

## DECEMBER 2001 NRPA LAW REVIEW

### “POT FESTIVAL” ORGANIZERS CHALLENGE CITY’S PARK PERMIT ORDINANCE

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In the case of *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, No. 99-11385 (11th Cir. 07/27/2000), the Coalition for the Abolition of Marijuana Prohibition ("CAMP") challenged the constitutionality of the City of Atlanta Outdoor Festivals Ordinance. The facts of the case were as follows:

CAMP is a non-profit organization focused primarily on forming alliances and associating with other groups concerned with marijuana issues. Additionally, CAMP sponsors the Great Atlanta Pot Festival (the "Pot Festival"), a direct action event advocating changes in the laws governing marijuana.

CAMP held the Pot Festival in Atlanta's Piedmont Park from 1990 through 1995. Prior to 1995, CAMP erected a stage with a cover, stage lights and barricades for the use of speakers and musical performers during the Pot Festival. During the Pot Festival, CAMP distributed printed information regarding the uses of marijuana and the hemp plant and advocating the repeal of all laws prohibiting the use of marijuana. CAMP also sold products, such as t-shirts, bearing messages about marijuana. Other vendors sold food and drinks.

In 1995, the City of Atlanta requested that CAMP apply for an outdoor festival permit. The City explained that, because the Pot Festival had evolved into a larger, more commercial event, attracting approximately 30,000 attendees and featuring concerts, political speeches, and vendors selling food and merchandise, it now fell within the 1994 Festival Ordinance's definition of an "outdoor festival."

When CAMP complied with the City's request and applied for a festival permit, their application was denied because the City determined that "the previous history of this event indicates to a reasonable certainty that public safety would be compromised substantially." The mayor's chief of staff explained that the permit was denied based on the recommendation of the Atlanta Police Department. The police department had estimated that in 1994 at least half of the Pot Festival attendees openly smoked marijuana in blatant defiance of the law and therefore, "[i]n the opinion of police officials monitoring this event, any attempt to enforce the law on such an occasion would require unusually large numbers of police officers and would be likely to provoke a civil disturbance."

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Upon denial of their application for a festival permit, CAMP exhausted the administrative appeals process defined in the 1994 Festival Ordinance. CAMP then filed for a preliminary injunction, requiring the City of Atlanta to grant them a festival permit. The district court determined that CAMP's First Amendment rights were not being infringed because they could hold a political demonstration and concert without a festival permit. Accordingly, the district court denied the request for a preliminary injunction. CAMP appealed.

On appeal, CAMP argued that "the 1994 Festival Ordinance was unconstitutional on its face because it provided unfettered discretion to the mayor's chief of staff and other public officials when deciding whether to issue a festival permit." Specifically, CAMP contended that the 1994 Festival Ordinance was "content-based, does not allow effective access to public fora, and is not the least restrictive means for regulating the appellant's First Amendment conduct." Further, Camp argued that "the permit fees required by the 1994 Festival Ordinance are not nominal and are manipulated to accomplish content-based restriction of First Amendment activity."

While CAMP's appeal was pending, the City repealed the 1994 Festival Ordinance and enacted the "2000 Festival Ordinance" which purported to address the constitutional concerns raised in the district court. Accordingly, in considering CAMP's arguments that the 1994 Festival Ordinance was unconstitutional, the appeals court stated that it would analyze the 2000 festival ordinance. In so doing, the appeals court noted that "[t]here are numerous cases illustrating the principle that where a challenged ordinance is amended during litigation the appropriate course is to proceed to a consideration of the amended ordinance".

### CONSTITUTIONAL ISSUES

As characterized by the appeals court, the 2000 Festival Ordinance, like the 1994 Festival Ordinance, imposed "a prior restraint on conduct protected by the First Amendment." Accordingly, in order to be considered constitutional, the appeals court acknowledged that "the 2000 Festival Ordinance must meet the requirements for reasonable time, place and manner restrictions of protected speech in public fora." Specifically, to be considered constitutional, the appeals court stated that "the 2000 Festival Ordinance must be (1) content neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information."

### CONTENT NEUTRAL?

In determining whether a challenged ordinance is content neutral or content based, the appeals court noted that "the constitutionality of the ordinance depends initially on whether it regulates expressive activity on the basis of content." In this particular instance, the appeals court found that the 2000

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Festival Ordinance did “not make a distinction between political demonstrations and other forms of expressive conduct.”

The 2000 Festival Ordinance... only excludes from the definition of an outdoor festival those events which are solely parades, unless such parade is proposed as an integral part of a broader outdoor festival. Also excluded from the definition of “outdoor festival” herein is any event with a scheduled duration of three (3) hours or less. Ordinance No. 99-O-1040, § 138-187...

[U]pon examining the intent behind the 2000 Festival Ordinance, it is evident that the City adopted the ordinance in an effort to manage effectively and efficiently the use of the City's parks and other resources by the sponsors of large festivals, not because of a disagreement with the message conveyed by any particular festival.

Moreover, the appeals court found that “[t]he 2000 Festival Ordinance applies equally to all festivals of any kind without regard to the content of any message the festival sponsor might convey.”

The 2000 Festival Ordinance only distinguishes between various festivals or similar gatherings on the basis of physical attributes, not content. The 2000 Festival Ordinance defines an Outdoor Festival as an event including various forms of expressive conduct "and which requires the erection of stages, barricades, utility poles, booths, tents, or other temporary structures, or the use of parked vehicles or of permanent structures." Ordinance No. 99-O-1940, § 138-187.

These criteria attempt to identify those outdoor events which will require additional municipal services. It does not attempt to create distinctions based upon the content of the speech and the 2000 Festival Ordinance specifically forbids the Chief of Staff from basing the decision to grant a festival permit on the content of speech or message conveyed by the festival. See Ordinance No. 99-O-1940, § 138-203.

By distinguishing events which require additional city resources based upon their physical attributes, the City can schedule and coordinate the municipal services required to ensure public safety and otherwise accommodate these large public gatherings.

As a result, the appeals court concluded that the 2000 Festival Ordinance was “content-neutral” because it "serves purposes unrelated to the content of expression" and is "justified without reference to the content of the regulated speech."

NARROWLY TAILORED?

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On appeal, CAMP had also argued that “the 2000 Festival Ordinance is not narrowly tailored to serve a significant governmental interest.” In so doing, CAMP questioned “the legitimacy of the city's stated purposes of assuring security and public safety, as well as avoiding scheduling conflicts.” Taking a “common sensical approach,” the appeals court, however, found it “obvious that the City has a significant interest in regulating the use of its parks and streets by large groups.”

To demonstrate the significance of its interest, the City is not required to present detailed evidence, but is entitled to advance its interests by arguments based on appeals to common sense and logic.

Certainly, the City needs advance notice and the cooperation of organizers to plan the services, such as security, sanitation, and traffic control, that are required for an event which, like the Pot Festival, attracts approximately 30,000 participants. It is only logical that a framework is needed for the City to work with the organizers of a large, multi-faceted event in order to coordinate the City's resources to successfully accommodate the event. The 2000 Festival Ordinance provides such a framework.

Having found that “the City's stated purposes for the 2000 Festival Ordinance are legitimate and significant interests of the City,” the appeals court then considered “whether there is a ‘reasonable fit’ between those interests and the 2000 Festival Ordinance, as the City's chosen means for serving them.”

In this analysis, the City bears the burden of demonstrating a logical and practical relationship between the restriction and its interests, so that we may determine whether the restriction is substantially broader than is necessary to achieve those ends.

However, the City need not prove that the 2000 Festival Ordinance is the least restrictive means of serving them. The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Applying these principles to the facts of the case, the appeals court found that the 2000 Festival Ordinance was “narrowly tailored to exclude those events which do not require additional governmental services and therefore do not logically fit within the scope of the City's interests.”

[T]he description of events "requir[ing] the erection of stages, barricades, utility poles, booths, tents, or other temporary structures, or the use of parked vehicles or of permanent structures," in the 2000 Festival Ordinance... limits the universe of events that will fall within the parameters of the 2000 Festival Ordinance regulations and, thus, does

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not burden "substantially more speech than is necessary to further the government's legitimate interest."

The appeals court then examined the constitutionality of the following provision in the ordinance which "granted the Chief of Staff the authority to impose restrictions on the applicants after their festival permit had been approved."

[The chief of staff is required to deny any application where the applicant] proposes to limit the use of public streets by pedestrians using the streets to move from location to location or if the applicant proposes to limit the use of public parks when use of the parks by the general public shall not unreasonably disturb the activities of the planned festival.

In the opinion of the appeals court, "this restriction was "narrowly tailored to meet its justification." In concluding that "this restriction does not overburden festival permit applicants," the appeals court quoted the U.S. Supreme Court noting "[m]unicipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for the movement of people and property, the primary purpose to which the streets are dedicated." Moreover, the court cited the Supreme Court's opinion in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296, 104 S. Ct. 3065, 3070, 82 L. Ed. 2d 298 (1984) which had recognized the government's "substantial interest in maintaining the parks in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them." As a result, the appeals court held that this provision in the ordinance satisfied the constitutional requirement of being "narrowly tailored to serve the City's significant interests."

### ALTERNATIVE CHANNELS OF COMMUNICATION?

CAMP had also contended that "the 2000 Festival Ordinance does not provide effective access to alternative avenues for communication of their message." In so doing, CAMP asserted that "use of the city park for the Pot Festival is 'absolutely essential' for them to convey their message to the intended audience." Moreover, CAMP claimed that they "absolutely require lighting, electricity, barricades, and stage covers to effectively convey their message."

According to the appeals court, "the City can satisfy the requirement that alternative channels of communication remain open to CAMP even if those channels "may be less effective than CAMP would prefer." Moreover, the appeals court noted that "CAMP may hold a political demonstration and concert in a city park without a festival permit." As a result, the appeals court found that "CAMP still has the opportunity to communicate its message advocating changes in the marijuana laws without a

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festival permit.”

Section 138-209 of the 2000 Festival Ordinance specifically limits the application of the 2000 Festival Ordinance and provides that “[n]othing in this article shall be construed to prevent members of the public from assembling in the parks or streets for the purpose of making any speech or conveying any message to the public or to the government without holding an outdoor festival permit.” Ordinance No. 99-O-1940, § 138-209.

Those individuals who organize an assembly without an outdoor festival permit are only limited in the sense that they are not entitled to the benefits of the new festival ordinance, including but not limited to, the right to erect stages, barricades, utility poles, booths, tents, or other temporary structures, or the use of parked vehicles or of permanent structures, or to the assistance of city personnel in carrying out their event.

Lighting, stage covers, electricity, barricades, or any of the other benefits conferred by an outdoor festival permit are not essential to CAMP's message, rather they are convenient mechanisms for increasing the efficiency with which CAMP might choose to communicate its message.

The appeals court, therefore, concluded that “ample alternatives remain available to CAMP for communicating its message despite the restrictions created by the 2000 Festival Ordinance.”

### NOMINAL PERMIT FEES

Finally, on appeal, CAMP argued that “the fees required for the grant of a festival permit are unconstitutional because the required fees are manipulated according to the content of the speech and they are more than nominal.” Specifically, CAMP contended that “the fees are content-based because (1) they are based on anticipated attendance at the festival and, thus, discriminate against festivals which attract larger crowds and (2) the number of extra personnel hours charged to the festival can be manipulated so as to accomplish content-based discrimination.”

As noted by the appeals court, “[t]he Supreme Court has authorized a municipality to charge fees for the use of the public streets only when such fees are both nominal and related to the expenses incidental to the policing of the event. Applying this principle to the facts of the case, the appeals court determined that the fees were not content based, but “reasonably related to the expenses of policing the activities in question.” Moreover, the appeals court noted that the fees were based upon a sliding scale which considered the anticipated attendance at the festival.

The fees are calculated based upon a sliding scale where the variables only include the

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extra personnel hours the City will expend and the anticipated number of individuals who will attend the festival.

When determining the anticipated attendance for the festival, “the Chief of Staff shall be guided by the estimate provided by the applicant, unless such estimate shall appear to have been made in palpable bad faith or otherwise grossly in error. If the Chief of Staff determines not to adopt the estimate given by the applicant, he shall state the reasons in writing on the permit.

Further, the 2000 Festival Ordinance makes clear that “no regard shall be given to any estimate of the number of persons who may be anticipated to be in the vicinity of the festival as counter-demonstrators or to show hostility to any message the festival may be perceived as having.” These provisions assure that the estimate of anticipated attendance is not manipulated in order to burden unconstitutionally speech based upon its content.

The appeals court then addressed CAMP’s argument that “the fees imposed by the 2000 Festival Ordinance are more than nominal.” In so doing, the appeals court noted that “[t]he nominality of the fees imposed by the 2000 Festival Ordinance must be considered in the context of the size of the festival to which they apply.” In this particular instance, the appeals court found that “the fees of imposed by the 2000 Festival Ordinance are nominal when balanced against the size of the festival to which they are applied.”

The fees are imposed based upon a sliding scale considering the relevant factors which impact the City's expense in supporting the event. The fees recoup the City's expenses in administering the 2000 Festival Ordinance and supporting the outdoor festival in question. The parties do not contend that the fees exceed those expenses or serve as a form of revenue tax.

Additionally, applicants for an outdoor festival permit have the opportunity to reduce the permit fees by entering a separate agreement with the City whereby the applicant supplies some of the personnel which the City would ordinarily utilize to support the festival. Similarly, the sanitation portion of the permit fees is returned to the applicant if it cleans up the public spaces utilized for the festival.

Accordingly, the appeals court concluded that “the fee schedule established by the 2000 Festival Ordinance is narrowly tailored to serve the City's legitimate interest in covering the cost of supporting the outdoor festival and, therefore, is constitutionally permissible.”

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Having found the 2000 Festival Ordinance to be “content-neutral, narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication, the appeals court affirmed the constitutionality of the ordinance as a reasonable time, place, and manner restriction on constitutionally protected speech.