



BY EMAIL

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City of Wilmington Law Department
Wilmington, Delaware

November 8, 2011

Re: OCCUPY DELAWARE – SPENCER PLAZA

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
of DELAWARE
100 W 10TH ST, SUITE 603
WILMINGTON, DE 19801
T/302-654-5326
F/302-654-3689
WWW.ACLU-DE.ORG

NORMAN M MONHAIT
PRESIDENT

KATHLEEN M MacRAE
EXECUTIVE DIRECTOR

RICHARD H MORSE
LEGAL DIRECTOR

Dear Rose:

Now that the city administration has identified the Wilmington City Code provisions it is relying on to say that Occupy Delaware may not erect tents on Spencer Plaza, it is clear that it does not have the authority to take that position. Accordingly, I write to ask the administration immediately to stop excluding Occupy Delaware from that public property.

The two code provisions cited in your email to me this morning only prohibit the erection of tents and other structures “beyond the true building line of any street, highway, lane or alley of the city.” Wilmington City Code. *See* §§42- 213, 241. “True building line” is defined to mean “the boundary line of the public street or highway established by the department of public works of the city.” *Id.* §42-211 Tents on Spencer Plaza would not extend into the roadway, so the city administration does not have the right to bar people from erecting tents there. For the same reason, the administration lacks authority to bar tents from city parks or other plazas.

Your email to me also mentioned unspecified “public safety/security issues as it relates to the Federal Building that is directly adjacent to the plaza.” I called the United States Marshall’s Office and spoke to the person in charge of building security to ask about that. She didn’t express any concern. To the contrary, she said the plaza was city property and it would be up to the city whether tents were placed there.

The administration’s basis for asserting it is entitled to charge a fee for Occupy Delaware’s and its members’ exercise of their free speech rights at Spencer Plaza is equally deficient. The code provision you cited to me in support of the city’s insistence on a \$200 payment, states that “[t]he department of parks and recreation shall impose and collect a partially refundable park usage and clean up fee in the amount of \$100 from *individuals and groups for a permit to utilize city parks and facilities* prior to the issuance of such park permit.” *Id.* § 38-76. In other words, the provision appears to say that if one person wants to utilize any city park by sitting on a bench to eat lunch or to make a speech to people on the next bench, or by walking across the park, the city shall charge them \$100. As I’m sure you know, a law is overbroad under the First Amendment if it reaches a substantial number of impermissible applications relative to the law’s legitimate sweep. Clearly, §38-76 is

overbroad under that standard and therefore unenforceable here. It is a fundamental rule of American jurisprudence that any law imposing an overbroad restriction on speech will be struck down. And it is no defense to say that some city official might exercise discretion not to charge the fee in some instances. The absence of standards for exercise of that discretion is a second reason why that code provision cannot stand.

The city administration also lacks the authority to prevent Occupy Delaware's members from using Spencer Plaza at night. The code provision the city has relied on states "It shall be unlawful for any person to be upon any park property owned by the city, whether maintained by the city, or by the county, or by the state, on any day of the week, from dusk of one day to dawn of the following day unless otherwise authorized by the department of parks and recreation." *Id.* § 38-60. That provision is plainly deficient in the First Amendment context for three reasons.

First, it gives the city administration discretion to waive the provision, without establishing standards for exercise of that discretion. The provision has no articulated standards; the department of parks and recreation is not required to rely on any objective factors; and it need not provide any explanation for its decision. Nothing in the law or its application prevents the city official from encouraging some views and discouraging others through arbitrary application of the power to allow nighttime use of public space. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

Second, it would be ruled vague by a court. The code provision purports to prohibit any person from being in a park "from dusk of one day to dawn of the next day." Read literally, the words mean one can't stay there from nightfall until the next morning. But the administration apparently reads it to mean one can't stay there for even one minute during the night. If this second way of interpreting the provision is plausible, it means the provision can be read two different ways, and is too vague to limit free speech rights.

Third, the code provision is titled "Park hours," and the language says it applies to "park property." The City Code recognizes that a "park" and a "plaza" are different. *See, e.g.*, § 2-150.7(3). So even if the city were entitled to apply § 38-60 against Occupy Delaware's use of a park, it would not apply to its use of the plaza.

By insisting on a \$200 payment from Occupy Delaware as a condition of its members exercising their right to express their opinions, and by having the police prevent Occupy Delaware from erecting tents on Spencer Plaza or even staying there at night without tents, the city administration has violated both the United States Constitution and the Wilmington City Code. Please tell me by noon tomorrow whether the city administration will change its position and allow Occupy Delaware to use the plaza around the clock, without paying a license fee.

Sincerely yours,



Richard H. Morse