

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

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)	
THE STATE OF OREGON,)	
)	Case Nos. 1110-51989,
Plaintiff,)	1203-43073,
)	1112-53209,
v.)	1111-52423,
	)	1205-45256,
	)	1110-51946,
CATHY ALEXANDER,	)	1111-52420,
ANDREW BARNICK,	)	1112-53160,
LARA BASKIN,	)	1110-51950,
AXCELLE BELL,	)	1111-52408,
CARLOS BENAVIDESMONTES,	)	1112-53304,
LAURIE BENOIT,	)	1206-46917,
GRANT BOOTH,	)	1206-46918,
FOREST A. BRANNON,	)	1202-41865,
BENJAMIN BRYAN BURSON,	)	1112-53207,
SARAH C. COBLE,	)	1201-41046,
CLIFFORD LAWAYNE COLLINS,	)	1110-51990,
MICHAEL OTIS COLVIN,	)	1112-53516,
TRUDY A. COOPER,	)	1112-53505,
KERRY M. CUNNEEN,	)	1203-43540,
STEVEN EUGENE DAILY, (2)	)	1112-53507,
MATTHEW DENNEY,	)	1111-52422,
CHRISTINA MARIE DOYLE,	)	1111-52433,
MITCHELL DRINKWATER,	)	1112-53508,
EMMALYN LORRAINE GARRETT,	)	1111-52427,
JAMES DOUGLAS GLESS,	)	1205-45251,
JOSEPH GORDON,	)	1112-53509,
NADIA FAE GREENE,	)	1111-52426,
PHILLIP GREENE,	)	1112-53182,
HANNAH ABIGAIL GRUNDNER,	)	1112-53151,
ADRIAN VINCENT GUERRERO,	)	1110-51951,
JEFFREY SCOTT HAMILTON,	)	1112-53515,
ANGELA IRENE HAMMIT, (2)	)	1112-53302,
MARIO HARO,	)	ZA0059303,
BENJAMIN A HARRIS,	)	1112-53305,
RONDA HARRISON,)	

CARSEN JEAN HARRISON-BOWER,	)	1112-53162,
DUSTIN HAWKS,	)	1203-43074,
KELLER DEAN HENRY, (3)	)	1206-46920,
JOHN H. HERBERT,	)	1112-53506,
TODD ANDREW HERMAN,	)	1205-45537,
MAJORIE FRANCIS A. HOOVER, (2)	)	ZA0029305,
ANN HUNTWORK,	)	1203-43192,
ASHLEY LYNN JACKSON,	)	1203-43076,
RHONDA ELAINE JELINEK,	)	1110-51959,
DANIEL M. KAUFMAN,	)	1202-41613,
DAN V. KELLER,	)	1111-52419,
JUSTIN ALEXANDER KERSTON,	)	1112-53517,
CHASTIN TAYLOR LAKE,	)	1203-42615,
NEFI DAVID MARTINEZ-BRAVO,	)	1203-42643,
CAMERON SCOTT MATTA,	)	1203-43541,
MATTHEW MGLEJ,	)	1111-52668,
JACQUELYN BEATRICE MILLER, (2)	)	1112-53154,
JONAH CLINTON MILLETT,	)	1203-43075,
JACK PETER MONGEON,	)	1112-53179,
ELIZABETH E. NICHOLS,	)	1201-40039,
DEBORAH NORTON,	)	1203-43542,
TARA D. PARRISH,	)	1110-51991,
JAMES GILBERT PARTRIDGE,	)	1112-53510,
ELI FRANKLYN RICHEY,	)	1206-46922,
JOHN WADE SAUNDERS,	)	1203-43545,
PATRICIA L. SCHWIEBERT,	)	1203-43077,
NEILL SEIGEL, (2)	)	1203-43193,
KATHARINE MARIE SHARKEY,	)	1205-45528,
TAYLOR JEFFREY SHARPE,	)	ZA0059006,
KARYN MARIKO SMOOT,	)	1112-53514,
NICHLAS STEPHENS,	)	1203-42644,
JEFFREY ARLO STONE,	)	1205-45250,
JAMES VERNON TARDY,	)	1112-53487,
TROY ANTHONY THOMPSON, (7)	)	1112-53175,
JUSTINE R. VERIGIN,	)	1203-43082,
MATTHEW WALSH,	)	1111-52512,
THEON MATTHEW WEBER,	)	1111-52515,
BRAD MATHEW WHISLER,	)	1111-52699,
CAMERON WHITTEN, (3)	)	1111-52716,
CAITLIN TRIALL WILSON,	)	1112-53717,
YEHONATAN GUR WILSON,	)	1112-53301,
JAY ERIC YUNGERMAN,	)	1203-43078,
	)	1205-45538,
	)	1111-52432,
Defendants.	)	1111-52698,
	)	1203-43072,
	)	1111-52431,
	)	1112-53180,

) 1203-43081,
) 1111-52430,
) 1112-53159,
1203-43079.

ORDER

I. PROCEDURAL POSTURE

This case came before me for hearing on defendants' Motions to Dismiss. Mr. Pete Castleberry appeared on behalf of Ms. Angela Hammit and other similarly situated defendants. Mr. Kenneth Kreuzscher appeared on behalf of Ms. Elizabeth Nichols. Mr. Brian Lowney appeared on behalf of the State.

Ms. Hammit was arrested and charged with Criminal Trespass in the Second Degree reduced to a violation. The charges arose when Ms. Hammit and others participating in the "Occupy Portland" movement were located in Jamison Square, a park owned and operated by the City of Portland. They were engaged in demonstrations and discussions related to the movement. Police sought to enforce park closure hours pursuant to Portland City Code Ordinance 20.12.210. Shortly before midnight on November 30, 2011, police made numerous announcements that the park closed at midnight and that everyone needed to leave. They arrested those who did not vacate pursuant to the order. Other Occupy Portland demonstrations in other parks followed a similar pattern.

Defendants argue the law is both facially invalid as well as invalid as applied in violation of Article I, Section 8 of the Oregon Constitution and the First Amendment of the United States Constitution. The court addresses solely the challenges to the facial validity of the applicable ordinances as the court is precluded from considering an "as applied" challenge prior to trial when the facts at issue do not appear on the face of the charging instrument. *State v. Cervantes*, 232 Or App 567, 574 (2009). As such, the court defers consideration of the as-applied challenge until such time as the facts may be introduced into the record at trial. The defendants argue the facial validity challenge pursuant to the First Amendment of the United States Constitution and do not address Article I, Section 8 of the Oregon Constitution.

II. APPLICABLE ORDINANCES

Portland City Code Ordinance 20.12.010 Purpose of Establishing Prohibited Conduct provides:

The purpose of this Chapter is to preserve the Parks for the enjoyment, safety, comfort and convenience of the public and to enhance the orderly administration of the Parks, by prohibiting conduct that unreasonably interferes with the administration and lawful use of the Parks. The purpose of this Chapter is not to punish any person for prior conduct, but, rather, to provide civil and non-punitive regulations the Council finds necessary to prevent nuisances and to protect the health, welfare and safety of the public using the City's Parks. Any violation of the provisions of this Chapter is punishable in accordance with Section 1.01.140 of this Code.

Ordinance 20.12.210 Hours of Park Closure provides as follows:

- A. No person shall be in a Park during hours of park closure. Unless the Director designates otherwise for any Park, "hours of park closure" means any time between the hours of 12:01 a.m. and 5 a.m.
- B. This Section shall not apply to the following:
 - 1. Vehicular traffic crossing on a Park roadway;
 - 2. Pedestrians crossing the North or South Park Blocks, Pioneer Courthouse Square, Lowndale Square, Chapman Square, Pettygrove Park, or Lovejoy Park.
 - 3. Persons playing golf at a municipal golf course when the golf course is open;
 - 4. Persons attending, participating in, going to or coming from an activity either programmed or scheduled by Portland Parks and Recreation or under a permit issued under Chapter 20.08;
 - 5. Persons in parked vehicles at scenic viewpoints along or adjacent to park roads, where designated parking areas are provided, at times when those roads are open to vehicular traffic;
 - 6. Pedestrians crossing a Park area between the two paved portions of one street or boulevard.

Ordinance 20.12.190 Emergency Park Closure provides:

- A. In case of an emergency, or in case where life or property are endangered, all persons, if requested to do so by any Park Officer, shall depart from the portion of any Park specified by that Park Officer, and shall remain off that Park or that portion of the Park until permission is given to return.
- B. Notwithstanding Section 20.12.210, whenever it is in the interest of public health or safety to do so, the Commissioner or the Mayor, the Director, or an officer of the Bureau of Police may close any Park, or any part thereof, and may erect or cause to be erected barricades prohibiting access to any such Park, or part thereof, at appropriate locations. Notices that any Park, or part thereof, is closed shall be posted at appropriate locations during the period of such closure, if feasible; however, failure to post such notices shall not invalidate such closure nor shall it invalidate any exclusion for violating this Section.
- C. No person shall enter any Park or any part thereof that has been closed under this Section, or remain in such Park, or part thereof, after having been notified of the closure and having been requested to leave by the Commissioner, the Mayor, the Director or an officer of the Bureau of Police or Park Officer. A closure under this Section shall not exceed 18 hours without the written approval of the both the Commissioner and the Mayor.
- D. When a state of emergency is declared under Section 15.04.040 of this Code, the Mayor or other persons authorized by Section 15.08.020 or by subsection B of this Section may close any park and recreation facility to normal use and may designate that facility for emergency operations, which operations may include providing emergency services to the public, subject to the following conditions:

1. The scope of use of park facilities during such emergency shall be defined by approved City emergency plans or by the Mayor or Commissioner in Charge.
2. If emergency services are provided in any Park facility, members of the public may be allowed into the facility, under the control of and subject to restrictions and conditions established by the organization responsible for the emergency operations at that facility.
3. Costs incurred by Portland Parks and Recreation for emergency operations shall be submitted to the City's Office of Emergency Management for reimbursement. Costs reimbursable under this Section include facility operating costs, costs to repair damage caused by the emergency operations, and the costs to restore the facility to the condition it was in at the commencement of the emergency.
4. As soon as practicable after the state of emergency is officially terminated, any Park facility closed on account of the emergency or used for emergency operations will re-open for normal use.

Ordinance 20.08.010 Permits Required For Park Uses provides as follows:

It is unlawful for any person to conduct or participate in any activity in a Park, for which a permit is required, unless the Parks Reservation Center has issued a permit for the activity. A permit is required for any activity in a Park under any one or more of the following circumstances:

- A. The activity is intended to involve, is reasonably likely to involve, or actually involves, as participants and/or spectators, at any one time, 150 or more persons;
- B. The activity includes the placement of any temporary or permanent structure, including but not limited to any table, bench, stage, fence, tent or other facility in a Park. No permit is required under this Subsection for the placement of any temporary facility in an area of a Park which the Director has designated for such use without a permit;
- C. The activity requires, or is reasonably likely to require, City services additional to those already provided to the public as a matter of course in the Park, including but not limited to: increased police or fire protection; the turning on or off of water; provision of utilities, such as gas, electricity or sewer; placing, removing, opening or closing bollards, gates or fences; or the special preparation of fields or other facilities;
- D. The person or persons engaged in the activity seek to exclude, or to have the right to exclude, any member of the public from the activity or from any Park or from any area of any Park;
- E. The activity is conducted in any building in any Park, except for personal use of public restrooms; or
- F. The activity includes using the Park or Park area in a manner inconsistent with uses designated by the Director for that Park or Park area, or includes conduct that otherwise is prohibited in a Park, including, but not limited to, conducting business, charging admission or otherwise receiving payment for goods or services related to the activity, or possessing, serving or consuming alcoholic beverages.

Ordinance 20.08.020 Applications; Reservation Center to Promulgate Policies and Procedures:

- A. Any person desiring a permit under Section 20.08.010 shall apply with the Parks Reservation Center. The Parks Reservation Center, subject to the Director's approval, shall establish written

policies and procedures, including but not limited to fees and standard conditions, for applications and for permits. The written policies and procedures shall be available for public inspection. Every application shall state the purpose for which the Park would be used, the date and time of the proposed use, the name of the Park, and the area thereof that would be used, the anticipated number of persons who would be present and such other information relating to the contemplated use as the Parks Reservation Center may require.

- B. The Parks Reservation Center shall issue the requested permit if a complete application complying with all adopted policies and procedures is filed and all of the following conditions are met:
 - 1. The proposed activity is consistent with the size of the Park and any specialized purpose for which it is normally used, or for which specialized facilities have been provided;
 - 2. The proposed activity will not have an unreasonably adverse impact, from noise, litter or traffic, on the Park or on the surrounding neighborhood;
 - 3. The proposed activity does not pose an unreasonable risk to public health or safety or to the physical integrity of the Park;
 - 4. The applicant pays all required fees and agrees to comply with all conditions of the permit;
 - 5. The proposed use is otherwise lawful, but nothing in this Chapter shall require the issuance of a permit for an activity otherwise prohibited by this Title;
 - 6. The proposed activity does not conflict with an activity already scheduled for the Park or for which a different permit already has been applied for or issued for the Park;
 - 7. The applicant, including any person, firm or corporation affiliated with the applicant and with the activity, has not failed to comply with conditions of any permit previously issued by the Parks Reservation Center.
- C. The Parks Reservation Center may issue a permit for use of a Park during hours when the Park is closed if it approves the application. If the requested use does not meet the criteria of Subsection B of this Section, the Parks Reservation Center may deny the application or may impose restrictions or conditions upon the permit or issue a permit for a different date, time, Park, or Park area so as to meet such criteria. Action by the Parks Reservation Center shall be completed as quickly as reasonably possible, and, at the latest, within seven (7) days after a complete application is filed.
- D. Any person whose application is denied or who is issued a permit other than as applied for or who objects to restrictions or conditions included in the permit may appeal the matter to the Council by filing within five days after denial or inclusion of restrictions a written notice of appeal with the City Auditor. Upon receiving such a notice the City Auditor shall within 14 days schedule the appeal on the Council Calendar for hearing by the Council. At the hearing, the Council may affirm or modify the decision of the Parks Reservation Center, as the Council may deem necessary, to meet the criteria of Subsection B of this Section.
- E. In determining whether the criteria of Subsection B of this Section are met, no consideration shall be given to the content of any constitutionally-protected expression connected with the planned activity. No permit shall be required under this Chapter, nor any condition imposed on any permit, if requiring a permit or imposing the condition would violate rights protected by the Constitution of the United States or by the Constitution of the State of Oregon. No permit shall be required under this Chapter in order for any person to participate in any activity programmed by or sponsored by Portland Parks and Recreation.

- F. If any portion or provision of this Section is held by a court of competent jurisdiction to be invalid, such portion or provision shall, so far as possible, be held severable, and shall not affect the remainder, which shall continue in full force and effect.

III. FIRST AMENDMENT ANALYSIS

A. *Forum analysis.*

Parks are generally considered to be “traditional public forums” when considering constitutionally-protected speech. *Karuk Tribe of California v. Tri-Met*, 241 Or App 537, 539 n. 2 (2011), citing *Christian Legal Soc. Chapter of University of California, Hastings College of Law v. Martinez*, 130 S Ct 2971, 2984 n. 11 (2010). A court looks to a number of factors in determining whether a particular area can be considered a traditional public forum, and Jamison Square meets that criteria. See, *State v. Carr*, 215 Or App 306, 314-315 (2007), citing *American Civil Liberties Union v. City of Las Vegas*, 333 F3d 1092, 1100-1101 (9th Cir. 2003). In traditional public forums, any restriction based on content of speech must satisfy strict scrutiny, that is the restriction must be narrowly tailored to serve a compelling governmental interest. *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, 130 S Ct 2971, 2984 n. 11 (2010).

Reasonable time, place and manner restrictions on expression are allowed. *Pleasant Grove City, Utah v. Sumnum*, 555 US 460, 469 (2009), citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 US 37, 45 (1983). In public forums, government may impose time, place and manner restrictions provided they are justified without reference to the content of the speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 US 781, 791 (1989). A regulation that serves purposes unrelated to the content of expression is deemed neutral even if it has an incidental effect on some speakers or messages but not others. *Id.* This is not strict scrutiny, but a comparatively softer intermediate form of scrutiny. *City of Los Angeles v. Alameda Books*, 535 US 425, 455 (2002).

B. *The Portland ordinances are content neutral.*

The principal inquiry in determining content neutrality is whether the government had adopted a regulation of speech because of disagreement with the message it conveys. *Ward v. Rock Against Racism*, 491 US at 791. A regulation that serves purposes unrelated to the content of expression is deemed neutral even if it has an incidental effect on some speakers or messages and not on others. *Christian Legal Society*, 130 S Ct at 2994. Licensing standards based on concerns such as public safety are generally considered content neutral and are not “inconsistent with civil liberties but . . . [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.” *Thomas v. Chicago Park District*, 534 US 316, 323 (2002), citing *Cox v. New Hampshire*, 312 US 569 (1941). The effect of the park's closure hours is to prohibit the use of the parks during those times for any purposes other than allowing movement of vehicles and pedestrians via the roads and sidewalks within the parks. The ordinance thus prohibits virtually all other conduct or expression between the hours of 12:01 a.m. and 5 a.m., including conduct or expression that would otherwise be protected by the constitution. The park closure hours are not directed at content but are based on other significant governmental interests, including but not limited to maintaining quiet during nighttime hours. Similarly, the emergency closure rule is aimed at a purpose unrelated to the content of expression. The fact that the

closure restricts protected speech and conduct is incidental to its purpose of closing the parks. As such, the closure ordinances are content neutral.

C. *The ordinances are narrowly tailored to serve a significant governmental interest.*

Government has a substantial interest in protecting its citizens from unwelcome noise. *Ward v. Rock Against Racism*, 491 US at 796, citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 US 789, 806 (1984). This interest is perhaps at its greatest when government seeks to protect “the well-being, tranquility, and privacy of the home,” *Frisby v. Schultz*, 487 US, at 484. It is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. *Ward v. Rock Against Racism*, 491 US at 796, citing *Kovacs v. Cooper*, 336 US, at 86-87, (opinion of Reed, J.); *id.*, at 96-97, (Frankfurter, J., concurring); (Jackson, J., concurring). See, also, *Community for Creative Non-Violence, supra*, 468 US at 296 (recognizing 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”). The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation. *Ward v. Rock Against Racism*, 491 US at 797, citing *Community for Creative Non-Violence*, 468 US at 296.

While a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, it need not be the least restrictive or least intrusive means of doing so. Rather, 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.” *United States v. Albertini*, 472 US 675, 689 (1985); see also *Community for Creative Non-Violence, supra*, 468 US, at 297. In this case, closure during the hours from midnight to 5 a.m. serves significant governmental interests similar to the ones listed above. The interest in quiet and safety during nighttime hours would be achieved less effectively, if at all, absent the regulation.

The defense argues that even if the closure ordinance serves a legitimate interest, it is not narrowly tailored because it bans all expression, including silent meditations or other expressive conduct that may not have the effect of infringing upon the purpose the ordinance serves. It is true that the ability to impose time, place and manner restrictions does not mean the restriction may burden substantially more speech than is necessary to further the government's legitimate interests. *Ward v. Rock Against Racism*, 491 US at 799. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. *Id.*, citing *Frisby v. Schultz*, 487 US at 485 (“A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil”).

When an ordinance encompasses a complete ban on expression, the court has explicitly recognized the interest of protecting unwilling listeners in their homes, and total bans should be reviewed to determine whether they protect only the unwilling recipients of the communication. See, *Frisby v. Schultz*, 487 US at 485. The First Amendment permits the government to prohibit offensive speech as intrusive when the “captive” audience cannot avoid the objectionable speech. *Id.*, at 487, citing *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 US 530, 542 (1980). A complete ban on picketing in residential neighborhoods sought to prohibit the intrusion of unwanted communication into the home, and as such, was narrowly tailored to the governmental interest recognized in the ordinance. *Frisby v. Schultz*, 487 US at 487-488. An ordinance banning all signs on public property was upheld when the harm targeted - visual blight to the unwilling viewer - was not a

possible byproduct but was created by the medium of expression itself. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 US 789, 810 (1984).

Conceivably, an ordinance allowing silent forms of communication could still avoid the intrusion of noise to the unwilling listener during late night hours; however, there is a significant likelihood of incidental noise connected to humans gathered together with a communicative purpose, including the noise inherent in arriving and leaving a particular location. As Walter Bagehot notably stated, “An inability to stay quiet is one of the conspicuous failings of mankind.”

So long as the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. “The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests” or the degree to which those interests should be promoted. *United States v. Albertini*, 472 US at 689; see, also *Community for Creative Non-Violence, supra*, 468 US at 299. In situations where “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,” pitting that privacy interest against the First Amendment’s protection requires a delicate balancing. *Hill v. Colorado*, 530 US 703, 718 (2000).

The ordinance’s means of preventing the harm of noise that intrudes into residents’ privacy interests in their homes or places of repose is not substantially broader than necessary. The ordinance limits its protections to five hours during a twenty-four hour period. All other hours remain open for the full and free flow of expression and communication subject to other reasonable time, place and manner restrictions.

Other courts have considered ordinances regarding conduct in city parks as part of the “Occupy” movements that have taken place in various jurisdictions around the country. The court in *Freeman v. Morris*, Lexis 141930, WL 6132196 (D Me) (2011), in the context of a preliminary injunction, determined the park closure hours of Augusta, Maine were likely to be found narrowly-tailored to meet the significant interests in public safety and preservation of the public resource of the park. Similarly, the court in *Occupy Sacramento v. City of Sacramento*, Lexis 128218, WL 5374738 (ED Cal. 2011), found that closing parks six hours a day did not prevent the members of the Occupy movement from conducting expressive activities in other public spaces so as to not be overbroad.

The court finds the city’s ordinance sufficiently narrowly-tailored to the significant governmental interest served by the ordinance.

D. *The ordinances do not grant unfettered discretion to subvert the time, place and manner restrictions.*

The defense argues the ordinance for nighttime closure hours is facially invalid because the ordinance permits after-hours activities in the park if permitted by city authority. As such, the argument goes, the ordinance gives the city unfettered discretion to choose which activities to permit and which not to permit. The defense argues this discretion allows the city to make permitting decisions based on the content of speech, thus rendering the ordinance not content-neutral and not sufficiently narrowly tailored to meet the significant governmental interest.

"The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." *Hague v. C. I. O.*, 307 US 496, 515-516; *Shuttlesworth v. Birmingham*, 394 US 147, 152 (1969). An ordinance permitting the city to deny permits for parades, processions and demonstrations depending on factors of "the public welfare, peace, safety, health, decency, good order, morals or convenience" conferred virtually unbridled and absolute power to the decision maker and so subjected the exercise of the First Amendment to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority. *Shuttlesworth*, 394 US at 150-151 (1969). The issue a court must address is whether the ordinance grants an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Id* at 153, citing *Kunz v. New York*, 340 U.S. 290, 293-294. See also *Saia v. New York*, 334 U.S. 558; and *Niemotko v. Maryland*, 340 U.S. 268. Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community. *Shuttlesworth* at 153.

As written, the Portland city ordinances do not trigger the concerns the prior constraint prohibitions address. They are not laws so broadly written as to chill the expressive activity of others not before the court. *Forsyth County v. Nationalist Movement*, 505 US 123, 129 (1992), citing *New York v. Ferber*, 458 US 747, (1982); *Brockett v. Spokane Arcades, Inc.*, 472 US 491, 503 (1985). Rather, the criteria set out in 20.08.020(B) contains "narrow, objective, and definite standards to guide the licensing authority." *Forsyth* at 131 citing *Shuttlesworth*, 394 U.S. at 150-151; see also *Niemotko*, 340 U.S. at 271. In *Forsyth*, an ordinance allowing an administrative official to charge a permit fee granted unfettered discretion when there were no factors determining whether or when to charge a fee, and no factors determining the amount. As such, nothing in the law or its application prevented the official from encouraging some views and discouraging others through the arbitrary application of fees. *Forsyth* at 133.

The permitting exception to the late-night park closure hours do not give free reign to an administrative official to interject his or her own moral or philosophical code into the permitting decision. To the extent the exception does permit an administrative official to make a decision that has the effect of allowing some expressive conduct and speech while excluding other types of expressive conduct and speech, that decision is based on content-neutral criteria that are not arbitrary. The decision to grant a permit to override the park closure hours is based on the same criteria as granting permits for activities within parks during regular hours, and those considerations do not include overly broad bases for excluding activity such as the ones at issue in *Shuttlesworth, supra*. Instead, it is based on narrow and objective standards related to public safety, traffic, noise, litter, lawfulness of the activity and the like. A person considering a permit "shall" grant the permit if those concerns are not present. The permitting scheme further prohibits consideration of the content of constitutionally-protected expression connected with activities. No permit may be required if requiring a permit or imposing a condition on a permit would violate constitutionally-protected rights. Ordinance 20.08.020(E). Additionally, a permitting official's decision is reviewable by the City Council pursuant to 20.08.020(D).

The court does not find the ordinances unduly infringe on First Amendment rights by granting permitting officials overbroad discretion.

E. *There are other alternatives for expression.*

The case of *Clark v. Community for Creative Non-Violence, supra*, is an earlier echo of the present case. In that case, a group of protesters sought to bring attention to the plight of homeless people by engaging in the symbolic act of sleeping in tents put up as a symbolic display in Lafayette Park. The regulation there involved sleeping or camping, which is distinct from the ordinance here governing hours of closure, but the effect of prohibiting expression and conduct constituting expression was the same. In considering whether the regulation was reasonable under the “time, place and manner” ambit, the Court majority wrote, “We seriously doubt the First Amendment requires the Park Service to permit a demonstration...involving a 24-hour vigil and the erection of tents to accommodate 150 people.” *Clark*, 468 US at 296.

In making the determination of whether there are ample alternatives, a court looks to whether a restriction “seriously impinged” the ability to communicate. *Perry Educ. Association v. Perry Local Educators’ Association*, 460 US 37, 53 (1983). *See, also, Pell v. Proconier*, 417 US 817, 827-828 (1974) (limiting one of several avenues of communication was not an unconstitutional denial of freedom of speech). Park closure rules were addressed in *Occupy Sacramento v. City of Sacramento, et al.*, 2012 US Dist Lexis 95517 (E.D. Calif.), with the court there concluding an ordinance closing city parks from 11 p.m. to 5 a.m. “does not prevent Plaintiffs from conducting their expressive activities twenty-four hours a day on adjoining sidewalks or in other public spaces if they so choose.” The court in *Mitchell v. City of New Haven*, 2012 US Dist Lexis 49797 (D. Conn.) similarly noted that the ability to demonstrate during the day after obtaining a permit provided an alternative means of communication.

To be sure, there is not such a wide variety of public forums that limitation of one as a means of communication leaves open several other alternatives to expression. Additionally, the same concern about noise in the parks would apply to noise emanating from the adjoining sidewalks if not more so. In a world with 24-hour access to information that may change by the minute, the need to communicate does not arbitrarily cease from midnight to 5 a.m. Nevertheless, the ordinance here, similar to the one in Sacramento, does not foreclose the ability to access other public forums during those hours where the message can be disseminated. The ordinance leaves open the ability to use the park as a forum for 19 hours of each day. And while there may be some limitations on the ability to access the internet depending on whether someone owns a device or what kind of device that person may have, the ability of an entire movement to access the internet from just about any location within the city limits and communicate with a mass audience via a variety of methods and tools constitutes another alternative means of expression. While the bedrock constitutional principle of freedom of speech does not conveniently fit within proscribed time frames, nor does the First Amendment guarantee the right to communicate one’s views at all times and places or in any manner that is desired. *Heffron v. Int’l Soc. For Krishna Consciousness*, 452 US 640, 647 (1981). The court finds the reasoning in the above cases persuasive and finds there are sufficient other avenues of expression so that carving out closure hours for a few hours a of the day does not seriously impinge on the ability of members of the movement to express their message.

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For the foregoing reasons and authorities, the Defendants' Motion to Dismiss based on the facial validity of the ordinances is denied.

IT IS SO ORDERED this _____ day of July, 2012.

Judge Cheryl Albrecht