IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RODOLFO SANCHEZ AND KRISTOPHER SLEEMAN, PLAINTIFFS,	§	
V.	§	CAUSE NO. A-11-CV-993-LY
CITY OF AUSTIN, DEFENDANT.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BE IT REMEMBERED that on December 21, 2011, the court called the above-styled cause for bench trial. Plaintiffs Rodolfo Sanchez ("Sanchez") and Kristopher Sleeman ("Sleeman") and Defendant City of Austin (the "City") appeared in person or by counsel. Having carefully considered the evidence presented at trial, the parties' stipulated facts, the case law applicable to this action, the argument of counsel, and the parties' post-trial letters, the court concludes that the City's policy on issuing criminal-trespass notices violates Plaintiffs' First and Fourteenth Amendment rights under the United States Constitution. In so deciding, the court makes the following findings of fact and conclusions of law.[1]

Jurisdiction and Venue

The court has jurisdiction over this cause as Plaintiffs' claims arise under the United States Constitution and federal law. *See* 28 U.S.C. § 1331. Venue is proper because the underlying events giving rise to this action occurred in the Austin Division of the Western District of Texas, which is also the City's primary place of business.

[1] All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed. Likewise, any conclusion of law more appropriately considered a finding of fact shall be so deemed.

Facts

The following facts incorporate those stipulated by the parties.

It has always been the City's intent to hold out the City Hall Plaza (the "Plaza") to the public as a free-speech venue without limiting speech to particular subjects. The City's policy regarding public use of the Plaza and other areas of City Hall expressly designates the Plaza, including the mezzanine and amphitheater areas, as a free-speech venue. The Plaza is accessible to the public 365 days a year. No permit is required to use the Plaza, but citizens may make reservations.[2] Events in the Plaza sometimes host hundreds or more people. Frequent use of the Plaza for public events is exactly what the City expected and intended to happen when the Plaza was designed.

The City Hall building houses the offices of City Council members, the Mayor, the City Manager, and the City Clerk, among other departments and offices. City Hall is the location for City Council meetings, zoning meetings, and early voting. Visitors to City Hall may come to get records from the City Clerk, to meet with City Council members and the Mayor, to meet with the City Manager and his assistants, to attend or participate in city meetings, or even just to see artwork or other displays. Normal business hours for City Hall are from approximately 8 a.m. to 5 p.m., with some variation for evening events.

Security at City Hall is provided by the City's Building Services department. Eric Stockton is the department director for the Building Services department. At City Hall, there are both security officers who are employees of the Building Services department and contract security officers who are employees hired on contract from Allied Barton, a security firm.

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[2] Pursuant to the City's new rules, which took effect on February 3, 2012, any group planning to use the mezzanine and amphitheater areas is required to make a reservation.

Occupy Austin describes itself as a protest movement focused on democracy, economic security, corporate responsibility, and financial fairness and is comprised of local citizens dedicated to "non-violently reclaiming control of our governments from the financial interests that have corrupted them." From October 6, 2011 through trial, the Plaza was the main site of an Occupy Austin protest. Not everyone who visited the Plaza during that period, however, was a member of Occupy Austin or a protestor.[3]

Sanchez began participating in the Occupy Austin protest on October 6, 2011. In the early morning hours of October 30, 2011, Sanchez was arrested by an Austin Police Department ("APD") officer during the City's efforts to enforce a restriction on nighttime food service included in a notice of cleanup that was issued by the City on October 28, 2011, posted on a City Hall door, and distributed to some protestors on the Plaza on October 29, 2011. Sanchez was issued a criminal-trespass notice by a member of the City Hall security staff who had authority to issue such notices. Sanchez subsequently received a letter from the City indicating that the duration of his ban was one year and advising him of his right to administrative review of the ban. Sanchez continued to demonstrate with the Occupy Austin protest the day of his release from jail on October 31, 2011, but across the street from City Hall at the Margaret Hoffman Oak Park. He continued to regularly demonstrate with Occupy Austin at various downtown protests at least until the time of trial.[4]

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[3] The Occupy Austin protest at the Plaza ended on Friday, February 3, 2012, when APD officers cleared the Plaza after the City enacted new rules prohibiting the use of the Plaza between the hours of 10:00 p.m. and 6:00 a.m.

[4] Sanchez subsequently was arrested during an Occupy Austin march from City Hall to the State Capitol on December 8, 2011.

Sleeman began participating in the Occupy Austin protest by attending organizational and planning meetings held before October 6, 2011. Sleeman was approached by APD officers on October 30, 2011, and placed under arrest. The arrest was based on an outstanding warrant stemming from Sleeman's failure to pay a traffic ticket received for running a stop sign on his bicycle several years before. He was transported to the Travis County jail, booked on the open warrant, and additionally charged with criminal trespass and an ordinance violation. As he was being transported to jail, he was informed by an unidentified city official that he was restricted from returning to any portion of City Hall, including the Plaza, for a period of one year. Sleeman was issued a criminal-trespass notice by a member of the City Hall security staff who had authority to issue such notices. Sleeman demonstrated with Occupy Austin the day of his release from jail on October 31, 2011, also across the street from City Hall at the Margaret Hoffman Oak Park. Sleeman continued to regularly demonstrate with Occupy Austin at various downtown protests at least until the time of trial.

On November 1, 2011, Marc Ott, in his official capacity as City Manager, signed and caused to be promulgated City Administrative Bulletin 11-04, titled *Criminal Trespass Notices On City Property* (referred hereafter as the "policy"). The City developed written criminal-trespass-notice forms pursuant to the policy. The policy establishes rules and procedures for issuing and reviewing a criminal-trespass notice resulting from activities that occur in a City-owned or occupied building, or on public lands owned by the City.

A criminal-trespass notice is a verbal or written statement that an individual must depart or may not enter City property, effectively serving as a ban from some area of public property for a set amount time. At City Hall, only City-employed security officers can issue criminal-trespass notices

under the policy; contract security officers are not authorized to do so. The policy provides guidelines to determine the duration of a criminal-trespass notice, including six lengths of duration, depending on the conduct involved. The suggested duration guidelines are as follows:

Description of Conduct	*Suggested Duration of Exclusion*
No harm to persons or property, some disruption to City business or other event, and no similar past conduct	0–30 days
Some harm to persons or property, no disruption of City business or other event, and no similar past conduct	30–60 days
Some harm to persons or property, or some disruption of City business or other event, and history of similar past conduct	30–120 days
Significant harm to persons or property, or significant disruption of City business or other event, and no similar past conduct	90–180 days
Significant harm to persons or property, or significant disruption of City business or other event, and history of similar past conduct	90 days–1 year
Significant harm involving serious bodily injury or the threat of serious bodily injury to a person or to property, and threat of similar future conduct	1 year–permanent

The policy further provides for post-issuance administrative review of criminal-trespass notices by means of an informal review by the director of the relevant city department, with an appeal to the City Manager. For notices issued at City Hall and the Plaza, the Building Services department is the relevant city department. As director of the Building Services department, Eric Stockton conducts the administrative-review process for criminal-trespass notices issued at City Hall.

The City conducted an administrative review of Sanchez's criminal-trespass notice and completed that review on November 22, 2011. The City conducted an administrative review of

Sleeman's criminal-trespass notice and completed that review on November 22, 2011. As of December 12, 2011, all criminal-trespass notices for which administrative reviews had been requested and conducted have been modified. In all of these cases, the restriction was modified to end the day of, the day after, or, in the cases of Sanchez and Sleeman, the day before the administrative review was held.

On November 26, 2011, Sleeman tried to return to the Plaza. Sleeman was told by APD Sergeant Sam Shurley that his criminal-trespass notice had not been lifted and remained in effect. Because Sleeman was unable to produce documentation proving that the City had modified his criminal-trespass notice, he was escorted from City Hall property and told that, if he returned to the Plaza, he would be arrested. Officer Shurley was mistaken about Sleeman's notice still being in effect at that time.

Plaintiffs' First Amended Complaint alleges violations of the First and Fourteenth Amendments to the United States Constitution pursuant to Title 42, United States Code Section 1983. Specifically, Plaintiffs allege that the bans imposed through their criminal-trespass notices fail First Amendment scrutiny and that the City's policy on issuing criminal-trespass notices is facially unconstitutional due to its lack of objective standards, vagueness, and overbreadth. Plaintiffs further assert that the administrative-review procedure in the City's policy violates Plaintiffs' rights to procedural due process under the Fourteenth Amendment. Plaintiffs seek both injunctive relief against the City's enforcement of its criminal-trespass-notice policy at the Plaza and monetary damages stemming from Defendants' unconstitutional actions in banning Plaintiffs from participating in the Occupy Austin protest at the Plaza.

First Amendment

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The First Amendment applies to states and municipalities through the Fourteenth Amendment. *See Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 792 n.2, (1984) (citing *Lovell v. Griffin,* 303 U.S. 444, 450 (1938)). "[M]unicipal ordinances adopted under state authority constitute state action and are within the prohibition of the [First] [A]mendment". *Lovell,* 303 U.S. at 450. "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, ____U.S. ____, 131 S. Ct. 1207, 1215 (2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Therefore, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

However, the protection of speech and assembly under the First Amendment is not absolute. Although the First Amendment applies to a municipality's conduct, a municipal government "need not permit all forms of speech on property that it owns and controls." *International Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678 (1992). Thus, courts follow a three-step process to assess whether the governmental restrictions are valid under the First Amendment. *See Mahoney v. Doe,* 642 F.3d 1112, 1116 (D.C. Cir. 2011) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 797 (1985)). First, the court determines whether the First Amendment protects the speech at issue; second, the court identifies the nature of the forum; and third, the court assesses

whether the government's justifications for restricting speech satisfy the requisite standard. *Id.* (*quoting Cornelius,* 473 U.S. at 797).

The City concedes that much of the conduct by Occupy Austin and its participants falls within the protection of the First Amendment and the City does not dispute that Plaintiffs' participation in the "occupation" of the Plaza (even on the October 30, 2011, the day of their arrest) is a matter of public concern and is within the protection of the First Amendment. Therefore, the court finds that the First Amendment protects Plaintiffs' protest speech with Occupy Austin at the Plaza.

Courts distinguish three types of forums in public property: traditional public forums; forums created by government designation; and nonpublic forums. *Cornelius,* 473 U.S. at 802. Places which by long tradition or by government authorization have been devoted to assembly and debate fall into the first category of traditional public forums. *Perry Educ. Ass'n,* 460 U.S. at 45. The second category consists of public property which the state has opened for use by the public as a place for expressive activity. *Id.* The third category–public property which is not by tradition or designation a forum for public communication– is governed by different standards. *Id.* at 46. The United States Supreme Court has recognized that with regard to such nonpublic forums, the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv. v. Greenburgh Civic Ass'n,* 453 U.S. 114, 129 (1981).

As stated in the parties' Agreed Joint Stipulations of Fact, the City has always held out the Plaza to the public for speech and has always kept it open for use for speech. *See Perry Educ. Ass'n*

v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Thus, the court finds that the Plaza falls under the category of a traditional public forum.[5]

In traditional public forums, which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[6] the rights of government to limit expressive activity are sharply circumscribed. *See id.* Thus, for a government to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *See Carey v. Brown,* 447 U.S. 455, 461 (1980). A government may also impose reasonable time, place, and manner constraints in traditional public forums, however, so long as it does not ban a speaker entirely from engaging in First Amendment-protected speech in those forums without satisfying the strictest of scrutiny. *See Clark v. Comty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

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[5] As noted above, the second category consists of public property which the government has opened for use by the public as a place for expressive activity. *See Perry Educ. Ass'n*, 460 U.S. at 45-46. To create a forum of this type, the government must intend to make or designate the property "generally available" to a class of speakers. *Widmar v. Vincent,* 454 U.S. 263, 264 (1981). Although a municipality is not required to indefinitely retain the open character of its facilities, as long as it does so it is bound by the same standards as apply in a traditional public forum; reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Id.* at 269-70. The court notes that having found that the City holds out the Plaza as a traditional public forum, which would qualify under the first category of public forum with a tradition devoted to assembly and debate, it also qualifies as a designated public forum as the City has not only expressly identified the Plaza as a designated public forum, but has also retained the open character of the Plaza such that it is bound by the same standards as apply in a traditional public forum. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998); *Estiverne v. La. State Bar Ass'n*, 863 F.2d 371, 376 (5th Cir. 1989).

[6] *Hague v. CIO,* 307 U.S. 496, 515 (1939).

A government may regulate expressive conduct in a public forum to protect public health, safety, or welfare. *See Beckerman v. City of Tupelo, Miss.,* 664 F.2d 502, 509-10 (5th Cir. 1981). If a content-based regulation is to be allowed, the government "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n,* 460 U.S. at 45, (citing *Carey,* 447 U.S. at 461). That standard is one of "strict scrutiny." *Chiu v. Plano Indep. Sch. Dist.,* 260 F.3d 330, 344-45 (5th Cir. 2001). A content-based regulation of speech will not satisfy strict scrutiny if there is a less restrictive means that "would be at least as effective in achieving the legitimate purpose" that is being served. *Reno v. ACLU,* 521 U.S. 844, 874 (1997). *See also Serv. Employees Int'l Union, Local 5 v. City of Houston,* 595 F.3d 588, 596 (5th Cir. 2010).

A content-based regulation has been defined as one that creates distinctions between "favored speech" and "disfavored speech." *Horton v. City of Houston,* 179 F.3d 188, 193 (5th Cir. 1999). Such a regulation creates a "substantial risk of eliminating certain ideas or viewpoints" from the public forum. *Id.* A regulatory scheme that requires the government to "examine the content of the message that is conveyed" is content-based regardless of its motivating purpose. *Ark. Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230 (1987) (quoting *FCC v. League of Women Voters of Calif.,* 468 U.S. 364, 383 (1984)).

However, content-neutral regulations of "time, place, and manner of expression" in public forums are permitted when they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n,* 460 U.S. at 45. *See also United States Postal Service v. Council of Greenburgh,* 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 535-36 (1980); *Grayned v. City of Rockford,*

408 U.S. 104, 115 (1972); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Schneider v. State of New Jersey,* 308 U.S. 147 (1939). Using this test to judge the constitutionality of a regulation is an application of "intermediate scrutiny." *Horton,* 179 F.3d at 192-93. In the context of intermediate scrutiny, narrow tailoring does not require that the least restrictive means be used. *Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989). As long as the restriction promotes a substantial governmental interest that would be achieved less effectively without the restriction, it is sufficiently narrowly tailored. *Id.* at 799. *See also City of Houston*, 595 F.3d at 596.

The City argues that it has a substantial interest in maintaining the Plaza "in an attractive and intact condition," *see Clark*, 468 U.S. at 296, as well as ensuring that the Plaza remains readily available to other members of the public, and that its policy does not single out any type of speech or provide differential treatment based on the idea expressed. The City further asserts that its policy is narrowly tailored because it is limited to proscribing intrusions upon the maintenance, use, and enjoyment of public space; it only temporarily restricts the use of one City-owned building or land; and it allows ample alternative channels for communication, including the Margaret Hoffman Oak Park across the street from the Plaza, so not to preclude Plaintiffs from communicating their message.

Plaintiffs contend that the ability to be physically present in public forums is necessary to engaging in free speech in those forums. *See Yeakle v. City of Portland*, 322 F. Supp. 2d 1119, 1127 (D. Or. 2004). Plaintiffs assert that the City's policy does not merely regulate nonexpressive conduct; rather, it regulates physical presence in a public forum, which is intimately related and essential to a broad variety of protected speech conduct; and it also prevents a banned person from engaging in any form of speech, assembly, or other protest-related activity at the Plaza for the duration of the ban.

See Hodgkins v. Peterson, 355 F.3d 1048, 1058-59 (7th Cir. 2004); *Yeakle*, 322 F. Supp. 2d at 1127. Finally, Plaintiffs argue that the City's policy does not include a less restrictive alternative to a complete ban that would protect Plaintiffs' speech, such as through the enforcement of existing criminal sanctions, nor does it allow for alternative channels of communication as the Plaza is an essential part and primary location of the Occupy Austin protest.

The City's stated interests in the body of the policy are the city's duties (1) "to be a responsible steward" of property it owns or controls, (2) to maintain public property "in a manner that promotes public safety and health," and (3) "to provide City-owned facilities where the City and the public can conduct business and other approved activities free from unlawful and disruptive interference." The policy allows authorized employees to issue a notice for "conduct occurring on City Property that is unreasonably disruptive or harmful to City Property, to the conduct of City business, or to the conduct of approved non-City activities occurring on City Property, including but not limited to conduct that violates the Austin City Code." The policy includes a nonexclusive list of conduct that violates the Austin City Code. Criminal-trespass notices are usually issued only after an individual has been warned that their conduct is in violation of law or "City policy" and given "a reasonable opportunity to cease the violation." However, if an individual's conduct is both unreasonably disruptive or harmful and is an offense under Texas law, has caused "injury to any person or damage to any property," or "threatens to cause an imminent breach of the peace," a criminal-trespass notice may be issued by an authorized employee without prior warning.

Plaintiffs assert that the bans they received are content-based restrictions of speech and expressive conduct. Specifically, Plaintiffs argue that the City's implementation of a newly written policy on criminal-trespass notices, less than a month after the start of the Occupy Austin protest, was

solely in response to the Occupy Austin protests. Therefore, Plaintiffs contend, any content-neutral justifications offered for the bans and the policy must be taken as pretextual. *See Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004).

A court generally looks to the terms of an ordinance to see if the ordinance distinguishes favored speech from disfavored speech on the basis of the ideas or views expressed to determine whether a governmental ordinance or policy is content neutral or content based. *See Turner Broad. Sys., v. FCC*, 512 U.S. 622, 643 (1994). The City's policy on its face does not specifically address speech. Despite Plaintiffs' assertions questioning the motive and timing of the City's policy in this case, Plaintiffs have not identified any terms on the face of the policy that distinguish speech.

Although the City's policy does not specifically address speech, however, by completely banning Plaintiffs from the Plaza it precludes Plaintiffs and others from being physically present to participate in clearly protected activities such as those of the Occupy Austin protest. It is necessary to be physically present in a public forum to engage in free speech in that forum. *Yeakle*, 322 F. Supp. 2d at 1127. Thus, the City's policy in this case does regulate conduct through the physical presence at the Plaza that is essential to protected-speech conduct. *See id.*

The City's policy prevents a banned person from engaging in any form of speech, assembly, or other protected activity at the Plaza for the duration of the ban. The policy imposes such a ban without first using less restrictive alternatives, including as Plaintiffs suggest, the enforcement of existing criminal sanctions. Morever, by banning Plaintiffs from the Plaza, the City reduces the quantity and quality of expression available. *Id.*

The City contends that the policy leaves open alternative avenues for communication because a person banned from the Plaza can still engage in protected speech activity in other public forums,

including Margaret Hoffman Oak Park, located just across the street from the Plaza. An alternative location is constitutionally inadequate, however, if the banned person is no longer able to communicate effectively or is unable to reach his intended audience. *Id.* (citing *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984); *Bay Area Peach Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990)). Leaving the banned Plaintiffs and others with alternative locations, such as a park across the street from the heart of the protest, is constitutionally inadequate.

A speech restriction must be narrowly tailored to advance a substantial governmental interest and leave open ample alternative channels of communication. *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992). Thus, a regulation is narrowly tailored only if it does not burden substantially more speech than is necessary to further the government's legitimate interests, if the cost to speech is carefully calculated, and there are not obvious, less burdensome alternatives. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *Supple*, 969 F.2d at 118. Applying this standard to the City's policy in this case, the court concludes that the policy and the bans imposed on Plaintiffs are not narrowly tailored and therefore fail constitutional scrutiny under the First Amendment.

Plaintiffs note that similar bans have failed constitutional scrutiny when applied to First Amendment activity in other courts. In *Yeakle*, a pre-Occupy case, plaintiffs were banned from Portland's Pioneer Courthouse Square for violating a city ordinance on unattended displays while conducting a petition signature drive. 322 F. Supp. 2d at 1122. The plaintiffs were banned pursuant to a city ordinance permitting issuance of "exclusion notices" for up to 30 days based on any violation of state law, city ordinances, or park rules and regulations. *Id.* at 1122-23. Analyzing the exclusion ordinance as a content-neutral regulation of speech in a traditional public forum, the district court

struck it down for violating the First Amendment, both as applied and on its face, holding that the ordinance was not narrowly tailored. *Id.* at 1125-28.

Plaintiffs further noted at trial that protestors at Occupy Tacoma recently challenged and successfully temporarily restrained a similar policy. *See* Order Granting Mot. for TRO, Dkt. No. 11, *Canfield v. Batiste*, No. C11-5994RJB (W.D. Wash. filed Dec. 6, 2011).[7] Plaintiffs argue that *Yeakle*, *Canfield*, and this case fit into a broad and well-defined pattern of cases striking down or modifying

[7] On February 2, 2012, Judge Robert J. Bryan signed the parties' Agreement and Stipulation of Settlement and Permanent Injunction. *See* Agreement and Stipulation of Settlement and Permanent Injunction, Dkt. No. 31, *Canfield v. Batiste*, No. C11-5994RJB (W.D. Wash. filed Feb. 2, 2012).

public-forum bans that restrict First Amendment activity.[8] *See, e.g.*, *Hodgkins*, 355 F.3d at 1056-57; *Johnson v. City of Cincinnati*, 310 F.3d 484, 502-06 (6th Cir. 2002).

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[8] Other Occupy cases are not inconsistent with this court's opinion in this case. *See, e.g., Occupy Sacramento v. City of Sacramento*, 2011 WL 5374748 (E.D. Cal. Nov. 4, 2011) (denying TRO against enforcement of ordinance prohibiting "remaining or loitering in parks during certain hours"); *Occupy Tucson v. City of Tucson*, 2011 WL 5401840 (D. Ariz. Nov. 8, 2011) (denying TRO against enforcement of park regulations to prohibit picketing, protesting, etc.); *Occupy Fort Myers v. City of Fort Myers*, 2011 WL 5554034 (M.D. Fla. Nov. 15, 2011) (granting, in part, preliminary injunction against enforcement of ordinances requiring permits for parades and protests, setting park hours, and barring camping and loitering; holding occupation to be expressive conduct protected by First Amendment); *Waller v. City of New York*, 933 N.Y.S. 2d 541 (N.Y. Sup. Ct. Nov. 15, 2011) (denying TRO against eviction of Occupy protesters from Zuccotti Park and against preventing reentry to park with tents and other equipment); *Occupy Minneapolis v. County of Hennepin*, 2011 WL 5878359 (D. Minn. Nov. 23, 2011) (granting TRO against enforcement of prohibition on signs or posters, and denying it as against prohibitions on sidewalk chalk, sleeping, and erecting structures on plaza and decision to cut off access to electricity; holding sleeping on plaza and erecting tents or other structures to be protected expressive activity in context of Occupy protests); *Davidovich v. City San Diego*, 2011 WL 6013010 (S.D. Cal. Dec. 1, 2011) (denying TRO against enforcement of ordinance barring erection or placement of any object on public property or rights-of-way); *Isbell v. City of Oklahoma City*, 2011 WL 6016906 (W.D. Okla. Dec. 2, 2011) (granting TRO against closure of park and enforcement of curfew); *Isbell v. City of Oklahoma City*, 2011 WL 6152852 (W.D. Okla. Dec. 12, 2011) (denying preliminary injunction against enforcement of park curfew and bans on camping and overnight sleeping); *Occupy Boston v. City of Boston*, No. 11-4152-G (Mass. Sup. Ct. Dec. 7, 2011) (vacating TRO and denying preliminary injunction against eviction from public square); *Occupy Denver v. City & County of Denver*, 2011 WL 6096501 (D. Colo. Dec. 7, 2011) (denying TRO against allegedly retaliatory enforcement of ordinances imposing park curfew and prohibiting encumbrances in public rights-of-way); *Freeman v. Morris*, 2011 WL 6139216 (D. Me. Dec. 9, 2011) (denying preliminary injunction against enforcement of camping ban and permitting requirement; holding that occupation constitutes protected expressive activity); *Occupy Columbia v. Haley*, 2011 WL 6318587 (D.S.C. Dec. 16, 2011) (granting preliminary injunction against policy barring after-hours use of statehouse grounds, including camping and sleeping; holding camping and sleeping to be protected expressive activity in the context of Occupy protests; "The court is merely enjoining Defendants from making up rules that do not comport with the First Amendment as a knee-jerk response to Plaintiffs' occupation."); *Occupy Fresno v. County of Fresno*, 2011 WL 6182325 (E.D. Cal. Dec. 13, 2011) (granting preliminary injunction against permitting requirements and ban on handbills, though denying it as against park hours restriction).

Procedural Due Process

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Thus, a court's determination regarding whether procedures provided are constitutionally sufficient requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the value of any additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *City of Los Angeles v. David*, 538 U.S. 715, 716 (2003); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (U.S. 1976); *Marco Outdoor Adver., Inc. v. Regional Transit Authority*, 489 F.3d 669, 673 (5th Cir. 2007); *Sys. Contractors Corp. v. Orleans Parish Sch. Bd.*, 148 F.3d 571, 575 (5th Cir. 1998).

Applying these factors, the court finds first that the private interests at stake are Plaintiffs' First Amendment rights and their ability to exercise those rights at the Plaza. Second, the risk of erroneous deprivation of Plaintiffs' interest is high due to the broad guidelines provided for use by officials in implementing the policy, the lack of notice and post-deprivation-only nature of the administrative-review process, and the burden placed on the ban recipient to seek appeal, prove that ban on improper on appeal, and prove final modification of the ban by supplying appropriate documentation to officials when requested. Balancing these first two factors with the third factor, which is the City's interest in preserving governmental function and general use of City Hall and the Plaza against disruption while minimizing the fiscal and administrative burdens of additional or other procedural safeguards, the court finds that the City's policy, and notably its postdeprivation appeal process, cannot minimize the risk of erroneous deprivation. *See Yeakle*, 322 F. Supp. 2d at 1131.

Accordingly, the court concludes that the City's policy violates Plaintiffs' procedural due-process rights.

Conclusion

Having determined that the actions of the Occupy Austin protestors, including Plaintiffs in this case, are protected by the First Amendment; that the City's policy regarding the issuing of criminal-trespass notices does not serve as a valid time, place, and manner restriction and is not narrowly tailored to achieve a significant public interest; and that no suitable alternative channels for protected expression exist, the court concludes that the City's policy does not survive strict scrutiny.

IT IS THEREFORE ORDERED AND DECLARED that City Administrative Bulletin 11-04, titled *Criminal Trespass Notices On City Property* is unconstitutional on its face and Defendant City of Austin, its agents, employees, and any other persons or entities acting on its behalf, are enjoined from further enforcement of the City's policy respecting issuance of criminal-trespass notices.

A Final Judgment shall be filed subsequently in this cause.

SIGNED this 27th of September, 2012.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE