

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO.: 2:11-CV-608-FtM-29DNF

OCCUPY FORT MYERS, CINDY BANYAI, STEPHANIE DARST,
CHRISTOPHER FAULKNER, F. FRANK GUBASTA, ZACHARY KUHN, HILARY
MAINS, MATT McDOWELL, MICHELLE MEYER, LUIS OSPINA, RYAN
POGUE, FRANK PRATT, MARLENE ROBINSON, and JUSTIN VALO,

Plaintiffs,

vs.

Fort Myers, Florida
October 31, 2011

1:32 p.m.

CITY OF FORT MYERS,

Defendant.

TRANSCRIPT OF ORAL ARGUMENT RE PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

HELD BEFORE THE HONORABLE JOHN E. STEELE
UNITED STATES DISTRICT COURT JUDGE

- - -

A P P E A R A N C E S

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I N D E X

October 31, 2011	Vol.	Page
Preliminary Discussions	1	4
Argument by Ms. Keesler	1	5
Argument by Mr. Alley	1	6
Argument by Ms. Keesler	1	9
Argument by Mr. Alley	1	11
Argument by Ms. Keesler	1	19
Argument by Mr. Alley	1	30
Argument by Ms. Keesler	1	36
Argument by Mr. Alley	1	37
Argument by Ms. Keesler	1	67
Certificate of Court Reporter	1	68

* * *

1 THEREUPON, the above-entitled case having been called
2 to order, the following proceedings were held herein,
3 to-wit:

4 - - -

5 THE COURT: This is the case of Occupy Fort Myers
6 and others versus the City of Fort Myers. It is Case 2:11
7 Civil 608.

8 Counsel, if you'd identify yourselves and your
9 respective clients, please, beginning with counsel for the
10 Plaintiff?

11 MS. KEESLER: Yes, Your Honor. May it please the
12 Court. Jennifer Keesler, from Cape Coral, on behalf of the
13 Plaintiffs.

14 MS. SHLACKMAN: May it please the Court, Mara
15 Shlackman from Fort Lauderdale, on behalf of the Plaintiffs.

16 THE COURT: All right. Thank you.

17 MR. ALLEY: Grant Alley, City Attorney, Fort
18 Myers.

19 MR. MORIARTY: Mark Moriarty, Assistant City
20 Attorney, Fort Myers.

21 THE COURT: We are here for Plaintiffs' motion for
22 a preliminary injunction. I've received what the city has
23 called a partial response. Looks like it was filed
24 yesterday. I saw it this morning.

25 Both sides ready?

1 MS. KEESLER: Yes, Your Honor.

2 MR. ALLEY: Yes, Your Honor.

3 THE COURT: All right. I saw, this morning, in
4 the newspaper, that the issue of the insurance had been
5 resolved, although a permit had not yet issued. Is there
6 any change in that? And if a permit has issued, does that
7 moot the injunction portion of this? I guess let me look to
8 counsel for the Plaintiff, first.

9 MS. KEESLER: Your Honor, to the best of my
10 knowledge, a permit has not yet issued. I am aware that
11 members of the Plaintiffs' group went to the City Recreation
12 Department on Friday afternoon, and they attempted to obtain
13 a permit. And they had indicated to me they were told that,
14 today, the Special Events Advisory Board would consider it.
15 I have not heard that they've received one yet.

16 In the event that a permit is received, I do not
17 believe it would moot this issue. It is my understanding
18 that permits are only issued for ten days. Therefore, this
19 would fall under the bourgeois standard of capable of
20 repetition yet evading review, because we --

21 THE COURT: I'm not suggesting the case would be
22 mooted. What I'm suggesting is the need for an injunction
23 would be mooted. And I suppose the answer, in part, depends
24 on whether the permit expires in ten days, and all that does
25 is postpone the issue for ten days. I'm not suggesting the

1 case would be mooted even with a permit.

2 MS. KEESLER: Yes, Your Honor.

3 THE COURT: What's your thought as to that? I
4 mean, if a permit gets issued, and it's -- let's assume it's
5 forever -- does that moot the need for an injunction, or is
6 there something else to be enjoined?

7 MS. KEESLER: I would . . . I would submit that
8 there would be other ordinances that would need to be
9 enjoined; specifically, the loitering ordinance, which I
10 believe could be used, even if there is a permit, to attempt
11 to dissuade speech. And again, there is the issue of, in
12 ten days, we may be right back in here even if we do get a
13 ten-day permit.

14 THE COURT: And what part of your complaint talks
15 about the loitering? Or have you called it something else?

16 MS. KEESLER: It was Count 3 and 4 of the verified
17 complaint. It was the 14th Amendment liberty interest and
18 the 14th Amendment vagueness challenge.

19 THE COURT: Three and four. The liberty interest
20 is sit wherever you want to sit. Whenever you want to sit.

21 All right. Mr. Alley, what, if anything, do you
22 know with regard to permits and if one is issued, whether
23 that moots the injunction part of this or not?

24 MR. ALLEY: May it please the Court, did you say
25 we could sit?

1 THE COURT: I didn't, but if you'd like to, you
2 may.

3 MR. ALLEY: I apologize. Your Honor, as of, my
4 understanding is, late Friday, after work hours, that there
5 was an insurance that was provided, and the city's in the
6 process of reviewing that insurance; and the city's position
7 is that, if a permit is issued, that that would -- it would
8 moot the need for an injunction.

9 The Plaintiffs have indicated that -- at least to
10 the media, that they're going to be vacating the park during
11 another event in the park, and then they would go to another
12 park. And so the city's position is that it would render
13 the need for an injunction moot under the mootness doctrine.

14 With respect to the loitering ordinance, it's the
15 city's position that the Plaintiff has not asked this Court
16 to enjoin the loitering ordinance, that the Plaintiff has
17 filed a temporary restraining order ex parte, what the city
18 has referred to as a sneak attack, while the city was
19 negotiating with the Plaintiffs, and they have not asked to
20 enjoin that section of the code in their pleading for the
21 temporary restraining order. The Court denied the temporary
22 restraining order on procedural grounds.

23 And on the emergency motion for a preliminary
24 injunction, the Plaintiff has not sought to enjoin, in an
25 emergency fashion, or even ask this Court to enjoin the --

1 what they call loitering ordinance. The loitering ordinance
2 that they refer to in their verified complaint is contained
3 in Section 58-154. And they've asked, in their verified --
4 they've asked, in their emergency injunction and in their
5 temporary restraining order, to enjoin four sections of the
6 city code, that being 58-153, 58-156, 2-273, and 86-153.

7 THE COURT: If the city does issue the permit, is
8 it valid for ten days, or some other length of time, or
9 what's the situation there?

10 MR. ALLEY: I don't know the answer to that.

11 THE COURT: The Plaintiffs' complaint pleads that
12 they were told, I don't remember by whom, that they would
13 need to go through the process of getting a permit and
14 insurance, essentially, every ten days. Do you know if
15 that's accurate?

16 MR. ALLEY: I have no reason to disbelieve the
17 Plaintiffs' counsel's representation. The Special Events
18 Permits, that's controlled under 2-273, and they are seeking
19 to enjoin that in an emergency fashion. And that -- that --
20 what they're seeking to enjoin is the Special Events
21 Advisory Board. And they're not seeking to enjoin the
22 creation of it or the processes that they follow, they're
23 seeking to enjoin all of the powers and duties of the
24 Special Events Advisory Board.

25 The Special Events Advisory Board is going to, as

1 Plaintiffs' represent, is going to be meeting to decide --
2 to make a decision on some aspect of the Plaintiffs' permit
3 request, as the Plaintiffs' attorney represents. I'm not
4 aware of that. But what I'm aware of is that special events
5 get granted for protests, special events get granted for
6 sporting events, but if there's somebody else that is using
7 the park exclusively because they have a prior special event
8 that's been issued, or if there's someone else that's using
9 that portion of the park, then the -- then the permit will
10 be denied. If the park's open, then the permit will be
11 granted. And there's a Taste of the Town event coming up in
12 the City of Fort Myers, and I know, during that period of
13 time, that the park has been already . . . already permitted
14 for the Taste of the Town event.

15 THE COURT: All right.

16 Ms. Keesler, you may proceed.

17 MS. KEESLER: Thank you, Your Honor. Your Honor,
18 do you prefer that we speak from the counsel table or from
19 the lecturn?

20 THE COURT: I prefer the lecturn, but it's up to
21 your preference.

22 MS. KEESLER: Thank you. Good afternoon, Your
23 Honor.

24 The Plaintiffs requested today's hearing to ask
25 the Court to enjoin Defendant City of Fort Myers from

1 enforcing several provisions of their city code. These code
2 sections have chilled and precluded core political speech,
3 conduct and assembly that's protected by the First
4 Amendment; and unless it's enjoined, it will continue to
5 infringe upon such protected rights of the Plaintiffs and
6 others similarly situated. Accordingly, my clients have
7 launched a special challenge to the certain sections of the
8 City of Fort Myers code. I would like to deal with the
9 easiest section first.

10 Section 86-153 is the Parades and Processions
11 Ordinance. It's a prior restraint as a permit from the
12 Chief of Police is required parades, processions, and
13 open-air meetings.

14 THE COURT: Is this the one that the city says
15 they don't --

16 MS. KEESLER: Yes.

17 THE COURT: -- there's a resolution that says they
18 don't enforce it?

19 MS. KEESLER: Yes, Your Honor. Based on the
20 documents filed yesterday, the city, in 2004, during a
21 different ordinance challenge, voluntarily agreed to stop
22 enforcing the parade ordinance. However, it does still
23 remain officially on the books, and it appears to have been
24 renumbered in the most recent 2006 enactment of the Code.
25 Therefore, groups and individuals who seek to have a parade,

1 or procession, or an open-air rally, look to the Code.

2 THE COURT: I'm sorry, let me stop you. This may
3 be the easiest.

4 Let me just hear from the city. I mean, you've
5 got an ordinance on the books that, in 2004, you promised
6 not to enforce? What's that all about? Why shouldn't I
7 enjoin from you enforcing that?

8 MR. ALLEY: We believe it's moot. It is not being
9 enforced. We've submitted Docket Number 28, which is the
10 correspondence from the City Attorney and the protestors
11 Mr. Green and Mr. Thomas, dated October, 2011; and, in that
12 correspondence, it says a permit is not required.

13 We submitted documentation of a legal memorandum
14 of October 17, 2011, the City Attorney to the City Manager,
15 saying a permit is to -- in affect, a permit is not required
16 under the First Amendment, that they would just have to
17 comply with state laws and other sections of the city code,
18 regarding obstruction of traffic, that the Plaintiffs have
19 not challenged.

20 We've submitted additional correspondence, dated
21 April 7, 2006, to the Immigration Latin United of Florida
22 and the City of Fort Myers, which was a protest that was
23 supposed to have a hundred thousand people in the City of
24 Fort Myers. That's what was being organized. It didn't
25 turn out that way, but it was a rather large protest. And

1 that correspondence to those parties to the organizers of
2 that protest basically provided, in a two-page letter, that
3 they needed to contact the city to identify what areas and
4 what -- where they were marching, what streets would need to
5 be closed, and are they providing for portable toilets,
6 water, food, because the city has limited resources. It
7 told them they didn't need to get a permit, but we were
8 going to hold them responsible to any damages to persons or
9 properties that their event caused, as organizers of the
10 event.

11 We submitted in that -- in support of that, also,
12 a -- the Code Article Parades and Processions, and excerpts
13 from the December 13, 2004, City Council meeting where the
14 City Council passed a resolution abating enforcement of not
15 only the section the Plaintiffs are complaining about, which
16 is 86-153, but also we abate 86-152 and 86-154. It somehow
17 got codified in the books after it was abated. It used to
18 be under Section 17, and then it somehow got codified in
19 Section 86.

20 The city does not enforce it. We believe it is
21 moot as applied to these Plaintiffs. The Plaintiffs were
22 never asked to get a permit under this section, the
23 Plaintiffs were never given a citation under this section,
24 and the Plaintiffs have been able to freely protest on the
25 city streets and sidewalks.

1 In the Plaintiffs' verification, they indicate
2 that they contacted the police department, and the response
3 from the police department was stay off the city streets,
4 don't go on to the city streets, don't block the city
5 streets, and don't use . . . I can't think of the terms, but
6 not blow horns to magnify your voice. In fact, they did.
7 They were on city streets, and, in fact, they did use those
8 blow -- megaphones.

9 And, finally, the -- the permit requirement has
10 never been applied to this Plaintiff, has never been applied
11 to anyone with respect to the Plaintiff, and the Court can
12 take -- we believe that that matter is rendered moot because
13 it has no applicability here, and because the city is not
14 enforcing that by the actions of City Council.

15 THE COURT: When you say the city, by resolution
16 in 2004, abated enforcement, why was it abated?

17 MR. ALLEY: It was abated because the city and
18 the -- the city entered into an agreement, a settlement
19 agreement, that the city was not going to enforce section --
20 any section of its parade ordinance, that entire article.
21 Not just Section 86-153, but also the purpose clause and the
22 penalties clause; 86-152 and 86-154.

23 The city entered into a settlement agreement that
24 the city was not going to enforce that section of the Code,
25 and that the city would be repealing that section of the

1 Code. And the city entered into a settlement agreement that
2 said that the city would be repealing a provision of the
3 Special Events Permit application process that had -- that
4 contained language that they -- that protestors could not
5 hand out leaflets or pamphlets. And there were some other
6 complained-of materials on that case approximately seven or
7 eight years ago.

8 THE COURT: And the city reneged because it didn't
9 repeal?

10 MR. ALLEY: No. The city abated enforcement of
11 the ordinance. And it was under Section 17, and it somehow
12 got recodified when the Code got recodified. It -- the old
13 Code was repealed, the new Code language was codified under
14 a new section. It was -- the language was divided in --
15 what was originally contained in two paragraphs was switched
16 to three separate sections.

17 THE COURT: So anyone who looks at the city code
18 today would see that that is still an ordinance that, at
19 least on its face, would apply to them.

20 MR. ALLEY: The Court's correct, and the city is
21 acting posthaste, as we've advised Plaintiffs' counsel this
22 morning -- or a lawyer from Plaintiffs' counsel. I'm not
23 sure if -- if they're admitted in the Middle District or
24 not, but we work -- the lawyers are working well together.
25 At least that's my perception. We've advised them we're

1 taking it off the books posthaste, and we wanted to discuss
2 other sections of the litigation.

3 THE COURT: When you say you're taking it off the
4 books, what does that mean?

5 MR. ALLEY: Well, we had permission to advertise
6 to repeal and repealing. We believe it has no legal effect
7 right now, and we've provided that information. We believe
8 it has no legal effect because the Court has jurisdiction
9 and federal law trumps our Code.

10 THE COURT: So what you're saying is it has no
11 binding effect because it's obviously unconstitutional?

12 MR. ALLEY: I'm saying it has no binding effect in
13 the settlement agreement that the city entered into. The
14 city did not make an admission of -- it did not address the
15 constitutionality of the Code provisions. The city entered
16 into a settlement agreement saying that it would repeal
17 those sections of the Code.

18 THE COURT: A settlement agreement has nothing to
19 do with me, I don't think. Or this case. I mean, it seems
20 to me -- and perhaps I'm reading between the lines
21 unnecessarily, but if it says what counsel says it says, it
22 virtually has to be unconstitutional, and I would presume
23 that's why the city agreed to abate enforcement, whatever
24 that means. And, for whatever . . . however it happened,
25 it's still on the books.

1 How is it that this group of Plaintiffs isn't
2 going to win on that? Other than, I suppose, the argument
3 is a standing one, since no one has tried to apply to it
4 them. But it's pretty clear, isn't it, to the extent that
5 that provision is still on the books, it can't possibly be
6 constitutional?

7 MR. ALLEY: Your Honor, when the city entered into
8 the settlement agreement which the Court has reserved
9 jurisdiction to enforce, the city did not concede that
10 the -- that that ordinance -- that those ordinance sections
11 were unconstitutional. The city did not concede that. The
12 city agreed that they would repeal that provision of the
13 ordinance, and the city immediately enacted a resolution
14 abating any enforcement of that -- of those ordinance
15 sections, and the city has not enforced that ordinance
16 section against anybody, and -- since the city entered into
17 that settlement agreement.

18 When it was under Section 17 . . . it's no longer
19 under Section 17. When the Code got recodified, the old
20 Code got repealed, and now the language shows up in three
21 paragraphs under Section 86. It shouldn't be there. And
22 we're -- the Plaintiffs' litigation, we identified it's in
23 the books, and when they filed their litigation, the Court
24 denied the temporary restraining order; however, the Court
25 granted an expedited hearing, and we've had three or four

1 days to research this, and it -- we're moving posthaste to
2 get it off the books. However, we have established that we
3 have not -- we have not utilized this ordinance, and we have
4 not applied it to these Plaintiffs. And there are sections
5 of the city code, that aren't being challenged, that say you
6 can't block streets and you can't block sidewalks. It has
7 no other prohibitions. And there are also sections of state
8 law that state that. So we need to get those sections off
9 the book. Admittedly, we didn't concede, in the litigation,
10 that it was unconstitutional on its face.

11 THE COURT: So it's still a live issue, I guess.

12 MR. ALLEY: Your Honor, respectfully, the . . . we
13 have passed -- we've taken official action by the highest
14 authority the city has, the governing body, and adopted a
15 resolution that the city is not enforcing -- the city will
16 not enforce --

17 THE COURT: You tell me what the difference is
18 between agreeing not to enforce it and not taking it off the
19 books.

20 MR. ALLEY: We should have taken it off the books.

21 THE COURT: And all they did in 2004 is to abate
22 enforcement of it, and it's been on the books for the next
23 seven years.

24 MR. ALLEY: It was in Section 17. It's now in --

25 THE COURT: Moving sections doesn't change

1 anything. All you're doing is maybe trying to hide it. But
2 you agreed to repeal it, you didn't repeal it, you abated
3 it, and it's still on the books. Why doesn't that make it a
4 live issue?

5 MR. ALLEY: Because it has not been applied to the
6 Plaintiffs, and they have not been -- there were 73 -- as of
7 the 20 On Docket Number 23, as of October 26th,
8 there were 73 citations issued, and they were -- none of
9 them were issued for this section of the Code as applied to
10 the -- as applied to the Plaintiffs. In the Plaintiffs'
11 verified complaint, they indicate that they contacted the
12 FMPD, the Fort Myers Police Department, and they were told
13 don't block the streets, and don't use the megaphone. And
14 the city has shown a history in its not enforcement this
15 section of the Code because it's not applicable. Both in
16 court --

17 THE COURT: Not enforcing a Code and leaving it on
18 the books so anyone who is doing legal research who wants to
19 check can find it, how does that possibly not chill
20 someone's exercise of First Amendment rights when they look
21 it up and city ordinance says they can't do any of these
22 things.

23 MR. ALLEY: Your Honor, it clearly is a violation
24 if there is an unconstitutional order -- if there is an
25 unconstitutional code if it's in the Code. That clearly is

1 a violation. And it does have a chilling affect, and
2 there's no disagreement. And that's what the severability
3 clause of the Code of Ordinance is for and that's what
4 the -- the city, in passing a resolution that says that the
5 city is not enforcing this provision of the Code, and when
6 it got recodified, it shouldn't have been put in, and it was
7 put in. It was put in in the form of three paragraphs.

8 THE COURT: All right. If you want to lose
9 ground, go ahead and argue that, but I understand that
10 issue.

11 MS. KEESLER: Thank you, Your Honor. I'd like to
12 move on to the park regulations ordinance. On Page 3 of the
13 Plaintiffs' Amended Motion for Preliminary Injunctive
14 Relief, Plaintiff does ask in their wherefore clause, to
15 have this Court enjoin Sections 58-153 through 58-156.
16 Plaintiffs' attorney apologizes for not being clearer.

17 After reviewing Defendant's response, Plaintiffs'
18 stipulate that they only seek to enjoin the sections of the
19 park regulations code that are either vague, overbroad, or
20 content-based viewpoint discrimination; specifically,
21 Section 58-153, Subsection 3; Section 58-154 Section 6; and
22 Section 58-156 in its entirety.

23 The first two, 58-153, Subsection 3; and 58-154
24 Subsection 6, are impermissibly vague and violate due
25 process for the reasons that the Plaintiffs outlined in

1 their memorandum of law, specifically quoting city -- or
2 City of Chicago versus Morales, they failed to establish
3 standards for the police and public that are sufficient to
4 guard against arbitrary deprivation of liberty interests.

5 Section 58-156, Subsection A of the park
6 regulations regarding operating hours closes the city parks
7 to everyone from 10:30 in the evening until 6:00 a.m. in the
8 morning, except for when the recreation manager shall make
9 accommodations for a sporting, cultural or civic event.
10 Exempting preferred speech from city regulations makes an
11 ordinance content based on its face.

12 Section 58-156, Subsection B vests unbridled
13 discretion on the recreation manager to close the park at
14 his whim during normal operating hours. While these are
15 being challenged facially, Plaintiffs have been issued
16 citations under both subsections.

17 THE COURT: Say that last part again.

18 MS. KEESLER: Plaintiffs have received citations,
19 monetary citations, under both of those subsections.

20 THE COURT: But, for all of your claims, what
21 you've alleged is facial claims for all four counts?

22 MS. KEESLER: Yes, Your Honor. These are all
23 facial challenges.

24 Regarding the Special Events Advisory Board --

25 THE COURT: Let me go back a minute to the park

1 regulations. Is it your position that the city cannot close
2 a public park?

3 MS. KEESLER: No, that is not my position. The
4 Plaintiffs' position is that exempting certain types of
5 events, such as sporting, cultural, or civic events, shows a
6 preference for nonpolitical speech.

7 THE COURT: If the ordinance was just 156-A,
8 saying the hours of the park are whatever they are, end of
9 ordinance, is there anything unconstitutional with that?

10 MS. KEESLER: No, Your Honor.

11 THE COURT: So it's only the impact of 156(b),
12 that has this exception, that causes the ordinance, in your
13 view, to be content based, and therefore a violation of the
14 1st Amendment?

15 MS. KEESLER: Subsection (a), 58-156,
16 Subsection (a) is the section that indicates that the
17 recreation manager can keep the park open for specific types
18 of events.

19 THE COURT: I'm sorry. So it's two sentences, or
20 whatever, but all of 156(a)?

21 MS. KEESLER: Yes.

22 THE COURT: All right.

23 MS. KEESLER: And --

24 THE COURT: So, but for that sentence -- I'm sorry
25 for stepping on you, but, but for that sentence, the second

1 sentence, as I understand your position, there's no claim
2 that the city has to have a park open 24/7.

3 MS. KEESLER: No, Your Honor.

4 THE COURT: All right. And it's only because of
5 the sentence that gives somebody the authority to make an
6 exception for certain types of events that creates this
7 1st Amendment problem, in your view?

8 MS. KEESLER: Yes, Your Honor.

9 THE COURT: Okay. Go ahead.

10 MS. KEESLER: The Special Events Advisory Board,
11 the city code 2-273. According to Page 5 of the special
12 events pamphlet, the Special Events Advisory Board, which is
13 created in the Code Section 2-271 through 2-273, has final
14 approval of all events in the city. Also, according to the
15 same pamphlet, any events on public property requires a
16 Special Events Permit. This requires anybody wanting to
17 protest within city limits, on public property, to go
18 through the Special Events Advisory Board.

19 Pursuant to the challenge section, the Special
20 Events Advisory Board is to advise the City Council as to
21 all special events with an eye toward: One, facilitating
22 quality cultural and artistic events; and, two, to provide
23 exposure and positive social and economic impacts for the
24 city. This is to be done by either recommending or
25 withholding recommendation of funding for special events

1 open to the public and held within city limits.

2 Subsection 3 of the same ordinance gives the same
3 advisory board authority to recommend events that should
4 either be given reduced fees or even monetary sponsorship by
5 the city based upon an undefined weighted scale of merit.

6 Subsection 4 of the Code gives the board authority
7 to recommend regulations for the conduct of special events
8 based only on the criteria of whether it will "Increase
9 interest to the citizens, residents, and visitors," of the
10 city.

11 In analyzing and striking down a similar special
12 events committee in Bledsoe versus city of Jacksonville
13 Beach, the Middle District Court noted that this type of
14 content filtering, although quaint in a Mayberry RFD
15 aspirational way, takes on an Orwellian aspect when applied
16 in the real world.

17 In order for the Special Events Advisory Board to
18 determine the fees and regulations of special events, the
19 board must look at each event with an eye to the interest of
20 the citizens, and they have to assign each event on a
21 weighted scale of merit. Under this Code, the Special
22 Events Advisory Board, or whomever makes the determination,
23 cannot help but to examine the content of the message of
24 each event in order to determine fees, conditions, and even
25 issuance of a permit.

1 Both the park regulations and the special events
2 code vest unbridled discretion on city officials. There's
3 nothing in the ordinance that prevents city officials from
4 applying one standard to one group while applying an
5 entirely different standard to a different group.

6 Under *Bourgeois versus Peters*, this is considered
7 an unconstitutional content-based restriction. There are no
8 parameters to consider, no internal guidance to granting
9 permits. The government regulation that allows arbitrary
10 application is inherently inconsistent with a valid time,
11 place, and manner regulation, quoting *Forsyth versus The*
12 *Nationalist Movement*.

13 Finally, the City's policy fails to provide a
14 procedural guideline as outlined in *Freedman versus*
15 *Maryland*, which is needed on a content-based scheme. And
16 that is noted in *Burk versus Augusta County* in their
17 Footnote 12.

18 Because these are content-based ordinances, the
19 city has the burden of advancing a necessary compelling
20 interest to survive a facial challenge. The city's interest
21 in esthetics and public safety are insufficient to justify
22 content-based codes.

23 It is difficult to comprehend how a dozen
24 individuals in the park will cause more destruction of park
25 facilities than teams of athletes and hundreds or maybe even

1 thousands of spectators at sporting events. It's difficult
2 to understand how a dozen individuals in the park will be a
3 greater threat to public safety than potentially intoxicated
4 members of the public leaving local bars about at 2:00 a.m.

5 Furthermore the enforcement of these content-based
6 regulations is not the least restrictive means available to
7 the city, as the city already has the ability to enforce
8 state penal codes should any individual threaten harm.

9 For these reasons, the Plaintiff respectfully
10 requests that this Court grant their amended motion for
11 emergency injunctive relief.

12 Also, Your Honor, as I did not use my entire 30
13 minutes, if I may just reserve a few minutes for rebuttal
14 after the city's argument, I would prefer it.

15 THE COURT: You may, but I've got some questions
16 for you.

17 MS. KEESLER: Yes, Your Honor.

18 THE COURT: Going back to the park regulation
19 ordinance and the extension of the time for, I think the
20 phrase is civic events --

21 MS. KEESLER: Yes.

22 THE COURT: -- the city argues that they have
23 interpreted that to include Occupy Fort Myers as a civic
24 event. First of all, is that correct?

25 MS. KEESLER: Factually, they are enforcing this

1 particular ordinance against members of Occupy Fort Myers.

2 I believe the city had just indicated that 73 citations have
3 been written out on the section of that code -- you know,
4 Subsection (a) -- which discusses the exceptions for civic
5 events. So it is being applied to my clients as we speak.

6 Additionally, if the city were to say that the
7 accommodations were open to everybody, and all types of
8 speech, it could have simply said that it was open to
9 everybody, and all types of speech, instead of carving out
10 exceptions for civic and cultural events.

11 THE COURT: With regard to the Special Events
12 Advisory Board issue, what is the authority of that board to
13 decide things, and to make decisions, as opposed to make, as
14 the title indicates, advisory opinions?

15 MS. KEESLER: The Code gives the Special Events
16 Advisory Board an advisory capacity for special events.
17 However, the pamphlet -- the Special Events Pamphlet, which
18 Plaintiffs filed at approximately 2:00 a.m. this morning,
19 actually indicates that the Special Events Advisory Board
20 has the authority to deny permits. There are no standards,
21 either within the city's Code or that I could find in the
22 Special Events Pamphlet, that identify under what authority,
23 or why they would deny permits; but that authority is listed
24 in the pamphlet. And, indeed, in the pamphlet, when it
25 lists that authority, it says pursuant to Ordinance 30-19,

1 which is codified as Section 2-273.

2 THE COURT: So you're saying there's an
3 inconsistency between the pamphlet and the ordinance?

4 MS. KEESLER: There is either an inconsistency, or
5 there has been authority given to the board that is not
6 listed in any of the city ordinances. Indeed, the final
7 subsection of 2-273 -- I don't remember the exact language,
8 but I believe it says that the board has any other authority
9 given to it by the City Council. So it may be that it's in
10 there somewhere.

11 THE COURT: And how would one know whether
12 authority has been given to that?

13 MS. KEESLER: I have no idea.

14 THE COURT: You're wrong person to ask.

15 All right. Let me go back to basics. Other than
16 the issues with regard to the parade that we talked about
17 earlier, what is the 1st Amendment activity that you claim
18 your clients are entitled to perform that are being impacted
19 by the park regulation ordinance and the Special Events
20 Advisory Board ordinance?

21 MS. KEESLER: Our clients, in solidarity with
22 hundreds of similar occupy movements throughout the country,
23 are participating in a symbolic occupation of the City of
24 Fort Myers. What this symbolic occupation is, is it is a
25 demonstration that's protesting economic unfairness and

1 social justice issues. As part of the symbolic protest,
2 which again is occurring in cities throughout the country,
3 the Plaintiffs have set up tents to symbolize their
4 occupation of the city. These tents -- at the moment, I
5 believe Occupy Fort Myers has approximately 10 to 12 tents
6 set up. However, those individuals demonstrating 24 hours a
7 day, in the evening is about four to five every evening
8 right now. So it's mostly a symbolic event.

9 Outside of the tents there is an information booth
10 that's set up, where the Plaintiffs hand out pamphlets; and,
11 when members of the public stop by and want to talk, they
12 talk to them about their ideas, their beliefs, and how we
13 can change our economic system. This is the speech that I
14 believe is protected.

15 THE COURT: Are your clients claiming that the
16 1st Amendment encompasses a right to camp? Or to sleep?

17 MS. KEESLER: Not to camp.

18 THE COURT: It obviously encompasses the right to
19 set up information booths, and pass out literature, and talk
20 about it; but it seems like, in part -- and I want to make
21 sure that I understand it right -- that they're claiming a
22 constitutional right to sleep on public property, and to set
23 up what could be called camping, if they're setting up tents
24 and living in the tents.

25 MS. KEESLER: Yes, Your Honor. The Plaintiffs are

1 not claiming that they should be allowed to live in the
2 tents or on public property. As a matter of fact, the
3 Plaintiffs tend to rotate in and out. They go home to
4 shower, or go to work, or anything like that. They live
5 their normal lives.

6 As far as the issue of sleeping, it is an
7 overnight symbolic area, and I . . . will submit that some
8 of them fall asleep. However, in Clark versus Community for
9 Creative Nonviolence, the Supreme Court did say, while they
10 did not completely decide the issue, they assume that
11 sleeping could be protected under the 1st Amendment if it
12 was in concert with other symbolic activity.

13 THE COURT: So I guess my question is are you
14 asserting that sleeping is one of those activities that your
15 clients want to do, and which they assert is protected by
16 the 1st Amendment?

17 MS. KEESLER: Yes, Your Honor.

18 THE COURT: Do they cook there? I mean, you talk
19 about them rotating in and out, and going home. Are these
20 just tents, or are they having bonfires, or cooking meals?
21 I mean, what is it that, other than the tents, that
22 constitute occupying?

23 MS. KEESLER: They do not have campfires set up.
24 It is my understanding, from talking with my Plaintiffs,
25 there was one grill there; however, I believe they did not

1 use it. I believe it was an electric grill. And the
2 electricity was turned off.

3 They have volunteer members from the public
4 bringing them food to eat during the day or in the evenings.
5 And they do not shower in the public restrooms. They don't
6 keep suitcases of clothing there to change.

7 THE COURT: So essentially you have a -- your
8 symbolism is the tent, and then people, that may or may not
9 be sleeping in it, doing whatever else they do.

10 MS. KEESLER: Yes, Your Honor. The symbolism is
11 the tent, and there are individuals who protest 24 hours a
12 day, moving in and out.

13 THE COURT: Thank you.

14 MS. KEESLER: Thank you, Your Honor.

15 THE COURT: Mr. Alley? Mr. Alley, let me ask you,
16 first, for the record, to describe Centennial Park. Those
17 of us from Fort Myers know what we're talking about, but the
18 record may not. I know because I can see it from my office.
19 But why don't you tell me what you want the record to know
20 about that park.

21 MR. ALLEY: May it please the Court. Centennial
22 Park is a gift to the public that was created through the
23 cooperation of the City of Fort Myers, the State of Florida,
24 and the federal government, namely the National Park
25 Service. The city obtained a grant from the federal

1 government which was used in the ability and to facilitate
2 the park for the public's use. The city's been authorized
3 to maintain and regulate the ongoing use of the park,
4 including shared competing uses in the park; and, in order
5 to fulfill the responsibility bestowed upon it, the City of
6 Fort Myers has created guidelines and restrictions in order
7 to preserve and manage the park and ensure accessibility for
8 long-term use by the public.

9 The city has to ensure financial accountability
10 for injuries to persons and/or property caused on the park,
11 primarily for injuries caused to persons on the park; and
12 the city has an obligation to coordinate multiple uses of
13 limited space, and to ensure the preservation of facilities,
14 prevent damages, and prevent unlawful or impermissible
15 behavior.

16 THE COURT: Do you know the acreage?

17 MR. ALLEY: One moment.

18 I do not know the acreage.

19 THE COURT: Does the city actually own the park?

20 MS. KEESLER: Yes.

21 MR. ALLEY: Yes; the city owns the park. It is
22 bordered by the Caloosahatchee River, Heitman Street, and
23 West First Street, and the city does own the park. However,
24 there are grant obligations the city has to meet with
25 respect to the National Park Service and the federal

1 government.

2 THE COURT: When you say grant obligations, you
3 mean from the grant that was used to purchase the land that
4 the park is on?

5 MR. ALLEY: The federal government gave the city
6 some money for the park, and there are grant -- I don't know
7 if it was used to actually purchase the land, or if it was
8 used to build structures in the park or infrastructure in
9 the park. The park has pavilions, the park has electricity,
10 the park has staging areas, the park has restrooms.

11 THE COURT: And do you know how long that area has
12 served as a public park?

13 MR. ALLEY: I can find out during the course of
14 this hearing.

15 THE COURT: It's probably not essential that I
16 know that. I was curious.

17 Is there any question in your mind that the
18 Centennial Park is a public forum within the meaning of the
19 1st Amendment?

20 MR. ALLEY: No, Your Honor. It clearly is a
21 traditional public forum.

22 THE COURT: All right. Go ahead, please.

23 MR. ALLEY: In Thomas v. Chicago Park District,
24 the United States Supreme Court, in 2002, upheld an
25 ordinance that did not contain procedural safeguards

1 applicable to content-based regulations, and they upheld the
2 ability of the municipal park ordinance requiring
3 individuals to obtain a permit before conducting more than
4 50-person events. That was challenged by the Plaintiffs in
5 that case, saying that it was a content-based attack. A
6 content -- a reg -- valid time, place, and manner
7 restriction that is content neutral.

8 Even in light of the 11th Circuit's ruling and the
9 District Court's ruling in Bledsoe v. City of
10 Jacksonville, the United States Supreme Court and the . . .
11 the U.S. Court of Appeals for the 11th Circuit has ruled
12 that a content neutral time, place, and manner restriction
13 is subject to the intermediate level of scrutiny; and that
14 is, if it applies to everybody, if it's narrowly tailored to
15 achieve a significant government interest and there are
16 alternative avenues for communication.

17 Plaintiffs are seeking to strike four sections of
18 the ordinance, the city ordinances, the code of ordinances.
19 And I'm referring to Docket Number 10 that says Plaintiffs'
20 Amended Emergency Motion for Preliminary Injunction and
21 Request for Expedited Hearing with Incorporated Memorandum
22 of Law. Page 2, I read, "Plaintiffs seek a preliminary
23 injunction enjoining Defendant City of Fort Myers, its
24 officers, employees, and agents, from enforcing Fort Myers
25 City Code provisions challenged in this complaint:

1 Specifically, Code Section 2-273, city code Section 58-153
2 and 58-156, and city code Section 86-153; or from issuing
3 additional criminal penalties to the Plaintiff."

4 In their wherefore clause in that, they state,
5 "wherefore, Plaintiffs ask this Court to set a hearing, in
6 an expedited manner, concerning issuance of a preliminary
7 injunction enjoining the City of Fort Myers from enforcing
8 city code Section 2-273, 58-153 to 58-156, and 86-153." And
9 then it goes on. The misunderstanding is because, in the
10 Plaintiffs' pleading, when they specifically cite the Code
11 section, and in Paragraph 2 they did not reference 58-154.

12 The City of Fort Myers has park operating rules
13 and policies and procedures, and it's basically contained --
14 excuse me. Under Chapter 58, Titled, "Parks and
15 Recreation," Article IV is titled, "Parks and Other
16 Recreational Facilities." 58-131 provides definition.
17 58-151 provides malicious, disorderly conduct. 58-152
18 provides sanitation. And in the case that the -- 58-153,
19 recreational activity restrictions. This is a section the
20 Plaintiff is seeking to enjoin.

21 58-154, prohibited behavior, this is a section
22 that the Plaintiff, through their oral arguments on this
23 emergency hearing, are seeking to enjoin. And 58-156, park
24 operating policy, they are seeking to enjoin that.

25 When you look at 58-153, recreational activity

1 restrictions, there are three sections to 58-153. The first
2 section says, "No unauthorized person in a park shall."
3 This is Subsection Number 1. There are three. "Swim, dive,
4 bathe, or wade in any waters, lakes, ponds, or waterways in
5 the city limits, except that such places as are provided and
6 designated therefor by signage and in compliance with the
7 sign regulations as herein sets forth or may be hereinafter
8 adopted."

9 And then it goes on to talk about you're not
10 allowed to swim in the public waters and ponds unless
11 swimming is permitted, it talks about you're not allowed to
12 dive head first. It is prohibited in the city limits
13 unless -- due to risk of catastrophic injury, except in
14 athletic diving events or private swimming pools.

15 No, the city code does not permit head-first
16 diving for 1st Amendment expression. "No person shall
17 frequent any waters or places customarily designated for
18 swimming, or bathing, or congregating where such activity is
19 prohibited by the recreation manager upon a finding that
20 such use of the water would be dangerous or otherwise
21 inadvisable."

22 The nucleus of operative facts that the Plaintiffs
23 have presented in this court in its verified complaint and
24 its temporary restraining order, and its preliminary
25 injunction, has nothing to do with swimming, diving, or

1 bathing in the waters, and the -- no Plaintiffs have been
2 cited for bathing in Centennial Park or for bathing in the
3 Caloosahatchee River.

4 THE COURT: Don't you think the Plaintiffs agree?
5 What I heard is that, basically, to the extent that that is
6 set forth in their prior papers, they were abandoning that
7 issue? Sounds like they probably didn't really intend to
8 bring it in the first place, but to the extent they did,
9 certainly seems to me that they're abandoning any claim
10 about swimming in the public parks. Do you not see it that
11 way?

12 MR. ALLEY: It's in their pleadings that they want
13 to strike 58-153. It doesn't say 58-153, Section 3, it says
14 58-153; and it contains three sections.

15 THE COURT: And you don't think she's bound by
16 what she told me earlier today, that what she wants is
17 58-153(3)?

18 MR. ALLEY: Your Honor, I was paying attention to
19 something else. If she's dropping 58-153(1) and (2), I
20 won't address them.

21 THE COURT: Let me verify that. That's my sense
22 of what they did.

23 MS. KEESLER: Yes. Plaintiffs' stipulate that we
24 only seeks to enjoin sections of the Code that pertain to
25 content-based, overbroad, or vague issues; specifically,

1 58-153, Subsection 3; 58-154, Subsection 6; and all of
2 58-156.

3 THE COURT: All right. That's what my notes say,
4 as well.

5 MR. ALLEY: Thank you, Your Honor.

6 58-152, recreation activity restrictions,
7 Section 3. The Code provides no unauthorized person in the
8 park shall set up tents, shacks, or other temporary shelters
9 for the purpose of overnight camping. No person shall live
10 in a park beyond the closing hours in any moveable structure
11 or special vehicle to be used or that could be used for such
12 camping purpose, such as a tent, house trailer, camp
13 trailer, camp wagon, or the like.

14 This rule is not aimed at -- it does not target
15 political speech, it does not apply to favored speakers, and
16 exempts -- it does not -- the rule isn't exempted for
17 favored speakers and applied to non-favored speakers. That
18 would clearly be unconstitutional. This is -- on its face,
19 the rule applies to everybody. You are not allowed to set
20 up temporary or permanent living structures, you can't live
21 in the park, and you can't camp in the park overnight.

22 The Plaintiff argues that, because there are
23 possibilities for exemptions to camp in the park, or to stay
24 overnight in the park, that that renders those regulations
25 facially invalid because it makes them content based and

1 therefore would have to survive the strict scrutiny
2 standard.

3 The affidavit filed by the public works director,
4 Documents Number 24 and 25 for the record, of Saeed Kazemi,
5 provides that the City of Fort Myers has, in the past,
6 extended operating hours for events such as Occupy Fort
7 Myers, as well as the Cancer Relay for Life events. The
8 city has permitted Occupy Fort Myers to camp in the park,
9 and the city has permitted Relay for Life to camp in the
10 park, as evidenced by the affidavit of Mr. Kazemi. But it's
11 not for an indefinite period of time. It can't go on
12 forever. It can't be kept a secret of how long protestors
13 plan to live in the park. They are not allowed to live in
14 the park.

15 This is not about esthetics and beauty only. This
16 is about fundamental aspects of safety. Setting up
17 temporary structures in a public park, and anywhere else in
18 the city, you have to get permits to see if the design is
19 safe. You have to get permits to make sure that the
20 electricity, the application of electricity to the
21 structures, is safe. You have to apply for permits. And
22 there are regulations regarding building codes that have to
23 be -- have to be at least looked at with respect to
24 safety -- health, safety, and welfare of the -- not only the
25 people camping or living in the park, but also innocent

1 bystanders that choose to also share and use the park.

2 The Plaintiffs have, in oral arguments, stated,
3 58-154, they're not seeking to strike any section but
4 Section 6, the loitering and boisterousness, sleep,
5 protractively lounge; and then 58-156, park operating hours,
6 hours (a), and hours in Section (b) is closed areas.

7 The government has a compelling government
8 interest in being able to close its parks, and the
9 compelling government interest is we -- the city owns the
10 land, it was a gift to the city, Centennial Park, in
11 particular, was a gift to the city. But these regulations
12 they're asking to strike aren't just Centennial Park. These
13 are all the city parks. This isn't limited to Centennial
14 Park. This is limited to parks where there aren't
15 pavilions. They are not limiting their occupation of a park
16 like Centennial Park, they are asking the Court to enjoin
17 the parks -- all of the recreation facilities.

18 The title of 58-156 -- the title of 58-153 says,
19 "Recreation Activity Restrictions," and it talks about it
20 doesn't limit -- it's not limited to Centennial Park only.
21 And the city has parks that have nothing but playground
22 equipment for kids. And that park is different than
23 Centennial Park. Centennial Park has pavilions. Centennial
24 Park is a larger park. But what they're asking this Court
25 to enjoin is a city from enforcing its regulations on all of

1 the parks. And there are parks where it would be absolutely
2 unsafe. And there's no facts presented where overnight
3 camping, or living, or staying beyond park hours of
4 operation, would be -- would be safe.

5 THE COURT: How many parks does the city operate?

6 MR. ALLEY: I believe the city has over two dozen
7 parks. Some of the parks are strictly designed for
8 children. They have playground equipment, swing sets,
9 slides. Some of the parks are passive parks, with picnic
10 benches and cooking grills. And some of the parks have
11 large staging events and areas, and pavilions.

12 The park operating policy establishes hours. The
13 city has a compelling government interest in being able to
14 establish the hours of the park. The Plaintiff had -- and
15 the park's operating hours are from 6:00 a.m. to 10:30 p.m.
16 unless otherwise -- unless posted otherwise by the
17 recreation manager.

18 The city -- the code provides that the hours shall
19 be deemed extended by the recreation manager as necessary to
20 accommodate athletic sports events or cultural or civic
21 activities. If you look up the word "Civic" in a
22 dictionary, it's of or relating to a citizen, or of or
23 relating to a city. It includes the -- it includes
24 protests.

25 Occupy now has been given extended hours in the

1 protest. Tickets weren't being written when they first
2 started occupying Centennial Park. They have been occupying
3 Centennial Park for weeks. The affidavit of the chief shows
4 when -- illustrates when the tickets were first started,
5 when the city first started writing tickets for violation of
6 58-156. All but three were written for (a), staying beyond
7 the hours. Three tickets . . . in the amended affidavit we
8 filed this morning, of the chief of police, three tickets
9 were for the closed areas.

10 My written brief, the city's written brief says
11 that -- argues that (b) should be -- isn't in issue because
12 no tickets were written on (b). And we correct that this
13 morning in our oral arguments from our brief. We did
14 write -- the city did write three tickets for
15 Section 58-156(b).

16 As of October 26th, there were 73 citations for --
17 and those citations, all but three of them were limited to a
18 violation of 58-153(3), and that is the prohibition on
19 setting up shelters or camping or living in the park against
20 the rules; and 58-156(a), which is the park hours. And I'd
21 like to address the Court on the park hours.

22 6:00 to 10:30. The Plaintiffs can express their
23 1st Amendment conduct and expression between the hours
24 of 6:00 to 10:30 every day, any day that they want to. And
25 there is -- there is little harm to the Plaintiff by not

1 being able to engage in their expressive conduct of camping
2 or engage in their expressive conduct of speech, of speech
3 through any activities they're doing, or just actual speech,
4 between the hours of 6:00 a.m. and 10:30 p.m.

5 THE COURT: Do you agree that, under the facts of
6 this case, camping and sleeping and pitching tents in
7 Centennial Park is expressive conduct that's within the
8 scope of the 1st Amendment?

9 MR. ALLEY: Your Honor, I look to the -- I look to
10 the case law to answer that. And I note that the Supreme
11 Court made that assumption when they upheld a sleeping ban
12 in Clark.

13 THE COURT: So what's your position? More
14 particularly, what's the city's position?

15 MR. ALLEY: I'm sorry, Your Honor. The city's
16 position on whether sleeping is expressive conduct?

17 THE COURT: In this case, does the city concede
18 that camping, setting up tents, sleeping in the park, in
19 this context, all qualify as expressive conduct?

20 MR. ALLEY: No. The city does not agree that the
21 setting up of structures is expressive conduct. The city
22 does not agree that camping is expressive conduct protected
23 by the 1st Amendment under the strict scrutiny or
24 intermediate scrutiny task.

25 THE COURT: Tell me why. Because if you're right,

1 this case is over now, if we don't have anything going on
2 with the 1st Amendment. So why isn't, in the context of
3 Occupy Fort Myers, setting up a tent, and sleeping, and
4 camping, symbolic expressive speech?

5 MR. ALLEY: Living is not symbolic expressive
6 speech. Camping is an act. It's not symbolic expressive
7 speech. The Plaintiffs argue that it's expressive conduct.
8 Under the Plaintiffs' argument, everything is expressive
9 conduct. Under the Plaintiffs' argument, when I get up in
10 the morning, and I put my pants on, I'm expressing conduct.
11 But there has to be some limitations prescribed on what
12 conduct is expressive and what conduct is not expressive
13 with respect to what the 1st Amendment affords, what
14 protections the 1st Amendment affords.

15 What we're talking about here, Your Honor, are
16 freedoms. And it's critical to protect the 1st Amendment.
17 The 1st Amendment is one of the greatest amendments in our
18 federal constitution and in our state constitution, but
19 there is some expressive conduct that is not protected by
20 the 1st Amendment; and the Plaintiffs allegation that living
21 in a park is expressive --

22 THE COURT: You said there is some expressive
23 conduct that is not protected by the amended motion. Did
24 you mean that?

25 MR. ALLEY: Under the Plaintiffs' . . . no. No.

1 Under the Plaintiffs' analysis that everything is expressive
2 conduct, living, living is expressive conduct under the
3 Plaintiffs' analysis. Putting -- tying my shoes is
4 expressive conduct under the Plaintiffs' analysis. That's
5 not expressive conduct that's protected by the
6 1st Amendment.

7 The Supreme Court assumed that it is expressive
8 conduct to have homeless -- for the homeless to sleep in a
9 park. They assumed that. And when the Plaintiffs -- when
10 the demonstrators wanted to set up tents that could
11 basically provide sleeping quarters for approximately up to
12 150 homeless individuals, the Supreme Court made an
13 assumption that it's expressive conduct. They did not find
14 it as expressive conduct, but they made that assumption.

15 The city is not conceding that camping is
16 expressive conduct. The city is saying that living in
17 Centennial Park is not expressive conduct. The city --

18 THE COURT: Go ahead.

19 MR. ALLEY: The city is saying that camping in
20 Centennial Park is not expressive conduct. The city is
21 saying that the express -- and the city is also saying that
22 the Plaintiffs are able to camp in Centennial Park while the
23 park is -- they can do their symbolic camping in the park
24 while the park is open, 16 and a half hours out of 24 hours
25 a day.

1 It's disingenuous to tell this Court that it's a
2 symbolic 24-hour protest. It's not. It's an unlimited,
3 indefinite, with no limit -- a secret on how long it's to
4 be. When we argue why the Plaintiffs should have to post a
5 bond, we don't know what -- if it's a year, the bond should
6 be a lot higher than if it's a week or two weeks. We don't
7 know how long they want to live in Centennial Park.

8 THE COURT: Did you find any cases that has held
9 that things like sleeping and camping are not expressive
10 conduct protected by the 1st Amendment?

11 MR. ALLEY: We got the emergency -- we got the
12 court order on, I believe, Wednesday or Thursday, and . . .
13 we weren't watching the Eagles beat the Cowboys last night
14 at 11:30. We were able to file by midnight, and give
15 opposing counsel a copy of our brief. But no, we have not
16 fully briefed this issue.

17 THE COURT: All right. Go ahead. It seems to me
18 there are a number of cases that, like the Supreme Court in
19 Clark, assumed such conduct was within the 1st Amendment,
20 and then, for the most part, addressed the validity of the
21 regulation. I was wondering whether you found any case --
22 it's not intuitive that sleeping is expressive conduct, no
23 matter what the Supreme Court has assumed. So I was just
24 wondering what you had found.

25 All right. Go ahead.

1 MR. ALLEY: In Clark, the United States Supreme
2 Court stated, "It is urged by the respondents, and the Court
3 of Appeals was of this view, that the symbolic city of tents
4 was to be permitted if demonstrators did not intend to cook,
5 dig, or engage in aspects of camping other than sleeping.
6 The incremental benefit to the parks could not justify the
7 ban on sleeping, which was here an expressive activity, and
8 which" -- I'm sorry. "Which was here an expressive activity
9 said to enhance the message concerning the plight of the
10 poor and homeless.

11 "We cannot agree." This is the United States
12 Supreme Court talking. "We cannot agree. In the first
13 place, we seriously doubt that the 1st Amendment requires a
14 park service to permit a demonstration in Lafayette Park and
15 the mall involving a 24-hour vigil and the erection of tents
16 to accommodate 150 people.

17 "Furthermore, although we have assumed, for
18 present purposes, that a sleeping ban in this case would
19 have an expressive element, it is evident that its major
20 value to this demonstration for this would be facilitative.
21 Without a permit to sleep, it would be difficult to get the
22 poor and homeless to participate, or be present at all."
23 486 U.S. 288, 104 Supreme Court 3065.

24 There the Supreme Court assumed that it was
25 expressive, but the Supreme Court did not agree. And here

1 they're trying to strike the park -- they're trying to
2 overturn the ban on setting up temporary . . . tents,
3 shacks, or otherwise temporary shelters, overnight camping,
4 living in a park beyond closing hours, or using moveable --
5 or putting moveable structures in the park. The sleeping
6 ban was upheld by the U.S. Supreme Court.

7 Now to the park operating policy, the hours. 16
8 and half hours out of 24 hours a day, they can do any
9 expressive conduct and expressive speech they want. Their
10 argument is that the city, because there's a nonexclusive
11 way to get an extension in the code to extend park hours --
12 Occupy now got extended park hours, Cancer -- the Cancer
13 Relay for Life got extended park hours -- because there are
14 nonexclusive methods to extend park hours, that the Court
15 should render this a content-based restriction and strike
16 it. Or enjoin it.

17 If the Court is of that mind, the Court -- as the
18 Court knows, Florida law favors severability. The Florida
19 Supreme Court and the federal courts recognize this as a
20 federal doctrine, recognizing the obligation of the
21 judiciary to uphold the constitutionality of legislative
22 enactments where possible, to strike only the
23 unconstitutional portion.

24 There is a four-part test in Florida, as the
25 federal courts recognize, as this Court knows, that was

1 identified in the *Solantic v. Neptune Beach* in the 11th
2 Circuit Court of Appeals in 2005. Can the language -- the
3 unconstitutional provisions be separated from the
4 constitutional provisions? Does the legislative purpose
5 remain intact? Can the Court determine what the legislative
6 intent would be? What the governing body would do if those
7 provisions were separated out. And then, what's left, is
8 that an act, complete and of itself, remains after the
9 severance.

10 The intention of the city council, is identified
11 in the city code that says, basically, it's hereby declared
12 to be intent of the city council that these sections,
13 paragraphs sentences, clauses, and phrases of the code are
14 severable; and if any phrase, clause, sentence, paragraph,
15 or section of this code shall be declared unconstitutional
16 by the valid judgment or decree of any court of competent
17 jurisdiction, such unconstitutionality shall not affect any
18 other remaining phrases, clauses, sentences, paragraphs in
19 the sections of this code, since same would have been
20 enacted by the City Council without the incorporation in
21 this code of any such unconstitutional phrase, clause,
22 sentence, paragraph or section.

23 THE COURT: Well, before you get into severance,
24 let me get you back to whether the hours provision is
25 content based. If it is content based, that doesn't

1 necessarily make it unconstitutional, that just tells me to
2 apply a different test. Is it your view that that provision
3 is not content based?

4 MR. ALLEY: Yes. You cannot read this -- the city
5 is at a loss as to how the Plaintiff can argue with a
6 straight face that this is content-based.

7 Hours. Park operating policy. "Except for
8 unusual and unforeseen emergencies, parks shall be open to
9 the public every day of the year during designated hours.
10 The opening and closing hours shall be posted for public
11 information. Normal park hours are 6:00 a.m. to 10:30 p.m.
12 unless posted otherwise by the recreation manager. Such
13 hours shall be deemed extended by the recreation manager as
14 necessary to accommodate athletic sports events, or cultural
15 or civic activities."

16 THE COURT: Isn't the last sentence the part that
17 Plaintiffs say makes it content based because the recreation
18 manager has to decide whether a particular event falls
19 within any of those categories?

20 MR. ALLEY: The Plaintiffs' position is that that
21 section adds language. And I'm reading from Page 10 of
22 Document Number 10. The Plaintiff states, "Fort Myers City
23 Code 86-152 prohibits any parade" -- let me get to
24 "Further, Fort Myers City Code 58-156" -- that's what we're
25 talking about -- "Governing park policy, by its terms,

1 targets all political speech and conduct to be burdened with
2 the requirement of shutting down at 10:30 p.m. or not
3 beginning by 6:30 a.m." The hours are 6:00 to 10:30,
4 not 6:30; but that's not the point.

5 The point is it says, "While exempting athletic
6 events, cultural and civic activities," and then the
7 Plaintiff adds, "And other nonpolitical association and
8 assembly." That's not in the code. That language isn't
9 there. It says while --

10 THE COURT: I heard what you read, what was in the
11 code. I read your brief. I know she added language that's
12 not there. Dealing with language that is there, how is that
13 not content based when someone has to decide whether the
14 event that is proposing to be permitted there, or is taking
15 place there, is a civic event, or a sporting event, or a
16 cultural event? Someone has to make that decision. Doesn't
17 that inherently make it content based?

18 MR. ALLEY: No. No. The fact that city
19 officials, or government officials, or persons of authority
20 have to make decisions interpreting codes does not render
21 them content-based regulations. That has to be -- that --
22 government officials have to make decisions regulating codes
23 every day of the year, hundreds of times a day, all across
24 the country. And, no, the fact that a government official
25 has to make that decision does not render it -- does not

1 make it a targeted political speech and put it under a
2 content-based regulation. Or to content-based scrutiny
3 level by the Court.

4 THE COURT: Somebody has to decide the content of
5 the event. Someone has to decide whether it's a sporting
6 event, a cultural event or a civic event. Don't they?

7 MR. ALLEY: Yes. Yes, they do. Somebody does
8 have to make that decision.

9 THE COURT: Doesn't that make it content based
10 then? Unless those are the only three possibilities in the
11 world.

12 MR. ALLEY: Of or relating to a city covers
13 everything because it is a city park.

14 THE COURT: So that is meaningless. So what
15 you're saying is, under that provision, every event of any
16 description is within the phrase, "Civic event".

17 MR. ALLEY: Under the affidavit filed by the
18 public works director, Docket Number 25, he specifically
19 states Section 58-156 of the Fort Myers City Code does not
20 exclude any categories of events seeking to extend the
21 operating park -- the operating hours of the park. So the
22 Court is correct.

23 THE COURT: So, no matter what the event was, it
24 would qualify for an extension under the ordinance.

25 MR. ALLEY: It would qualify for consideration of

1 extension under the ordinance.

2 THE COURT: And then what does the recreation
3 manager use to decide whether to grant that extension.

4 MR. ALLEY: The recreation manager applies the
5 rules of the park and the recreation activities under the
6 city code, the parks and recreation. Competing interests
7 for the park. Which park is it? What are they actually
8 applying for? What hours do they want an extension for?

9 As in the case of Occupy now, they were granted
10 hours to go 24/7 until it became clear that they weren't
11 going to be getting -- or they were challenging permit --
12 getting insurance to cover personal injury damage to any of
13 their participants, or to innocent bystanders, or to cover
14 property damage.

15 The park -- the parks and recs manager has to make
16 a number of determinations. Has anyone else rented the park
17 for that day? Is anyone else using the park for that day?
18 Can we provide police services? It's a standard interaction
19 between somebody who wants to go to the property owner and
20 ask if they can stay beyond the hours of closing, and the
21 determination is made in the management of the facility.

22 THE COURT: Has the city ever denied an extension
23 to a group because it wasn't one of those three categories
24 of events?

25 MR. ALLEY: The city has denied extensions of

1 hours going for 24 hours. The city is denying that right,
2 now, to Occupy. To the Plaintiffs. But the city has never
3 denied consideration for extended hours.

4 THE COURT: So essentially you're saying that last
5 sentence really has no meaning, because the city will
6 consider any request for extension?

7 MR. ALLEY: I'm not arguing that it has no
8 meaning. There is legislative intent behind it. It says,
9 "Such hours shall be deemed extended by the manager as
10 necessary to accommodate," and then it says, "Athletic sports
11 events, or cultural or civic activities." And those
12 athletic sports events, or cultural or civic activities
13 covers everything.

14 THE COURT: So what you're saying is what it could
15 have said is to accommodate any event.

16 MR. ALLEY: Yes.

17 THE COURT: All right. Go ahead.

18 MR. ALLEY: The fact that it's possible for a
19 government official to favor some speakers, and grant
20 exemption to favored speakers, and to deny exceptions to the
21 rules to unfavored speakers, because that's possible, and
22 that clearly would be unconstitutional because that's
23 possible, that doesn't render a -- the regulation content
24 based, and provide it in the highest tier of scrutiny by
25 this Court.

1 In the Chicago Park case, the United States
2 Supreme Court, in 2002 -- this is the case where they upheld
3 a 50-person event -- the Supreme Court said, "Granting
4 waivers to favored speakers, denying them to disfavored
5 speakers, would, of course, be unconstitutional; but we
6 think that this abuse must be dealt with if and when a
7 pattern of unlawful favoritism appears, rather than by
8 insisting upon a degree of rigidity that is found in few
9 legal arrangements. On Plaintiffs' theory," and then it goes
10 on to criticize the Plaintiffs' theory".

11 The Plaintiff can't show any evidence, there is no
12 evidence, that the city is favoring some parties and not
13 favoring another. In the Plaintiffs' own verified complaint
14 they are acknowledging they were able to stay in the park
15 beyond the park hours. They have been occupying the park
16 for weeks.

17 There are alternatives. The Plaintiffs can
18 express themselves, and express their symbolic camping, and
19 express their -- whatever . . . whatever their message is,
20 they can express that 16 and a half hours a day out of a
21 24-day -- out of a 24-hour day. There are ample
22 alternatives.

23 And it's not only expressive conduct. They also
24 have commercial speech here. They're soliciting donations.
25 They're soliciting material. This isn't -- this isn't all

1 about complaining about their social injustices worldwide,
2 or infinite complaints about social ills worldwide. This is
3 also soliciting. Please bring us supplies, please bring
4 us . . . it's commercial speech. They're making
5 solicitations that are covered under a completely separate
6 portion of the code that you're not supposed to use the
7 public lands to solicit money or to -- for your
8 organization, or to solicit supplies.

9 THE COURT: Are they in violation of any city
10 ordinance during the 16 and a half hours or so that the park
11 is open?

12 MR. ALLEY: The setting up of structures and the
13 setting up of tents is not permitted in the park. You can
14 get a Special Events Permit for it, and the Special Events
15 Permit requires a description of what you plan on setting up
16 and where you plan on setting it up. Do you plan on digging
17 into the ground and possibly hitting wires? How big is the
18 structure going to be? And, if it's a large structure, it
19 gets inspected. It gets inspected to make sure it doesn't
20 fall on somebody. It gets inspected to make sure the
21 electric outlets are fine.

22 It's just not -- the 1st Amendment doesn't afford
23 somebody the right to go up and set up a structure in a park
24 and -- an unsafe structure. They believe it's safe when
25 they set it up, but an unsafe structure. And it doesn't

1 protect that.

2 THE COURT: You said they could set up their
3 symbolic tenting, I forget your exact phrase, but almost
4 anywhere. Is that literally true? Where can they set up
5 tents in the City of Fort Myers other than a public park?

6 MR. ALLEY: The city did not provide -- the city
7 has areas zoned where camping is permitted, but city-owned
8 property? The city does not provide campgrounds for
9 residents at this time. And it's not because the city's
10 anti-camping, it's simply because this is -- the public
11 lands are limited lands, and there's a higher priority of
12 use for playgrounds, passive parks, and other recreation
13 parks. The city does not have a campground park; however,
14 the city does accommodate camping through zoning.

15 The Plaintiffs would argue that they can -- they
16 can set up tents on public rights of way, or tents on
17 sidewalks. And that issue has yet to be litigated. The
18 state laws provide, and the city code provides, that you
19 cannot obstruct the sidewalks. So that issue has to be
20 litigated. If it's a tent large enough for a human being,
21 and the sidewalk is big enough, then that's a different
22 issue than if the sidewalk is a difficult sidewalk, and
23 they're setting up a tent on the sidewalk.

24 THE COURT: Okay.

25 MR. ALLEY: Another section that they're striking

1 is 58-156(b), and that's closed areas. The city has a
2 compelling -- and three tickets have been written for the
3 closed areas. The city has a compelling government interest
4 and it would survive the strict scrutiny standard were the
5 Court to find this content based. And the city believes
6 it's content neutral, and it's in the intermedial level of
7 scrutiny by this Court; but, irrespective of that, the city
8 believes that it's -- they have a compelling interest in the
9 ability to open and close its parks. Or a portion of their
10 parks.

11 No, the city can't close a park to prevent
12 political speech; but the city has a compelling interest to
13 closing a park that has electrical problems, or where
14 there's going to be a capital improvement built, like a
15 pavilion maintained, or a pavilion built, or something along
16 those lines.

17 The violations section of these codes provides for
18 a violation for a fine between \$25 and \$250, and the
19 Plaintiffs allege that it's a criminal citation. In *Thomas*
20 *v. State*, the Supreme Court has said that municipal
21 violation ordinances are not noncriminal, but they are not
22 criminal either. So what it is, is it's a municipal
23 ordinance violation citation.

24 THE COURT: Can you go to jail?

25 MR. ALLEY: Not from the city code. There are

1 sections in any code, antiquated sections; and that's why a
2 code has severability clauses. The city used to have a
3 municipal jail, decades ago. It does not have a municipal
4 jail now. There are references to the municipal jail in the
5 city code.

6 THE COURT: But for any of the violations issued
7 to people involved in this case, is there the possibility of
8 jail time?

9 MR. ALLEY: Not under the city code.

10 THE COURT: That's what the citations were issued
11 under; correct.

12 MR. ALLEY: I don't see. Yes.

13 THE COURT: All right.

14 MR. ALLEY: The next section the Plaintiffs are
15 seeking to strike is Section 2-273, which is the Special
16 Events Advisory Board. This is a group of volunteer
17 citizens that are appointed by the City Council to make
18 advisory recommendations to city officials to make, and
19 rendering the decisions that they make, to make advisory
20 recommendations to the City Council, and what type of events
21 would be good for the City of Fort Myers, and what type of
22 events would be bad for the City of Fort Myers, and to
23 make -- and the events -- for events over 1,000 people.

24 It's not applicable here. Even on their best day
25 it's 500 people in their verified complaint, and they're

1 complaining about those numbers being dwindled down because
2 citations have been written for people living in the park or
3 camping in the park beyond hours of operation, and citations
4 have been written for people setting up tents or moveable
5 structures.

6 When I say bad events, I'm talking about events
7 that the Special Events Advisory Board decides that they
8 don't -- they don't like, they don't think is good for the
9 City of Fort Myers. And when -- in permitting an event,
10 that's exactly what a property owner does. They sit back
11 and they say okay, these events, this event is an event I
12 would like in the City of Fort Myers.

13 When the City of Fort Myers decides to put a
14 pavilion in the city park, they sit down, and city officials
15 sit back, and they make a decision we want to put a pavilion
16 there because we want shelter. We don't like the fact that
17 there is not shelter there. We want to put shelters up.
18 When we put a playground in a park, we make a decision, a
19 government official makes a decision, we don't want this a
20 passive park for sporting events. We want this to have
21 playground facilities for children to play on. The city
22 makes those types of decisions every day.

23 And for an appointed board -- an unpaid, appointed
24 board that makes recommendations on what type of events they
25 would like to see in the city, and this is what type of

1 events they would not like to see in the city, they can make
2 that decision, and it has absolutely no binding authority.
3 They cannot deny a permit. The ordinance facially speaks
4 for itself. They cannot deny a permit. That authority
5 doesn't rest with that board. They can make
6 recommendations.

7 There are city officials every day, across this
8 country, that make recommendations, and individuals that
9 make recommendations, that are not constitutional. The fact
10 of the matter that they're making a recommendation that's
11 not constitutional does not render the city's regulation or
12 the action the city is taking as unconstitutional. That
13 happens every day, in every city in this country, where
14 people make recommendations on things that are bad ideas.
15 It doesn't comply with state law, doesn't comply with the
16 city code, or doesn't comply with federal law.

17 THE COURT: So what does this Special Events
18 Advisory Board do that is binding on the city, if anything?

19 MR. ALLEY: Absolutely nothing. It actually is an
20 extra shield, or an extra layer of review of decisions made
21 by city officials, and their criteria is outlined and
22 specified for what type of events that they review based on
23 size, based on what type of commercial activity it brings to
24 the city, what type of benefits it brings to the city, are
25 they -- is it Cancer for Life, those types of situations.

1 The Plaintiffs represent that they have been told
2 that the special events board is going to be making a
3 recommendation on whether they should be exempt from the
4 insurance requirement, for a Special Events Permit. Their
5 decision is not binding on anybody. It's an advisory board
6 by its express terms.

7 THE COURT: Does it carry any extra weight in
8 comparison with somebody else who may call and express an
9 opinion?

10 MR. ALLEY: It depends on the subject. The
11 person -- or the entity, if it's a City Council, which the
12 code provides for an appeal of any person aggrieved by
13 decision of any city official, you can appeal it to the City
14 Council. It's their subjective weight that they give it.
15 They don't have to -- it's not a -- it's not a -- if they
16 vote -- if special events recommends no, you must say no,
17 it's not that, for the City Council to say yes, they must
18 get the Special Events Advisory Board to say yes.

19 What they do is they give advice and they make
20 recommendations. They have no decision-making authority.
21 In some cases it may carry weight, and in some cases it may
22 not carry weight.

23 But the Plaintiffs are asking for more than just
24 striking Section 2-273, because if you strike that
25 section -- 2-271 is a purpose creation, membership, terms,

1 vacancies, qualifications, nonvoting meeting attendees; and
2 Section 2-272, is the oaths, officers, records, meetings,
3 quorum attendance, and minutes. Those two sections, if you
4 strike the powers and duties of the Special Events Advisory
5 Board, you're in affect rendering those two sections of the
6 code without meaning and effect, because if they have no
7 powers and authorities, then those other two sections have
8 no meaning and effect.

9 What the Special Events Advisory Board is, is it's
10 a determination by the legislative branch of the City of
11 Fort Myers that they want an advisory board to give advice
12 and recommendations to various city officials, and to
13 themselves, the governing body, on special events. And on
14 issues related to special events. And there is a separation
15 of powers.

16 It's well settled in court, and this Court has
17 recognized in thousands of cases with respect to the
18 separation of powers between the judiciary and the
19 legislature, and creating an advisory board with no
20 authority other than to make recommendations doesn't violate
21 any federal laws even if they're making recommendations that
22 don't comport -- even if they're making a recommendation
23 that doesn't comport to federal law.

24 And, in their powers and duties section that the
25 Plaintiff is seeking to strike, there is a clause that says

1 recommend regulations for the conduct of special events that
2 will increase interests therein to the citizens, residents,
3 and visitors to the city generally, insofar as the same are
4 not in conflict with city code and state statutes.

5 In and of itself, their express powers have a
6 prophylactic protection against violating state statutes.
7 To strike the Special Events Advisory Board would be
8 basically to render two other sections of the code that
9 they're not asking for meaningless, and it would not offer
10 any relief to the Plaintiff either. The Special Events
11 Advisory Board doesn't make the decisions. So striking the
12 Special Events Advisory Board doesn't -- someone has to make
13 a decision. Some city official has to make a decision.

14 THE COURT: What is the procedure for the
15 Plaintiffs to challenge the decision of whatever official it
16 is to either deny the permit or to deny a waiver of the
17 insurance requirement?

18 MR. ALLEY: Some provisions of the code outline
19 and specific procedure. Other provisions of the code, you
20 go to the City Manager, who is the chief administrative
21 officer under the city charter.

22 THE COURT: Tell me how it works for this.

23 MR. ALLEY: I'm sorry?

24 THE COURT: Tell me how it works for this.

25 MR. ALLEY: If somebody on Section 2-273?

1 THE COURT: No. I'm sorry. If the Plaintiffs are
2 dissatisfied with the city's decision not to waive the
3 insurance requirement, and are dissatisfied with the
4 decision not to issue a permit, how do they challenge that?

5 MR. ALLEY: They can come before the City Council
6 and so state what you stated, and say we would like to have
7 the insurance requirement waived, and here is what we would
8 like. And City Council, the governing body, can make the
9 decision.

10 THE COURT: And where is that set forth in the
11 code?

12 MR. ALLEY: The city code is adopted by the City
13 Council. In some cases, there are specified provisions for
14 appeal; but, as a matter of general law, any decision made
15 under the city code, unless otherwise prescribed, is
16 appealable to the City Council.

17 THE COURT: When you say general law, do you have
18 a cite for me?

19 MR. ALLEY: The City Council can waive their code.
20 A Florida statute section -- the home rule powers. I
21 believe it's Florida Statute 163, it may be 166. It's the
22 home rule powers. The City Council has the authority to
23 amend its code.

24 THE COURT: What does that have to do with
25 appealing? They're not asking you to -- well, maybe they

1 are asking to you amend the code, but in terms of the
2 decision as to whether they get a permit or not, all they're
3 asking is for the permit.

4 MR. ALLEY: They can come before the City Council
5 and say we have applied for a permit, and the city said we
6 need to have insurance, and we don't want to have insurance.
7 We would like the City Council to approve this without
8 insurance.

9 THE COURT: That's what I'm asking, what is the
10 cite that says that?

11 MR. ALLEY: It's the home rule powers. The
12 Florida Supreme Court -- the Florida Constitution was
13 amended in 1969 and in 1973, and what it did is, previously
14 the powers of a municipality had to be expressly granted to
15 the municipality by the state government; and, with the
16 enactment of the home rule powers constitutional revision,
17 the government has all authority and powers unless
18 specifically preempted by the state.

19 THE COURT: So that says that anytime a citizen is
20 unhappy with the decision of the city official, he or she
21 can file an appeal with the City Council?

22 MR. ALLEY: No, Your Honor, it does not expressly
23 say that.

24 THE COURT: That's what I'm looking for. You're
25 saying that's what happened. Now tell me, if I'm their

1 lawyer, where do I find that? Where do I find their
2 appellate process that they go through?

3 MR. ALLEY: The four sections that are seeking to
4 enjoin the appellate process is not outlined in the code.

5 THE COURT: Does that mean there is no appellate
6 process?

7 MR. ALLEY: There is. They can appeal to the City
8 Council. They can come to the City Council and --

9 THE COURT: Don't go in circles. Give me the cite
10 that says that these people can go to the City Council.

11 MR. ALLEY: Your Honor, it's the Florida home rule
12 powers doctrine.

13 THE COURT: I want you to give me a citation. I
14 don't mean today. Or at least I don't mean right now. I
15 want you to tell me what cite these lawyers can go to that
16 will say when my clients are unhappy with the lack of a
17 waiver, the appellate process is to go to City Council. And
18 I'd be amazed if that's in the home rule statute.

19 MR. ALLEY: No, it's not, in the home rule
20 statute, expressly stated that way.

21 THE COURT: Tell me where it is expressly stated.
22 If it's not expressly stated, you don't have it. You can't
23 just say, oh, you can always go to the City Council. How is
24 a litigant to know that? I want you to -- you can file it
25 as a submission. Just give me a cite to the ordinance and

1 to the state statute, whatever it is, you're relying upon,
2 that tells people how they appeal from the denial -- or from
3 the decision of a city official. That's what I'm looking
4 for.

5 All right. What's next?

6 MR. ALLEY: Your Honor, I briefly touched on
7 severability, and the four-part test, and the intention of
8 City Council that the city would argue that these challenge
9 provisions, should the Court find them unconstitutional are
10 severable, that there are severable provisions should the
11 Court find that unconstitutional.

12 And the city would like to preserve two minutes.
13 Thank you.

14 THE COURT: You may do so.

15 Ms. Keesler?

16 MS. KEESLER: Your Honor, thank you for affording
17 me the time, but the Plaintiffs will rest on their papers
18 and prior oral argument.

19 THE COURT: All right.

20 Do you want another two minutes?

21 MR. ALLEY: No, thank you, Your Honor.

22 THE COURT: All right. Let me just go through my
23 notes, here, before I let you go.

24 All right. Those are all the questions I have.
25 Thank you very much. I will get an order out as soon as I

