plaintiffs with no shelter to improve their living quarters or construct better quality housing for themselves on public land. The case of Lubavitch Chabad House v. Chicago, 917 F.2d 341, 345-346 (1990) is instructive. The Seventh Circuit determined that the City of Chicago's refusal to allow a free-standing structure in a public area of the Chicago O'Hare airport was not unconstitutional. Specifically, the Seventh Circuit stated that "[w]e are not cognizant of . . any private constitutional right to erect a structure on public property." Id. at 347.

While public parks are "quintessential public forums where free speech is protected," if there were a right to erect structures, "our traditional public forums, such as our public parks, would be cluttered with all manner of structures." Id. "[T]he Constitution neither provides, nor has ever been construed to mandate, that any person or group be allowed to erect structures at will." Id. However they conceive of their occupation, the Constitution does not endow these protesters with any right of possession to the land they hold or to improve the facilities thereon.[4]

Further, the act of occupation is not immune from criminal prosecution for trespass or other crimes. To rule otherwise would invite disorder and chaos into our public spaces; voluble citizens would be seizing statues, benches, and promontories as platforms. If the city officials are obligated to take a hands-off attitude to every person that seeks to possess a public amenity in order to make a speech, they could not keep control over the land the public has entrusted them to maintain. "The State, no less than a private owner of property, has power to preserve

[4] Since this matter was taken under advisement, the court has been informed that the protesters wish to import a stainless steel sink and fireproof tent onto the site. As should be clear from this opinion, they are not entitled to do so.

the property under its control for the use to which it is lawfully dedicated." Adderley v. Florida, 385 U.S. 39, 47 (1966). "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." Cox v. Louisiana, 379 U.S. 536, 554 (1965). See also Commonwealth v. Egleson, 355 Mass. 259, 263-264 (1969) (right to free speech does not mean that everyone with an opinion may express it at any public space at any time).

Occupation, whether by hostile take-over or simply by settlement upon the land of another, is a trespass in the eyes of the law. Criminal trespass is set out at M.G.L. c. 266 s. 120.[5] The Commonwealth qualifies as "another" under the statute. Egleson, 355 Mass. at 262. The trespass statute is not aimed at regulating speech or communication in any form. Hurley v. Hinckley, 304 F.Supp. 704, 708 (1969). Conduct intertwined with First Amendment freedoms of speech and petition can be regulated where the actor or actors disrupt the uses to which the public has dedicated its property. Id.

No active prosecution for the crime of trespass arising out of Occupy Boston is before me, and any such case must be decided on its own facts. But there is no reason to enjoin the Boston Police Department from arresting protesters for the crime of trespass on the Occupy Boston site, should probable cause be present. The same applies to unlawful assembly.

In summary, this court seriously doubts that the First Amendment permits the plaintiffs to seize and hold a public forum to the exclusion of others. Clark, 468 U.S. at 296 (doubting First Amendment requires park services to permit 24-hour vigil on public park and erection of tents to

[5] Whoever, without right enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf, or pier of another. . . after having been forbidden so to do by the person who has lawful control of said premises. . . shall be punished . . M.G.L.A. 266 § 120

accommodate 150 people). There is no reason to believe that any different result would obtain under Article XVI of the Declaration of Rights.

B. The Plaintiffs' Living Activities are Protected Under the First Amendment

In order to fully address the questions presented by this case, this court now analyzes the plaintiffs' claims that their activities on the site are expressive.

The four plaintiffs claim to have a particularized message. Their actions at Dewey Square are consistent with that message. The setting up of tents, sleeping overnight, eating, and meeting in their General Assembly are all demonstrative and expressive of the democracy they claim to be creating. Within the presentation of the case that has been made to me, this court can only conclude that those activities are communicative of the exemplar democracy they wish to convey.

The more difficult question is whether the Occupy message can be readily understood from within and without the encampment, and I conclude that it can. The case law instructs me that whether the message is being effectively communicated must be analyzed in terms of the context of the conduct. Spence, 418 U.S. at 412. There can be no doubt that at this writing in Boston, and perhaps throughout this country, an enclave of tents in a public park connotes the Occupy movement and their 99%/1% viewpoint. Matters of finance and the present economic situation are of intense concern to many people. There is considerable media attention devoted to Occupy sites, and most articles, per journalistic custom, restate the Occupy position. The media has clearly understood the plaintiffs' contribution to the national conversation.

Media coverage is highlighted here because this court is instructed to look to the context in which the message is delivered to decide if it can be so understood. Id. See University of Utah Students Against Apartheid, 649 F.Supp. at 1205 n.10 ("Media attention is a strong

indication of observer understanding because it highlights the communicative nature of the very form of conduct undertaken.")

Additionally, there is evidence, which I credit, that those activities are understood by visitors to Dewey Square. Therefore, the collective living activities at Dewey Square, i.e., setting up tents, sleeping overnight, eating, and governance are clearly both symbols and conduct-which-speaks and are entitled to First Amendment protection.

The undoubted truth that a ragtag collection of tents presents an offense or annoyance to the senses and sensibilities of many other citizens is of no legal effect. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Street v. New York, 394 U.S. 576, 592 (1969). "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-633 (1943).

C. Regulation of Symbolic Expression

But even speech that is entitled to Constitutional protection can be regulated. A sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. United States v. O'Brien, 391 U.S. 367, 376 (1968). See also Commonwealth v. Provost, 418 U.S. 416, 421 (1994). No sensible person hearing the City of Boston Fire Marshal testify regarding his safety concerns could question the importance of the governmental interest in the encampment at Dewey Square.

I credit the Marshall's testimony and his affidavit in every particular. His opinion about the use of flammable tarps on the tents, his observations regarding smoking and automotive batteries, the tripping hazards, and the photograph of the jack-o-lantern were chilling. The

scenario he realistically fears is horrific. The government has sufficiently met its burden of justification for regulating the expressive activities of setting up tents and sleeping overnight by his testimony alone.

D. Validity of City and State Codes and Conservancy Regulations

Protected speech may be restricted in public forums by reasonable time, place and manner regulations. Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 197-198 (2005). There is no dispute that Dewey Square is a traditional public forum and therefore has a "special position in terms of First Amendment protection" that leaves the defendants with a "very limited" ability to restrict expressive activity there. Boos v. Barry, 485 U.S. 312, 318 (1988). However, such activity may still be subject to reasonable restriction. Clark, 468 U.S. 288, 293 (1984). The applicable safety codes and park rules will be deemed constitutional if they are content neutral, they are narrowly tailored to serve a significant government interest, and they leave open ample alternative channels of communication. Id.

i. Content-Neutrality

The requirement that any time, place, and manner regulations be neutral as to the content of the speech is clearly satisfied by the regulatory scheme here.

Fire safety vigilance in the City of Boston, the location of the Cocoanut Grove fire in 1942, is not motivated by any desire to suppress expression. Rather, the Boston Fire Prevention Code of 1979 and Code of Fire Prevention Regulations are in place to protect life, property, and public welfare, not to regulate speech. The affidavit of Superintendent Linsky details the City's substantial interest in public safety in a situation the City sees as deteriorating. There is no argument made that the applicable health, sanitary, and inspectional codes are intended to suppress the plaintiff's mode of expression. I conclude from the affidavits, which I credit, that

the concerns of the City of Boston Health Commissioner and Inspectional Services are motivated solely by the worrisome and unsanitary conditions they see at Dewey Square, and have no other purpose.

The park rules prohibit sleeping in the Greenway and the guidelines specify the procedure to obtain a permit for tents. The plaintiffs contend that enforcing the park rules would unconstitutionally interfere with their exercise of their right to free speech. However, they do not contend that the park rules themselves are content-based. Thus, the park rules are "justified without reference to the content of the regulated speech" and there is no meaningful argument otherwise. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

ii. Narrowly Tailored

The next requirement is that the regulations be narrowly tailored to further substantial government interests. Clark, 468 U.S. at 294. This requirement is also satisfied because the evidence submitted by the defendants establishes that that the City and State codes go no further than necessary to meet those fire, health, and safety goals.

The Conservancy is also obligated by law to preserve Dewey Square as a space open to the public. The regulation prohibiting overnight sleeping on the park is effective at preventing twenty-four-seven use of a public park by one group without disrupting oratory, debate, and other forms of speech. The regulation naturally limits the nature, extent, and duration of all demonstrations, not just Occupy Boston. Thus, the regulation meets the goal of preserving the park land without affecting the content of the speech. Id. at 296.

The purpose of the regulations is to "balance the desire for special events and gatherings with the commitment to ensure unobstructed public access to the parks and the need to provide excellent care to the horticultural collections, the sidewalks and paved areas, the fountains, and

the lawns." Park Use Guidelines at pg. 7 (June 2010). The regulations are narrowly tailored to further the Conservancy's substantial interest in "offer[ing] beautiful, well-cared for spaces" as well as to ensure unobstructed public access to the parks for all. Id. Having considered all the facts, it is apparent that permitting overnight sleeping and thereby the plaintiffs' occupation of Dewey Square "would be totally inimical to those purposes." Clark, 468 U.S. at 296.

iii. Adequacy of Alternatives

The plaintiffs contend that the location of Dewey Square is integral to their message. Dewey Square is located directly across from the Federal Reserve Bank in the financial district. The plaintiffs mainly rely on Coalition to Protest Democratic Nat'l Convention v. Boston, 327 F. Supp. 2d 61 (D. Mass. 2004), for support that the location of Dewey Square is an essential part of the message being conveyed and that there are no adequate alternatives. In Coalition to Protest Democratic Nat'l Convention, the United States District Court in Massachusetts reviewed the City of Boston's refusal to allow parades on Causeway Street, the public way abutting the then Fleet Center, during the Democratic National Convention. Id. at 72. That court recognized that Causeway Street was the "doorstep" to the Democratic National Convention, and that other areas where the plaintiffs were permitted to march were not adequate alternatives.[6] Id.

The court recognizes the ruling in Coalition to Protest Democratic Nat'l Convention but distinguishes this case. The doorstep of the convention was the only place at which those protesters would surely be in the sight line of the delegates, the target audience. Here, the Federal Reserve Bank is not the target audience. None of the plaintiffs' activities are directed

[6] While the plaintiffs rely on Coalition to Protest Democratic Nat'l Convention to support their claim that they have no adequate alternatives to convey their message, in that case, the United States District Court found that the balance of the hardships and the public interest actually favored the denial of the plaintiffs' motion for a preliminary injunction during the Democratic National Convention. 327 F. Supp. at 72-73.

toward the bank. That the present location is optimal for the protest is an insufficient reason to invalidate time, place, and manner restrictions, when other options are available.

The park rules ban the plaintiffs from sleeping overnight in Dewey Square and require them to obtain a permit before erecting any tents. They leave other parts of the plaintiffs' demonstration intact, including signs, picketing, and the presence of participants during the daytime hours. Additionally, the plaintiffs are permitted to camp on the Harbor Islands in Boston. I note that the individuals who averred that they had received the Occupy Boston message at the encampment, all traveled to it from other parts of the metropolitan area, i.e., Cambridge, Somerville, and the Back Bay. Presumably, those interested would travel to participate in this protest were it in another location.

This court concludes that the fire, health, and safety codes and the ban on sleeping overnight, and the requirement that the plaintiffs obtain a permit before erecting tents and similar structures on Dewey Square are valid time, place, and manner restrictions on Occupy Boston. See Clark, 468 U.S. at 290-291 (Supreme Court upheld as reasonable time, place, and manner restriction a National Park Service regulation prohibiting camping in Lafayette Park as it left open alternative channels of communication). Therefore, the plaintiffs are unable to show a likelihood of success of proving that their protected expression is being abrogated.

II. Balance of the Equities and the Public Interest

As the plaintiffs have not met their burden of demonstrating that they are likely to succeed on the merits, they are unable to show that balance of equities or public interest favor the granting of a preliminary injunction to suspend the enforcement of the park rules and guidelines and a declaration that their occupation of Dewey Square is protected as free speech, assembly, association and the right to petition the government. However, the affidavits filed demonstrate

that the balance of equities and public interest favor the denial of a preliminary injunction, as the plaintiffs' use of the site raises concerns for public safety and has effectively excluded other members of the public from accessing or using Dewey Square in any other manner.

III. Waiver and Delegation of Authority to the Conservancy

The plaintiffs claim that the Conservancy has waived its ability to enforce any of the park rules, as it has not enforced the park rules up to this point. The court finds this argument to be unfounded. Doctrines such as estoppel and waiver are not applied to the government's exercise of its public duties where, as here, it would "frustrate . . . the statutory obligation to promulgate and enforce regulations to protect 'public health, safety, and order.'" Highland Tap of Boston, Inc. v. Commissioner of Consumer Affairs and Licensing of Boston, 33 Mass. App. Ct. 559, 569 (1992), quoting Risk Mgmt. Found. of the Harvard Med. Inst., Inc. v. Commissioner of Ins., 407 Mass. 498, 509-510.

While the Conservancy is not a governmental body, it is a lessee to a lease with the MTA, now MassDOT, a governmental entity. Per the lease terms, the Conservancy is required to adopt rules and regulations governing conduct and activity within the Conservancy. These rules and regulations are subject to the approval of the MTA. Therefore, the Conservancy in enacting and enforcing rules is effectively acting as a governmental agency. The rules and regulations developed by the Conservancy and approved by the MTA were created to protect public health, safety, and order. As such, doctrines such as waiver and estoppel are inapplicable. Id. Cf. Commonwealth v. Boston Edison Co., 444 Mass. 324, 334 (2005) (proper exercise of enforcement discretion is not ordinarily judicially reviewable).

Lastly, the court rejects the plaintiffs' argument that Chapter 306 of the Acts of 2008 is an unconstitutional delegation of authority to the Conservancy. The Legislature may only

delegate to a board, individual officer, or a private party the working out of the details of a policy adopted by the Legislature if three criteria are met: (1) the Legislature may only delegate the implementation of the legislatively determined policy and not the making of fundamental policy decisions, (2) the enabling act must provide adequate direction for implementation of the legislatively determined policy either in the form of statutory standards or sufficient guidance, and (3) the enabling act must provide safeguards for abuse of discretion. See Tri-Nel Mgmt. Inc., 433 Mass. at 225.

The Acts of 2008 ("the Acts") satisfy these requirements. The Legislature delegated to the Conservancy its predetermined policy of preserving, operating, maintaining, and improving the Greenway. Additionally, the Acts provide the Conservancy with sufficient guidance and direction for implementing this policy. The Acts also provide safeguards for abuse of discretion by requiring the Conservancy to consult with the Commissioner of the Department of Conservation and Recreation and the Greenway Leadership Council before adopting any of its rules or regulations. The Turnpike Authority is also required to approve the Conservancy's rules and regulations. These levels of oversight on the Conservancy's rulemaking power are adequate safeguards to protect against any abuse of authority. The Legislature constitutionally delegated authority to the Conservancy to enact rules and guidelines and the rules and guidelines enacted comply with the express provisions of the Acts.

CONCLUSION

For the foregoing reasons, this court concludes that plaintiffs have not established that the seizure and holding of public land is protected by the First Amendment and somehow immunized from criminal prosecution for any applicable crime including trespass. While the plaintiffs have demonstrated that the setting up of tents, overnight sleeping, eating, and governing at Dewey Square is entitled to protection under the First Amendment, the defendants have justified the regulations restricting the protesters' living activities on the site. The fire, building, sanitary and health codes as well as the park rules and guidelines are constitutional time, place, and manner restrictions.

The plaintiffs' rights have been protected because there has been a judicial determination that they are fairly subjected to those valid rules and guidelines. The plaintiffs are obligated to respect the rules.

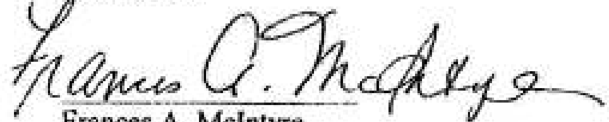
As to the prayers for relief, plaintiffs have failed to establish a likelihood that they will obtain a declaration of law from a court of law that they are entitled to continue to peacefully occupy Dewey Square, that the trespass and unlawful assembly statutes do not apply to them, or that the Conservancy's Park Use Guidelines violate their First Amendment rights.

In summary, the plaintiffs have not met their burden of demonstrating that their First Amendment rights or their rights under articles XVI or XIX of the Massachusetts Declaration of Rights are in danger of being abridged. The balance of equities does not favor the plaintiffs; thus, their motion is denied.

ORDER

No order against the plaintiffs or Occupy Boston has been requested. None is entered by this court. The temporary restraining order is ordered **VACATED** at 3:00 P.M. on December 7, 2011. The motion for a preliminary injunction is **DENIED**.

So Ordered:



Frances A. McIntyre
Justice of the Superior Court

DATED: December 7, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EUGENE DAVIDOVICH, an individual; DAVINA LYNCH, an individual; and JOHN KENNEY, an individual,

Plaintiffs,

vs.

CITY OF SAN DIEGO,

Defendant.

CASE NO. 11cv2675 WQH-NLS

ORDER

HAYES, Judge:

The matter before the Court is the Ex Parte Application for Temporary Restraining Order filed by Plaintiffs Eugene Davidovich, Davina Lynch, and John Kenney. (ECF No. 7).

I. Background

On November 16, 2011, Plaintiffs Eugene Davidovich, Davina Lynch, and John Kenney initiated this action by filing a "Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Declaratory Relief" against the City of San Diego. (ECF No. 1). The Complaint asserts two claims titled: "Injunctive Relief" and "Declaratory Relief" and alleges that San Diego Municipal Code section 54.0110 titled "Unauthorized Encroachments Prohibited" which provides: "It is unlawful for any person to erect, place, allow to remain, construct, establish, plant, or maintain any vegetation or object on any public street, alley, sidewalk, highway, or other public property or public right-of-way...." is unconstitutional. *Id.* at 2-3. Plaintiffs seek "a declaration that [San Diego Municipal Code]

EXHIBIT 6

section 54.0110 is void for vagueness and overbreadth" and an injunction "prohibiting Defendant and its agents or employees from enforcing [San Diego Municipal Code] section 54.0110." *Id.* at 3-4. The declarations attached to the Complaint state that Plaintiffs are members of the Occupy San Diego movement, which is "a protest in solidarity with the Occupy Wall Street movement for economic and social justice" being held at the Civic Center Plaza in downtown San Diego. (ECF No. 1-1 at 2; 1-5 at 1; 1-6 at 1). Plaintiffs allege that the "police sometimes choose to enforce section 54.0110 very strictly, requiring that no one entering Civic Center Plaza place any object on the ground, particularly when members of the protest group 'Occupy San Diego' enter the Plaza. On other occasions or with respect to other individuals, the police allow objects to be placed on the ground." (ECF No. 1 at 3). Plaintiffs allege that the "ordinance has a chilling effect on free expression ...." *Id.*

On November 17, 2011, Plaintiffs filed an Ex Parte Application for Temporary Restraining Order. (ECF No. 7). On November 18, 2011, Defendant City of San Diego filed an Opposition to the Ex Parte Application for Temporary Restraining Order. (ECF No. 18). On November 21, 2011, Plaintiffs filed a Reply. (ECF No. 23).

On November 21, 2011, the Court heard oral argument on the Ex Parte Application for Temporary Restraining Order. At oral argument, Plaintiffs stated that they assert a facial challenge to San Diego Municipal Code section 54.0110 in the Ex Parte Application for Temporary Restraining Order and Plaintiffs reserved the right to bring an as-applied challenge.

II. Discussion

When the nonmovant has received notice, as here, the standard for issuing a temporary restraining order is the same as that for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation omitted). To obtain preliminary injunctive relief, a movant must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an

1 injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20
2 (2008); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)
3 ("[S]erious questions going to the merits and a balance of hardships that tips sharply towards
4 the plaintiff can support issuance of a preliminary injunction....").

5 **A. Success on the Merits**

6 Plaintiffs seek "a temporary restraining order enjoining the City of San Diego and its
7 agents and employees from enforcing [San Diego Municipal Code] section 54.0110." (ECF
8 No. 7-1 at 5). Plaintiffs contend that the general application of San Diego Municipal Code
9 section 54.0110 by City officials infringes their First Amendment right to free speech.
10 Plaintiffs contend that San Diego Municipal Code section 54.0110 is void for vagueness in
11 violation of the Due Process Clause of the Fourteenth Amendment.

12 Defendant contends that San Diego Municipal Code section 54.0110 is a constitutional,
13 content neutral, reasonable time, place, and manner restriction narrowly tailored to advance
14 the substantial interests of "protecting the public's health, safety and welfare, protecting the
15 City's properties from damage, overuse, and unsanitary conditions, and maintaining the City's
16 public areas as right-of-ways, free of obstructions and clutter, open for the use and enjoyment
17 of the public." (ECF No. 18 at 8).

18 A party presents a facial challenge to the constitutionality of an ordinance when the
19 party challenges the general application of the ordinance. *See Doe v. Reed*, __ U.S.__, 130
20 S.Ct. 2811, 2817 (2010) ("[A] claim is 'facial' in that it is not limited to plaintiffs' particular
21 case, but challenges application of the law more broadly to all [similar plaintiffs]"); *Jerry*
22 *Beeman & Pharm. Serv., Inc. v. Anthem Prescription Mgmt, LLC*, 652 F.3d 1085, 1097 (9th
23 Cir. 2011) (a party alleges a facial challenge when the party alleges that the statute is
24 unconstitutional "against whomever it is enforced" rather than "only as applied in the context
25 of plaintiffs' suit."). "A successful challenge to the facial constitutionality of a law invalidates
26 the law itself." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). Facial
27 challenges to statutes may be made on First Amendment grounds "where statutes, by their
28 terms, purport to regulate the time, place, and manner of expressive or communicative

conduct." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973) (citations omitted); *see also Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996).

The First Amendment precludes the enactment of laws "abridging the freedom of speech." U.S. Const. amend. I. The First Amendment protects literal speech as well as some expressive or communicative conduct. *Spence v. Wash.*, 418 U.S. 405, 409 (1974). Expressive or communicative conduct is entitled to First Amendment protection where it is "sufficiently imbued with elements of communication." *Id.*; *see also Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (finding that camping on park lands, including "the use of park lands for living accommodations, such as sleeping, storing personal belongings, making fires, digging, or cooking ... *may* be expressive and part of the message delivered by the demonstration [regarding homelessness].") (citations omitted) (emphasis added). For the purpose of this Ex Parte Application for Temporary Restraining Order, the Court presumes that San Diego Municipal Code section 54.0110 restricts expressive or communicative conduct. *See Clark*, 468 U.S. at 294.

i. Reasonable Time, Place, and Manner Restriction

Defendant contends that San Diego Municipal Code section 54.0110 is content neutral and serves significant government interests in "protecting the public's health, safety and welfare, protecting the City's properties from damage, overuse, and unsanitary conditions, and maintaining the City's public areas as right-of-ways, free of obstructions and clutter, open for the use and enjoyment of the public." (ECF No. 18 at 8). Defendant contends that San Diego Municipal Code section 54.0110 is narrowly tailored because it does not preclude Plaintiffs from communicating their message.

"Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark*, 468 U.S. at 294. The restriction must be content neutral. *Id.* "[W]hether a statute is content neutral or content based is something that can be determined on the face of it ...." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1071 (9th Cir. 2006) (quotation omitted). Legislation is not content neutral where it "singles out certain speech for differential treatment based on the idea expressed." *A.C.L.U. of Nevada v.*

1 *City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006) (citing *Foti*, 146 F.3d at 636 n.7).
2 The reasonable time, place, or manner restriction must be "narrowly tailored to serve
3 a significant governmental interest, and ... leave open ample alternative channels for
4 communication of the information." *Clark*, 468 U.S. at 293-94 (quotation omitted); *see also*
5 *Doe v. Reed*, 586 F.3d 671, 678 (9th Cir. 2009) (content neutral restrictions with an "incidental
6 effect" on expressive conduct must survive intermediate scrutiny) (citing *United States v.*
7 *O'Brien*, 391 U.S. 367, 376 (1968)); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 434 (9th
8 Cir. 2008)). The regulation "need not be the least restrictive or least intrusive means," so long
9 as the regulation does not "burden substantially more speech than is necessary" to achieve the
10 significant government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).
11 In *Clark*, the Supreme Court considered whether a content neutral restriction against
12 camping in public parks, preventing individuals from sleeping in tents to protest homelessness,
13 was a reasonable time, place, and manner restriction. The Court found that the government
14 had a substantial interest in maintaining public parks "in an attractive and intact condition" as
15 well as ensuring that public parks remain readily available to other members of the public.
16 *Clark*, 468 U.S. at 296. The Court found that restricting camping on public property was
17 narrowly tailored and that "using these areas as living accommodations would be totally
18 inimical to these purposes...." *Id.* The Court concluded that the ban on sleeping in the public
19 park was a reasonable time, place, and manner restriction. *Id.*; *see also Lubavitch Chabad*
20 *House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) (holding that there is no
21 "private constitutional right to erect a structure on public property. If there were, our
22 traditional public forums, such as our public parks, would be cluttered with all manner of
23 structures.").
24 In this case, the prohibition against unauthorized encroachments in San Diego
25 Municipal Code section 54.0110 is content neutral because it does not single out any type of
26 speech or provide differential treatment based on the idea expressed. San Diego Municipal
27 Code section 54.0110 serves significant government interests in protecting the public's health,
28 safety, and welfare; maintaining public property; and ensuring that the public space is free of

1 obstructions and is available for the use and enjoyment of members of the public. San Diego
2 Municipal Code section 54.0110 is narrowly tailored because it is limited to proscribing
3 intrusion upon the maintenance, use, and enjoyment of public space. San Diego Municipal
4 Code section 54.0110 allows ample alternative channels for communication and does not
5 preclude Plaintiffs from communicating their message.

6 Based on the record, the Court concludes that San Diego Municipal Code section
7 54.0110 is a content neutral, reasonable time, place, and manner restriction which is narrowly
8 tailored to serve a significant governmental interest and leaves open ample alternative channels
9 for communication.

10 **ii. Overbroad**

11 Plaintiffs contend that San Diego Municipal Code section 54.0110 is overbroad on the
12 grounds that it "sweeps unnecessarily broadly and thereby invades areas of protected
13 freedoms." (ECF No. 7-1 at 5). Plaintiffs contend that San Diego Municipal Code section
14 54.0110 "has a chilling effect on free expression in that individuals are often not permitted to
15 even place protest signs down next to where they are standing[]" and that the ordinance
16 "prohibits not only the placement of First Amendment protected literature tables, but any other
17 object on any city property." *Id.* (emphasis omitted) (citing *A.C.L.U. of Nevada v. City of Las*
18 *Vegas*, 466 F.3d 784, 791-99 (9th Cir. 2006)).

19 Plaintiff Davidovich has submitted a declaration in which he states that he entered the
20 Civic Center Plaza with a three-gallon bucket containing a tomato plant that had a protest sign
21 and an American flag affixed to it. Davidovich states that he sat down on the steps of the plaza
22 and placed the plant beside him when he was approached by a police officer who told him to
23 pick up the plant. Plaintiff Kenney has submitted a declaration in which he states that he was
24 told by a police officer that he could not put his bag, jacket, or backpack down in the Civic
25 Center Plaza and that he was told to pick a sign up from the ground while he was writing on
26 it. Plaintiff Lynch has submitted a declaration in which she states that a police officer
27 informed her that she could not place any object down in the Civic Center Plaza. Plaintiffs
28 have also submitted declarations from individuals who are not parties to this case who state

1 that police officers told them that they could be arrested for putting their crutches and a purse
2 on the ground.
3 Defendant contends that enforcement of San Diego Municipal Code section 54.0110
4 "is limited to those persons who attempt to and/or do erect or leave objects unattended on
5 public property on a permanent, indefinite, or otherwise clearly non-temporary basis, i.e., when
6 there is some degree of permanence to the encroachment." (ECF No. 18 at 12-13). Defendant
7 contends that San Diego Municipal Code section 54.0110 prevents unsanitary and unsafe
8 conditions in public places. Defendant contends that San Diego Municipal Code section
9 54.0110 does not prevent individuals from demonstrating or otherwise engaging in speech
10 activities; it prevents individuals from "camping and storing their personal property in a public
11 place." *Id.* at 13.
12 "In a facial challenge to the overbreadth ... of a law, a court's first task is to determine
13 whether the enactment reaches a substantial amount of constitutionally protected conduct."
14 *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). If the
15 law reaches activity protected by the First Amendment, "a law may be invalidated as overbroad
16 if a substantial number of its applications are unconstitutional, judged in relation to the
17 statute's plainly legitimate sweep." *United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1587
18 (2010) (quotations omitted). To succeed in their challenge of the ordinance based on
19 overbreath, Plaintiffs must "demonstrate [overbreath] from the text of [the ordinance] and from
20 actual fact that a substantial number of instances exist in which the [ordinance] cannot be
21 applied constitutionally." *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 14 (1988).
22 "Invalidation for overbreadth is strong medicine that is not to be casually employed." *United
23 States v. Williams*, 553 U.S. 285, 293 (2008) (quotations and citations omitted).
24 In *A.C.L.U. of Nevada*, plaintiffs brought a facial challenge and an as-applied challenge
25 to a content-based restriction on solicitation, a traditional form of free speech, in a public
26 forum. The Court of Appeals for the Ninth Circuit held that the content-based restriction on
27 certain types of solicitation was a facially unconstitutional regulation of speech protected by
28 the First Amendment. *A.C.L.U. of Nevada*, 466 F.3d at 797. Plaintiffs also challenged a

restriction on the use of tables to aid in solicitation. The Court of Appeals held that "the erection of tables in a public forum is expressive activity protected by our Constitution to the extent that the tables facilitate the dissemination of First Amendment speech." *Id.* at 799. The Court of Appeals stated: "We express no view as to whether the tabling ordinance would be a constitutionally invalid restriction on the time, place, and manner of Plaintiffs' free speech in a traditional public forum in the absence of the [content-based] labor exemption." *Id.* at 800 n.18. The Court of Appeals declined to hold that the tabling ordinance was facially unconstitutional. *Id.* at 800 ("Although the record is sufficiently clear for us to hold that the tabling ordinance is unconstitutional *as applied* to Plaintiffs' expressive activities, nothing in the record indicates that tables are used in the [public forum] for expressive purposes with enough frequency to support Plaintiffs' *facial* challenge to the ordinance.") (emphasis added).

In this case, Plaintiffs make only a facial challenge and have reserved the right to make an as applied challenge. San Diego Municipal Code section 54.0110 has the "plainly legitimate sweep" of protecting the public's health, safety and welfare; maintaining public property; and ensuring that the public space is free of obstructions and available for the use and enjoyment of members of the public. *Stevens*, 130 S. Ct. at 1587. The conduct targeted by the ordinance relates to the maintenance, use, and enjoyment of public space and is not constitutionally protected. *See Village of Hoffman Estates*, 455 U.S. at 494. To the extent that the ordinance may restrict expressive conduct, Plaintiffs have failed to show that there are a "substantial number of instances in which the [ordinance] cannot be applied constitutionally" in relation to its "plainly legitimate sweep." *Stevens*, 130 S. Ct. at 1587; *N.Y. State Club Ass'n*, 487 U.S. at 14. The Court finds that Plaintiffs have failed to show that they are likely to succeed on the merits of their claim that San Diego Municipal Code section 54.0110 is facially unconstitutional as overbroad.

iii. Vagueness

Plaintiffs contend that San Diego Municipal Code section 54.0110 is impermissibly vague on the grounds that "it does not define a criminal offense with sufficient certainty so that ordinary people can understand what conduct is prohibited, and it encourages arbitrary and

discriminatory enforcement." (ECF No. 7-1 at 4). Plaintiffs contend that San Diego Municipal Code section 54.0110 "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests and fails to give fair notice of what acts will be punished so that First Amendment rights are chilled." *Id.*

Defendant contends that San Diego Municipal Code section 54.0110 defines the prohibited conduct in a manner which can be understood by people of ordinary intelligence because the ordinance "uses common terms found in the English dictionary.... [and] lists a number of words or phrases having similar meanings." (ECF No. 18 at 10). Defendant contends that "when read together, in context, and based on human experience," the ordinance gives the reader fair warning regarding the proscribed conduct and provides sufficient guidance to the police for enforcement. *Id.*

A statute is void for vagueness where a person of "common intelligence must necessarily guess at its meaning and differ as to its application...." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). However, "the Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Roth v. United States*, 354 U.S. 476, 491 (1957) (quotations omitted); *see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 578-79 (1973). "[T]he void-for-vagueness doctrine requires that a penal statute 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." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citation omitted). In *Kolender*, the Supreme Court explained:

> Although the doctrine focuses on both actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement.

Kolender, 461 U.S. at 357-58 (quotations and citation omitted).

An ordinance that does not implicate constitutionally protected conduct is void for

vagueness only where it "is impermissibly vague in all of its applications." *Village of Hoffman Estates*, 455 U.S. at 495. However, an ordinance that "reaches a 'substantial amount of constitutionally protected conduct[]'" may be void for vagueness even where it is not vague in all applications. *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (quoting *Kolender*, 461 U.S. at 359 n.8). "The need for definiteness is greater when the ordinance imposes criminal penalties on individual behavior or implicates constitutionally protected rights than when it regulates the economic behavior of businesses." *Nunez*, 114 F.3d at 940.

San Diego Municipal Code section 54.0110 is titled "Unauthorized Encroachments Prohibited" and provides: "It is unlawful for any person to erect, place, allow to remain, construct, establish, plant, or maintain any vegetation or object on any public street, alley, sidewalk, highway, or other public property or public right-of-way, except as otherwise provided by this Code." S.D. Mun. Code § 54.0110. San Diego Municipal Code section 11.0209 provides that "[w]ords and phrases ... shall be construed according to the context and approved usage of the language." S.D. Mun. Code § 11.0209(e).

The need for definiteness is present in this case because the Court has presumed that the ordinance implicates constitutionally protected conduct. When considering the ordinary meaning of the terms encroach, erect, place, remain, construct, establish, plant, and maintain,[1] as well as their use in conjunction with each other, the ordinance plainly prohibits individuals from using vegetation or objects to interfere with the maintenance, use, and enjoyment of public property. The ordinance makes it unlawful for a person to "erect, place, allow to remain, construct, establish, plant, or maintain any vegetation or object" upon public property in order to advance substantial government interests in protecting the public's health, safety

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[1] The dictionary defines encroach as: "to enter by gradual steps or by stealth into the possessions or rights of another" or "to advance beyond the usual or proper limits." Webster's II New College Dictionary, 371 (2001). The definition of erect is "to construct by assembling materials and parts" or "to assemble or set up." *Id.* at 381. The definition of place is "to put in a particular position." *Id.* at 841. The definition of remain is "to continue without change of condition, quality, or place" or "to stay or be left over after removal, departure, loss, or destruction of others." *Id.* at 937. The definition of construct is "to put together by assembling parts." *Id.* at 242. The definition of establish is "to make secure or firm." *Id.* at 384. The definition of plant is "to place or set (e.g., seeds) in the ground to grow." *Id.* at 843. The definition of maintain is "to continue: carry on" or "to keep in existence." *Id.* at 660.

and welfare; maintaining public property; and ensuring that the public space is free of obstructions and is available for the use and enjoyment of members of the public. S.D. Mun. Code § 54.0110. The ordinance proscribes easily identifiable conduct which directly advances the public interest. The Court concludes that the ordinance provides adequate guidelines to govern law enforcement and to avoid the potential for arbitrarily suppressing First Amendment liberties.[2] *See Kolender*, 461 U.S. at 357. The Court finds that Plaintiffs have failed to show that they are likely to succeed on the merits of their claim that San Diego Municipal Code section 54.0110 is facially void for vagueness.

B. Irreparable Injury, Balancing of Hardships, Public Interest

"When ... a party has not shown any chance of success on the merits, no further determination of irreparable harm or balancing of hardships is necessary." *Global Horizons, Inc. v. United States Dep't of Labor*, 510 F.3d 1054, 1058 (9th Cir. 2007) (explaining that "this rule applies with equal force to the public interest."). A determination of irreparable harm, balancing of the hardships, or public interest is not necessary at this stage of the proceedings because the Court finds that Plaintiffs have failed to show a likelihood of success on the merits.

III. Conclusion

IT IS HEREBY ORDERED that the Ex Parte Application for Temporary Restraining Order filed by Plaintiffs Eugene Davidovich, Davina Lynch, and John Kenney (ECF No. 7) is DENIED.

DATED: December 1, 2011

WILLIAM Q. HAYES
United States District Judge

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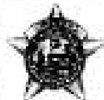
[2] Even if the Court were to find one word, such as "place," to be unconstitutionally vague, the remainder of the ordinance would remain in effect. *See* S.D. Mun. Code § 11.0205 which provides: "If any ... phrase, portion or provision of this Code is ... held to be invalid or unconstitutional ... such decision shall not affect the validity of the remaining portions of this Code." S.D. Mun. Code § 11.0205.

EXHIBIT 7



Chicago Police Department

Special Order S04-22-01

EXEMPTIONS AND RESTRICTIONS FOR ISSUING ANOV CITATIONS

ISSUE DATE:	08 August 2003	EFFECTIVE DATE:	08 August 2003
RESCINDS:	S03-12-01		
INDEX CATEGORY:	Preliminary Investigations		

I. PURPOSE

This directive outlines the restrictions and exemptions for issuing Administrative Notice of Ordinance Violation (ANOV) citations.

II. RESTRICTIONS

Except for the exceptions listed in Item III of this directive, an ANOV citation **will not** be used:

A. when an arrestee is charged concurrently with an MCC violation and a state statute violation. The MCC ordinance violation will be cited on a Class "C" Misdemeanor / Ordinance Violation Complaint form and be incorporated on the Arrest Report (CPD-11.420), along with any additional reports, court complaints, and/or citations.

B. for violations that are to be cited on another ticket form (i.e., Personal Service citations and Violation Notice citations). Such violations will be cited on the appropriate instrument and any additional MCC ordinance violations will be cited on ANOV citations.

C. for the following MCC ordinance violations:

1. MCC Chapter 4-92-010 through 210: Massage Establishments and Services
2. MCC Chapter 4-144-010 through 250: Weapons
3. MCC Chapter 7-28-190: Throwing Objects into Roadways
4. MCC Chapter 8-20-010 through 260: Weapons
5. MCC Chapter 8-24-010 through 060: Firearms and Other Weapons.

D. in the following situations:

1. the violator is less than 17 years of age.
2. the violator cannot or will not produce a valid picture identification card (i.e., State Identification card, Drivers License, or similar identification).

   NOTE: Refer to Item III of this addendum for the exceptions to this restriction.

3. the violator exhibits behavior which requires an officer to exert physical force to effect the arrest.
4. there is a reasonable likelihood that the offense will continue, recur, or that life or property will be endangered if the violator is not arrested and removed from the scene of the occurrence.
5. there is a reasonable likelihood that the violator will fail to appear at the hearing.
6. there is a reason to believe that a warrant may be outstanding against the violator.
7. the violator refuses to sign the ANOV citation. When such a refusal occurs, the violator will be informed that a refusal to sign the ANOV citation will subject him or her to physical arrest. If the violator still refuses to sign the citation after it has been completed, the ANOV citation will

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be canceled in accordance with the procedures outlined in the Department directive titled "**Municipal Administrative Hearings**."

NOTE: Refer to Item III of this directive for the exceptions to this restriction.

8. If after completing the mandatory name check of the violator, the officer is informed by OEMC or via the PDT, **REPEAT ANOV VIOLATOR: NOT ELIGIBLE FOR ANOV,** the officer will not issue an ANOV. A mandatory physical arrest will be made.

III. EXCEPTIONS

A. Vacant / Abandoned Building Violation Exceptions

The requirement that a violator sign the ANOV citation will not apply to citations written for a violation of:

1. MCC 13-12-125, entitled "Abandoned Buildings," or
2. MCC 13-12-140, entitled "Vacant or Open Buildings - Watchman Required."

B. Curfew Violation Exceptions

1. The requirements that a violator or person served produce a valid picture identification card and sign the ANOV citation will not apply to citations written for curfew-related violations cited under MCC 8-16-024.

NOTE: Members will request a valid picture identification and absent such identification will obtain sufficient information to perform a name check.

2. If the violator or person served refuses to supply an identification card or apply their signature in the "Signature of Respondent or Person Served" box, the issuing officer will write the phrase "information refused" in the appropriate section of the ANOV citation.

IV. ARREST PROCEDURES

A. Except in the situations outlined in Item III of this directive, when a situation prevents the member from issuing an ANOV citation due to the restrictions listed in Item II of this directive, the offender will be placed under arrest. The violator will be processed in accordance with the procedures outlined in the Department directive titled "**Processing Persons Under Department Control**," and MCC charges will be cited on a Class "C" Misdemeanor / Ordinance Violation Complaint form, unless otherwise indicated.

B. Sworn members **will not** make a physical arrest when the circumstances of the situation meet the exceptions listed in Item III of this directive **and** there are no other facts of the situation prohibiting the issuance of an ANOV citation as defined in Item II of this directive.

Terry G. Hillard
Superintendent of Police

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