

ORDINANCES

Fining Art

by Devala A. Janardan, Associate Counsel

The ability of an artist to display or sell his paintings on municipally-owned property has been the subject of two Tenth Circuit Court of Appeals cases in 2009. The more recent ruling is that in *Travis v. Park City Municipal Corp.*[1] The plaintiff, Travis, was displaying, but not openly selling, his art (although he stated he would have accepted compensation had he received an offer to buy). A local law enforcement officer told Travis that he needed to have a permit to sell his art, but did not arrest or detain Travis. Travis went to the planning department and obtained a permit to display his art during a festival. A year later, in the same park, a City employee told Travis (who did not have a permit) that he could display his art without a permit, but needed a permit to sell it. Travis brought a 42 U.S.C. § 1983 suit claiming, among other things, that his First Amendment rights had been violated by the City and its employees.

The City had two ordinances governing art in public places. The first, a display ordinance, was designed to promote the "enjoyment of outdoor public works of art" while maintaining the "visual interest[] and economic vitality of Park City's Historic, resort-based community[]."[2] Anyone wishing to display artwork on a city-owned property had to obtain a permit and comply with height and set-back requirements, lighting regulations, and applicable building codes. The second ordinance, the sales ordinance, designated a green space adjacent to the City library for up to 30 artists, on a first-come, first-served basis, to sell their art on weekends and holidays. Those intending to sell art pursuant to this ordinance still had to register with the City by filling out a form with their name, address, phone number, and a brief description of their art. The City retained the power to revoke or deny the registration, and a decision could be appealed to the City Manager.

The Tenth Circuit upheld the ordinances. The display ordinance was content-neutral, as it applied to anyone without regard to the content of the expression or whether the City agreed or disagreed with the message. The City's rationale, "ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer," constituted a substantial government interest.[3] In addition, the law was narrowly tailored, as it allowed the display of art in public parks provided the artist complied with what the court considered *de minimis* requirements. The sales ordinance was also constitutional, as the court found no problem with requiring artists to provide minimal contact information and a description of the type of art to be displayed. In addition, the sales ordinance served the City's substantial interest in "protecting the property values of surrounding businesses and neighborhoods and in controlling the free flow of pedestrian and vehicular traffic...".[4] Finally, the court held that the ordinance left open "ample alternative channels" of communication – artists could still sell art on private property and display their art in other public parks (where they would be able to sell if a viewer initiated purchase negotiations).

The second, older decision is *Christensen v. Park City Municipal Corp.*[5] Christensen, an artist, attempted to display and sell artwork in a public park and on the streets of Park City, Utah. An ordinance, however, prevented persons from soliciting "business within any public street, sidewalk, alleyway, within the public parks, golf course, or publicly owned parking areas"[6] without the prior approval of the City Council. Local civic organizations (such as the Boy Scouts, historic preservation groups, schools, museums, non-profit organizations, and charities) were exempt from the prior approval and license requirements. Another ordinance confined all businesses to "a fully enclosed building."[7] Christensen was arrested for failing to comply with the outdoor business licensing ordinance, and was released from jail three days after. The charges were ultimately dismissed.

Christensen filed suit against the officers and Park City, claiming a violation of his First Amendment rights.[8] The district court granted the defendants' motion to dismiss. On appeal, the Tenth Circuit, applying the qualified immunity test set in *Pearson v. Callahan*,[9] affirmed the dismissal as against the officers in their individual capacities, but reversed and remanded the claims against the City. Now on remand, the *Christensen* case may bring out some interesting developments. One issue may be whether or not Christensen can claim any First Amendment interest in having his art displayed on city-owned property. While other circuits around the country have determined that there is a First Amendment interest in *original* artwork,[10] it is not clear whether Christensen was displaying or selling his own creations, or whether he was displaying art that was created by someone else. IMLA will keep you updated on developments in the *Christensen* case.

Notes

1. No. 08-4115, 2009 WL 1313186 (10th Cir. May 13, 2009).
2. PARK CITY, UTAH, CODE §15-4-15 (West 2009).
3. *Travis* at *7.
4. *Id.* at *4 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984)) (noting substantial government interest in maintaining parks for public use and enjoyment).
5. 554 F.3d 1271 (10th Cir. 2009).
6. PARK CITY, UTAH CODE § 4-3-3 (West 2009).
7. The City did permit licensed busi-

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Traffic Enforcement Issues

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2009); S. 211, 95th Leg., 1st Reg. Sess. (Mo. 2009).
74. H.R. 300, 81st Leg., Reg. Sess. (Tex. 2009).
75. S. 59, 2009 Leg., Reg. Sess. (Ala. 2009).
76. S. 389, 116th Leg., 1st Reg. Sess. (Ind. 2009); A.B. 504, 75th Leg., Reg. Sess. (Nev. 2009); S. 2004, 2009 Leg., Reg. Sess. (Fla. 2009); H.R. 439, 2009 Leg., Reg. Sess. (Fla. 2009).
77. S. 277, 2009 Leg., Reg. Sess. (Md. 2009).
78. *See* theNewspaper.com, *New York Legislature Approves Massive Traffic Camera Expansion* (Apr. 09, 2009) at http://www.thenewspaper.com/news/27/2742.asp.
79. NCUTLO, *Automated Traffic Law Enforcement Model Law*, at http://www.ncutlo.org/autoenforce622.htm. ML

Federal

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ciliation Act of 2005 (May 17, 2006).
3. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.
4. National Association of Counties (NACo), *Toolkit on Repeal of New Non-Wage Withholding Requirement*, undated.
5. A letter sent to IRS Commissioner Douglas Shulman by a coalition of organizations, including IMLA, and urging the Commissioner to hold public hearings on Section 511, is available online at www.imla.org/irsletterimla.pdf.
6. GFOA Issue Brief, *Withholding Requirement on Government Payments and Other General Tax Issues* (Feb. 2009) states that "[i]n 2006, the Congressional Budget Office estimated the cost to state and local governments for administering this provision to be $62 million per year."
7. NACo Fact Sheet, *Repeal Three Percent Withholding Tax on County Purchases* (March 2007).
8. National Defense Industrial Association, *Little Known Legislation Takes Federal Contractors By Surprise* (March 2007).
9. Statement available at http:/www.acec.org/advocacy/committees09priorities /3percent.cfm. ML

Supreme Court

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sorts. The Court placed great emphasis on test design and essentially held that a professionally prepared, content-valid test was a near impregnable defense to a Title VII disparate-impact lawsuit. Municipalities faced with adverse impact and the possibility of a lawsuit by minority candidates must now be prepared to stand by and defend their content-valid tests. At the same time, municipalities are free to explore selection procedures that have less adverse impact on minority candidates than traditional tests. The hope is that these alternative procedures will not only generate a more diverse promotion list, but will also do a better job of selecting candidates with intangible qualities, such as leadership, good judgment, and interpersonal skills. ML

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Inside Canada

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the requester appealed. Section 6 (1)(b) provided that a record that revealed "the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public," was exempt from disclosure. To benefit from the exemption, the City was required to show that a statute – in this case, s. 239 of the *Municipal Act* – authorized the holding of the meeting in the absence of the public. That Act did so in the case of a meeting addressing "a proposed or pending acquisition or disposition of land by the municipality."

After reviewing the report at issue, the hearing officer concluded that the meeting (and consequently, the report) did not come within the "closed meeting" category because "most of the report" did not deal with "a proposed or pending acquisition or disposition of land" – "the bulk of the report contain[ed] background information and set[] out other options." There was, however, sufficient evidence to establish that council's actual deliberations at the meeting included the land disposition; thus, disclosing those limited portions of the report would have the effect of revealing the substance of city council's deliberations.

He concluded that only limited portions of the report qualified for exemption under s. 6(1)(b) of the MFIPPA (the portions addressing whether the City should dispose of the encroached-upon land to the requester and the position of staff on that issue), and that the remainder had to be disclosed. Second, he "also found that the City did not take all relevant factors into account when it exercised its discretion to withhold those portions of the report from the [requester]." These factors included whether the requester had "a sympathetic or compelling need to receive the information," and whether disclosure would "increase public confidence in the operation of the institution." Consequently, the City was ordered to re-exercise its discretion in this respect.

The CanLII website lists IPC decisions at http://www.canlii.org/en/on/onipc/index.html. The CanLII cites are, respectively, *Ottawa (City) (Re)*, 2009 CanLII 16569 (Ont. I.P.C.) and *St. Catharines (City) (Re)*, 2009 CanLII 29180 (Ont. I.P.C.). Both rulings are also available from the IPC website at http://www.ipc.on.ca. ML

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nesses (other than restaurants) to conduct outdoor sales on their own property and adjoining streets or sidewalks, on a temporary basis, five times a year.
8. Christensen also claimed a violation of his rights under the Equal Protection Clause and the Fourth Amendment, but these claims were dismissed by the trial court and the dismissal was affirmed by the Tenth Circuit, so they are not discussed in this column.
9. 129 S. Ct. 808 (2009).
10. *See* Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996); ETW Corp v. Jireh Pub. Inc., 332 F.3d 915 (6th Cir. 2003); White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007). ML