



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

OCCUPY DELAWARE, an unincorporated )  
association, )

Plaintiff, )

v. )

C.A. No. \_\_\_\_\_

CITY OF WILMINGTON, )

Defendant.

**VERIFIED COMPLAINT**

Occupy Delaware, by and through undersigned counsel, alleges, upon knowledge as to its own actions and otherwise upon information and belief (including counsel’s reasonable investigation), as follows:

**SUMMARY OF THE ACTION**

1. By this action plaintiff seeks orders temporarily restraining and preliminarily and permanently enjoining defendant from (a) denying plaintiff and its members the right to use Peter Spencer Plaza without paying defendant a \$200 fee that plaintiff cannot afford to pay, (b) preventing plaintiff and its members from using the plaza at night, and (c) preventing plaintiff and its members from placing tents and other temporary shelter on the plaza. Defendant has insisted on the \$200 payment and prevented Occupy Delaware and its members from using the plaza on the basis of Wilmington City Code provisions that

(1) by their terms are not applicable to Peter Spencer Plaza and (2) are so overbroad and vague that they cannot be applied to rights guaranteed the First and Fourteenth Amendments of the United States Constitution and Article I, § 5 of the Delaware Constitution. Plaintiff also seeks a declaration (a) that it does not need a permit to use Peter Spencer Plaza or, in the alternative, that it is entitled to issuance of the permit for which it has applied (at defendant's instruction) without paying the \$200 fee, and (b) that it and its members may erect temporary shelter, such as tents, on the plaza and that they may use the plaza at night. Plaintiff further seeks an award of damages for the delay in its access to plaza caused by defendant's actions, together with its costs of suit, including attorney fees.

#### **THE PARTIES**

2. Plaintiff Occupy Delaware is an unincorporated non-profit association that seeks to bring attention to the imbalance in our financial and economic system, to ensure that elected leaders are as concerned about and responsive to citizens of our country without means or with moderate means as they are to those with the most and to eliminate the excessive, unwarranted influence of money and corporations in political decision making. It communicates with its members and the public through <http://www.facebook.com/occupyde> and <http://twitter.com/#!/occupyde>. It was organized in October 2011. It is, in some sense, a modern day Bonus Army, seeking to persuade the public by occupying a public space.

3. Plaintiff brings this action to vindicate its own rights and the rights of its members.

4. Defendant City of Wilmington is an incorporated municipality in the State of Delaware.

### FACTS

#### **PLAINTIFF'S APPLICATIONS FOR PERMITS**

5. On October 26, 2011, Occupy Delaware decided to convey its message to the general public in Delaware by conducting an occupation in H. Fletcher Brown Park, a state park located adjacent to Market Street in downtown Wilmington, between the Hercules Building and South Park Drive, across from the Brandywine River. That location in downtown Wilmington, would have enabled plaintiff to present its message to a large number of people through, *inter alia*, setting up tents and occupying the park on a twenty-four hour basis.

6. On October 28, 2011 Occupy Delaware submitted an application for a permit from the City of Wilmington to use H. Fletcher Brown Park for these purposes. After several days delay, Occupy Delaware was advised by a representative of the City of Wilmington that H. Fletcher Brown Park was a Delaware State Park, and that a permit application would have to be submitted to a Delaware Department of Natural Resources and Environmental Control ("DNREC") office.

7. DNREC issued a permit for daytime use of H. Fletcher Brown Park during the weekend of November 5-6, 2011. It declined to permit Occupy Delaware to use that park during the work week because it is regularly used twice a day by 100 children attending a nearby day care center for outdoor play, and both the state and the daycare center operator

considered the intended occupation and the day care center use, which had been occurring for many years, to be incompatible. Occupy Delaware did not challenge that conclusion.

8. For an alternative to H. Fletcher Brown Park, DNREC issued Occupy Delaware a permit for overnight, seven day use of an area in Brandywine Park, underneath the I-95 overpass. Recognizing its obligations under the First and Fourteenth Amendments and Article I, § 5 of the Delaware Constitution not to condition free speech and the right to assemble on financial wherewithal, DNREC waived its permit fee and other financial requirements.

9. The location proposed by DNREC, a mile from downtown in an area where there is no through traffic, is incompatible with Occupy Delaware's intention of expressing its concerns to the public through an encampment that will be seen by many members of the public. Therefore, it declined DNREC's proposed permit.

10. Instead, on Sunday, November 6, 2011, it decided to occupy Peter Spencer Plaza and Freedom Plaza in downtown Wilmington. Peter Spencer Plaza is located on French Street across from the Carvel State Office Building and the City/County Building. Freedom Plaza is located between the Carvel Building and the City/County Building.

11. On Sunday afternoon, November 6, 2011, Occupy Delaware moved to Peter Spencer Plaza.

#### **CITY OF WILMINGTON RESPONSES TO OCCUPY DELAWARE**

12. Defendant responded to Occupy Delaware's decision by directing Occupy Delaware to submit permit applications for the two plazas to the city administration and

Wilmington Renaissance Corporation, an agent of the City of Wilmington. Occupy Delaware was told by defendant's counsel that a permit for Spencer Plaza had to be approved only by defendant, and that a permit for Freedom Plaza had to be approved by defendant, New Castle County and the state. Defendant's counsel stated that defendant would interface with the state and county regarding the permit for Freedom Plaza.

13. On Sunday evening, a Wilmington police officer told the Occupy Delaware members who were at Spencer Plaza that they could stay, but could not lie down or erect any structures.

14. Also on Sunday evening, defendant's counsel stated that if Occupy Delaware applied for permits by 9:30 a.m. on Monday, November 7, 2011, Occupy Delaware and its members could stay on the plazas at least until a decision on the permit applications was made. Occupy Delaware complied with that deadline.

15. Several hours after the permit requests were submitted, Wilmington Renaissance Corporation responded with an email stating that a permit request for use of Spencer Plaza has been approved conditionally for a period of seven days, but that the use of tents or other structures would not be permitted in Spencer Plaza. The email further stated that there was a fee of \$200 for the seven-day period, and that if it was not paid by 4:30 p.m. "the permit will be revoked."

16. Plaintiff and its members do not have the resources to pay the fee, either for this one week permit or for any extensions of a permit. It did not pay the \$200.

17. Following the 4:30 deadline, counsel spoke, and were unable to reach any

agreement about the use of Spencer Plaza. Occupy Delaware's ACLU attorney asked that defendant defer taking action for one day so Occupy Delaware would have an opportunity to file suit. Defendant refused to wait.

18. At 5 p.m. Wilmington police told Occupy Delaware that it had to move off Peter Spencer Plaza within one hour. Occupy Delaware did so.

19. Defendant issued a press release justifying the \$200 charge for using Peter Spencer Plaza with a statement that "The City's overtime costs for police coverage related to Occupy Delaware are now approaching approximately \$25,000." How the city administration managed to spend \$25,000 on overtime police costs for a few days of peaceful demonstration by a small group is difficult to comprehend. Moreover, the statement is pretextual. Shortly before the press release was issued, counsel for the city wrote that "Occupy DE does not need a permit to utilize the public sidewalk in front of the plaza, so long as the sidewalk is not substantially blocked and no tables are set up on the sidewalk." Requiring the Occupy Delaware members to sleep in chairs on the sidewalk next to Peter Spencer Plaza, rather than on the ground in the plaza, has no effect on police costs.

20. Wilmington police have permitted members of Occupy Delaware to sleep in the area, but have told them they may not use sleeping bags because of PATRIOT Act concerns. Similarly, counsel for defendant mentioned unspecified "public safety/security issues as it relates to the Federal Building that is directly adjacent to the plaza" as a reason for barring Occupy Delaware from erecting tents on the plaza.

21. In response to that statement, counsel for Occupy Delaware contacted the United States Marshall's Office and spoke to the person in charge of security for the Federal Building. She expressed no 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 CODE PROVISIONS INVOKED BY DEFENDANT MAY NOT BE  
EMPLOYED TO PREVENT OCCUPY DELAWARE'S USE OF SPENCER  
PLAZA**

**Tents**

22. The Wilmington City Code does not authorize the city administration to bar Occupy Delaware and its members from erecting tents and other temporary shelter on Peter Spencer Plaza. When asked for the City Code provision that authorizes defendant to bar tents from Peter Spencer Plaza, counsel for defendant cited only two provisions, Wilmington City Code, §§42- 213, 241.

23. Section 42-213 states:

No person shall place, build, erect, construct or maintain, or cause or permit to be placed, built, erected, constructed or maintained, any encroachment beyond the true building line of the streets, highways, lanes and alleys of the city, except as provided by this article.

24. Section 42-241(a) states:

No person shall place, erect, build, construct or maintain, or cause or permit to be placed, erected, built, constructed or maintained, any booth, stand, stall, cabinet, tent or place for the purpose of displaying or selling any goods, wares or merchandise, or for any purpose whatsoever, which extends beyond the true building line of any street, highway, lane or alley of the city, or shall in any manner place, display or sell any goods, wares or merchandise upon any portion of any street, highway, lane or alley of the city between the true building lines thereof.

25. Those provisions only prohibit the erection of tents and other structures “beyond the true building line of any street, highway, lane or alley of the city.” “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 Thus, the Code only bars tents that extend into the roadway. It does not apply to tents that will be erected on a plaza, inside the sidewalk, so the Wilmington City Code does not authorize the city administration to bar people from erecting tents there.

#### **Night Time Use**

26. Apart from whether or not defendant may bar tents in Peter Spencer Plaza, it has no City Code authority to prevent Occupy Delaware’s members from using Spencer Plaza at night. The code provision the city has relied on, § 38-60, 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. Any person lawfully may be upon any such park at any time between dawn and dusk of the same day, unless otherwise provided by the said department.

27. That provision does not prevent all night time use of Peter Spencer Plaza, as defendant appears to believe. The language only addresses being on park property “from dusk of one day to dawn of the following day.” In other words, it only prohibits staying through the night. Thus, if the provision were otherwise applicable and enforceable, Occupy Delaware’s members could comply by leaving for a few minutes during the night.



28. Moreover, the code provision does not apply to a “plaza.” It is titled “Park hours,” and its 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 defendant were entitled to apply § 38-60 against Occupy Delaware’s use of a park, it would not apply to its use of the plaza.

29. The language of the code provision is also deficient in the First Amendment context for two 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.

30. Second, the provision is too vague to be invoked to limit First Amendment rights. Read literally, the words mean one can’t stay on park property 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 those two interpretations are plausible, the provision is void for vagueness.

### **Permit Fee**

31. Finally, the City Code provision on which defendants have relied to charge a \$200 fee, Wilmington City Code § 38-76, may not be invoked to limit free speech and the right of assembly because it is overbroad. It states:

The department of parks and recreation shall impose and collect a partially refundable park usage and clean up fee in the amount of \$100.00 from individuals and groups for a permit to utilize city parks and facilities prior to the issuance of such park permit. Twenty-five dollars of the initial fee shall be refundable if the individual and or group removes all trash and debris associated with the permitted usage of the park, the facility, or both.

If the park and/or facility is left with trash and debris associated with the permitted usage of the park and/or facility then the \$25.00 refundable fee shall be deemed forfeited by the individual and or group. If the event in the park is shut down for any violation, then the refundable portion of the usage and clean up fee shall be forfeited.

32. Section 38-76 does not state that a permit must be obtained before a city facility or park may be used. But if it is interpreted to mean that, which is defendant's position with regard to Occupy Delaware, the requirement applies to all "individuals and groups [who] utilize city parks and facilities." If a permit is required by § 38-76, no one can use a city without first paying the fee. If one person wants to utilize a city park by sitting on a bench to eat lunch or to make a speech to people on the next bench, defendant charge them \$100. That is a burden the First Amendment and Article 1, § 5 of the Delaware Constitution preclude.

33. 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. Any law imposing an overbroad restriction on speech will be struck down. It is no defense for defendant to say that some city official might exercise discretion not to charge the fee in some instances. The provision lacks constitutionally acceptable standards constraining that discretion.

34. Plaintiff does not have an adequate remedy at law.

## COUNT I

35. Plaintiff incorporates herein by reference paragraphs 1 through 34 hereof as if set forth at length.

36. Defendant's refusal to permit Occupy Delaware to use Peter Spencer Plaza without paying a \$200 fee, and its refusal to permit Occupy Delaware and its members to use the plaza at night or to erect tents on the plaza, has deprived them, and unless enjoined will continue to deprive them, of the right to use open public space for public meetings, assemblies, demonstrations and speech, without any basis in the Wilmington City Code for that denial.

37. If plaintiff is not permitted to use Peter Spencer Plaza as it has sought to do, Occupy Delaware and its members will suffer irreparable harm.

## COUNT II

41. Plaintiff incorporates herein by reference paragraphs 1 through 37 hereof as if set forth at length.

42. If the Wilmington City Code provisions on which defendant has relied may be interpreted to allow defendant to impose the fee requirement, it will allow defendant to deny constitutionally-guaranteed rights of free speech and assembly to persons who are unable to pay an arbitrary fee.

43. If so interpreted the Code provisions would enable the city to arbitrarily, capriciously, and discriminatorily impose a requirement that discourages or deny people

and groups from exercising constitutional rights of political protest in the state's public parks, streets and squares.

44. If the Code provisions may be so interpreted, they are constitutionally flawed because they do not provide an indigency exception, and therefore would condition the exercise of the right to free expression and free association in traditional public forums on the ability of applicants to pay fees and costs plaintiff and its members are unable to pay.

45. If the Code provisions may be interpreted to permit defendant to prohibit Occupy Delaware and its members from remaining in Peter Spencer Plaza at night after sunset, they are overbroad because they would give Defendants the power to prohibit Occupy Delaware, its members and any other persons and organizations having grievances from exercising their rights of free speech and assembly after sunset in every state park and all other lands under defendant's jurisdiction.

46. If the Code provisions may be interpreted to permit defendant to prohibit Occupy Delaware, its members and any other persons and organizations having grievances from exercising their rights of free speech and assembly at night without parks department authorization, they are unconstitutionally vague because they would give defendant complete discretion to limit exercise of the rights of free speech and assembly without providing any standards or guidance, leaving the requirement open to use for improper viewpoint discrimination.

### **COUNT III**

47. Plaintiff incorporates herein by reference paragraphs 1 through 46 hereof as if set

forth at length.

48. Plaintiff's and its members' proposed activity constitutes political speech and association in a public forum and therefore is expressive activity entitled to the highest degree of protection under the First Amendment and Article I, § 5 of the Delaware Constitution.

49. Defendant's actions barring Occupy Delaware and its members from using the Peter Spencer Plaza without paying a fee they cannot afford and barring them from using the plaza at night and from erecting tents on the plaza, violate Occupy Delaware's and its members' First Amendment, Fourteenth Amendment and Article I, § 5 rights in the following ways:

- a. They constitute an impermissible prior restraint on speech.
- b. They constitute a content-based regulation of speech.
- c. They embody the exercise of excessive and unfettered arbitrary discretion, ungoverned by objective standards, by the officers, employees or agents of the city.
- d. They constitute an arbitrary and standardless tax or financial burden on plaintiffs' speech, and impose arbitrary requirements on Occupy Delaware's and its members' attempt to exercise their expressive rights.
- e. They are unconstitutionally vague.
- f. They are unconstitutionally overbroad.
- g. They discriminate against Occupy Delaware and its members in that they chill or eviscerate their constitutional rights on the basis of their financial status, and their

inability to pay the fees and costs imposed by the state on expressive activity in public forums.

50. As a proximate result of the Defendants' actions, the Plaintiffs have been deprived of their rights under the First Amendment, Fourteenth Amendment and Article I, § 5 rights and will suffer immediate and irreparable harm unless this Court rules that defendant must permit Occupy Delaware and its members to conduct their occupation in Peter Spencer Plaza without paying a permit fee, to remain in the plaza at night and to erect tents in the plaza.

51. Defendant has acted under color of state law at all times material hereto.

52. Plaintiff and its members are entitled to relief pursuant to 42 U.S.C. § 1983 and Delaware state law for the deprivation of their freedom of speech, expression and association as guaranteed by the United States and Delaware Constitutions, including a declaration that they are entitled to remain in Peter Spencer Plaza for the duration of their occupation, and damages for any deprivation of those rights they have suffered.

53. Plaintiff and its members are also entitled to a declaration that the Code provisions are void as overbroad and vague, in violation of the United States and Delaware Constitutions.

**WHEREFORE**, the Occupy Delaware demands judgment as follows:

A. That Defendant be temporarily restrained and preliminarily and permanently enjoined from preventing plaintiff and its members from using Peter Spencer Plaza in the

manner in which it has stated it intends to use it;

B. A declaration that Occupy Delaware is entitled to issuance of a permit without paying the fee defendant seeks to charge, if defendant is found to have the authority to charge a fee;

C. That Defendant be ordered to issue the permit without charging a fee, if the Wilmington City Code authorizes a fee to be charged;

D. A declaration that the Wilmington City Code provisions relied on by defendant are unconstitutional both facially and as applied in against Occupy Delaware;

E. Awarding plaintiff damages for any loss or injury caused by defendant's actions;

F. That plaintiff recover the costs of this action, including reasonable attorneys' fees, from defendants, pursuant to 42 U.S.C. § 1988;

G. Any other relief that this Court deems just and appropriate.

*s/Richard H. Morse*

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