

ORDINANCES

"Occupational Hazards"? Occupy Wall Street

by Sophia M. Stadnyk, Senior Associate Counsel

According to a survey conducted by The Associated Press, the first two months of the "Occupy" protests in the United States have cost local American taxpayers "at least $13 million in police overtime and other municipal services, such as cleanup and sanitation." New York City alone has racked up more than $7 million in police overtime, as of November 15; Oakland, California, reported $2.4 million in costs as of November 14, including "more than $1 million for police overtime and $500,000 for other law enforcement agencies. Costs are being tapped from the city's $30 million reserve fund and are expected to reach $3 million." (The Associated Press, *Glance: Occupy protests' cost to 18 US cities*, Nov. 23, 2011, at http://tinyurl.com/ckyam69.)

On November 15, the Supreme Court of the State of New York issued an order in *Waller v. the City of New York*, denying the protesters' application for a temporary restraining order (TRO) and preliminary injunction to prohibit the City from enforcing park use rules and evicting Occupy Wall Street protesters from Zuccotti Park in New York City (as the order notes, the Park is a *privately*-owned, public access plaza that is open to the public continuously). The Zuccotti Park Rules document begins by noting that the Park is a "privately-owned space that is designed and intended for use and enjoyment by the general public for passive recreation." The Rules, among other things, prohibit tents or tarps; camping; lying down on benches; the storage or placement of personal property on walkways, benches, sitting areas, or otherwise so as to interfere with the use of the space by others; and the placement of tarps or sleeping bags or other covering on the property.

The protesters' documents filed in *Waller* argued that the "core expressive conduct involves a symbolic occupation of a traditional public forum. The messages being conveyed by the occupiers require a 24-hour occupation and tents, tarps, and the like. The around-the-clock OWS protest has come to symbolize the belief that people have the right to occupy public spaces in order to press the government to meet the needs of its people." The court in *Waller* assumed that the First Amendment applied to the park, but found that "the owner had the right to adopt reasonable rules that permit it to maintain a clean, safe publicly accessible space consonant with the responsibility it assumed to provide public access according to law." The applicants failed to demonstrate that these Rules (adopted *after* the demonstrations began) were not reasonable time, place and manner restrictions permitted by the First Amendment, and also failed to show that they (and their tents, generators, sleeping bags, and other belongings) had a right to remain in Zuccotti Park "to the exclusion of the owner's reasonable rights and duties" to maintain the park, or "to the rights of public access of others who might wish to use the space safely." The four-page court order is available online at http://info.publicintelligence.net/OWS-Eviction.pdf.

Similarly, Occupy protesters in Boston have moved for a TRO and preliminary injunction to prevent the City from taking steps to evict them from Dewey Square or taking any steps that would abridge their free speech rights. The City of Boston and police department indicated they had no plans to remove the protestors; therefore, there was no active case or controversy and the matter was not ripe for a declaration. The court allowed the motion in part: "the status quo could change at any moment, without notice" and there was no reason to believe that the occupation would be allowed to continue "into infinitude." The court found the plaintiffs had shown a likelihood of success on the merits regarding their First Amendment claim; that there was no irreparable harm to the defendants in maintaining the existing status for 10 days, and that the granting of a TRO would not adversely affect the public. The case is *Occupy Boston, et al. v. City of Boston, et al.*, CV 2011-01452-G (Suffolk Superior Ct.). For a copy of the Nov. 17, 2011 Order, see http://tinyurl.com/ce24vxh.

In a ruling in Toronto, Canada, *Batty v. City of Toronto*, 2011 ONSC 6862 (Ont. S.C. J. Nov. 21, 2011), the court upheld a trespass notice that had been issued by the City of Toronto to the Occupy encampment occupants on November 15. The camp had taken over a City-owned park, St. James Park, in violation of the Parks By-law. The notice stated the protesters were prohibited from engaging in the following activities in the Park and in any other City of Toronto park: installing, erecting or maintaining a tent, shelter or other structure; and, using, entering or gathering in the park between the hours of 12:01 a.m. and 5:30 a.m. The evidence before the court included affidavits from area residents and City staff that there had never been any demonstrations between 10:00 p.m. and 5:30 a.m. during the course of the occupation, or any speech-making or political or protest activity during those hours; that area residents and other users of the park witnessed vandalism, drug and alcohol use, experienced unprovoked verbal abuse and disruptive behavior, and that the constant loud noise and smells (human waste and smoke) were affecting nearby businesses and residences (that were not of the tent/yurt/tarp variety). The City noted damages to trees, the turf, and the irrigation system, and pointed to evidence of arrests at the site (including one for sexual assault).

The applicant-protesters sought, among other relief, a declaration that

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(*Editor's note*: The ruling is available online at http://www.canlii.org/en/on/onscdc/doc/2011/2011onsc5398/2011onsc5398.html.)

Called to the Bar in 1971, George Rust-D'Eye practises municipal and planning law, administrative law, and public law litigation. The former Metropolitan Solicitor for Metropolitan Toronto, Mr. Rust-D'Eye joined the firm of WeirFoulds LLP in 1989. He is co-author of Ontario Municipal Law: A User's Manual–2011 and Ontario's Municipal Conflict of Interest Act–A Handbook, and author of Handbook for Municipal Councillors. He has been designated by The Law Society of Upper Canada as a Certified Specialist in Municipal Law. He is co-Director and a Lecturer of the Part-Time Municipal Law LL.M. programme at Osgoode Hall Law School, York University. In June 2007, he was awarded the Ontario Bar Association's Award of Excellence in Municipal Law. ML

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they were constitutionally exempt from the application of the trespass legislation and Parks By-law, and contended that the trespass notice violated their rights under sections 2(a) through (d) of the *Canadian Charter of Rights and Freedoms* (their rights of freedom of conscience, expression, peaceful assembly, and association).

The judge rejected the City's argument that the protesters' act of camping out and, in effect, taking over a public park was not activity which engaged section 2 of the *Charter*, but concluded that the trespass notice was constitutionally valid and dismissed the application. Although enforcement of the trespass notice would infringe the applicants' section 2 fundamental freedoms, such an infringement could be justified under section 1 of the *Charter*. The City "has established that the limitations resulting from the enforcement of the Trespass Notice on the applicants' section 2 freedoms are 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'." "Although proclaiming a message of participatory democracy, the evidence, unfortunately, reveals that the Protesters did not practise what they were preaching when they decided to occupy the Park. Specifically, they did not ask those who live and work around the Park or those who use the Park—or their civic representatives—what they would think if the Park was turned into a tent city... The *Charter* does not permit the Protesters to take over public space without asking, exclude the rest of the public from enjoying their traditional use of that space, and then contend that they are under no obligation to leave. By taking that position and by occupying the Park the Protesters are breaking the law. Such civil disobedience attracts consequences...." For the 54-page ruling, see http://tinyurl.com/bpvsflt. ML

Second Look

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Schreiber v. Society for Sav. Bancorp, Inc., 11 F.3d 217, 220-21 (D.C. Cir. 1993); [*In re Subpoena Served Upon Comptroller of Currency, & Sec'y of Bd. of Governors of Federal Res. Sys. (Fleet Bank)*, 967 F.2d 630, 633-34 (D.C. Cir. 1992)].

Houston Bus. Journal, Inc. v. Office of Comptroller of Currency, U.S. Dept. of Treasury, 86 F.3d 1208, 1212 (D.C. Cir. 1996).

Treat the relator's attorney just as you would treat outside counsel retained by a plaintiff corporation. All discovery sought from the plaintiff is served on its attorney. Do not let the relator's attorney make you seek third-party discovery from federal agencies as if the United States were not a party. This discovery would include interrogatories, production requests, requests for admissions, and perhaps most importantly, Rule 30(b)(6) depositions of representative federal agency witnesses.

Object at depositions if a Department of Justice (DOJ) or agency attorney tries to defend or to ask questions — particularly if the DOJ objects after the outside lawyer has appeared as the attorney defending the deposition, or tries to ask questions after the relator's attorney has done so. The DOJ lawyer can observe but not participate. Seek a protective order if necessary. 31 U.S.C. § 3730(c)(4) gives the Government the right to copies of deposition transcripts when it has not intervened, but does not even give the DOJ the right to be present at, much less participate in, depositions.[4] Move to compel if the relator's counsel objects to discovery requests on the grounds that he or she lacks access to federal documents or witnesses.

Seek to hold relator's counsel to the unique ethical standards for government lawyers, making the lawyer subject simultaneously to the ethical duties of every jurisdiction where the lawyer "engages in that attorney's duties," in addition to the ethical duties imposed by local rules of the court where the case is pending. 28 U.S.C. § 530B(a) (the so-called McDade Amendment). These duties are sometimes conflicting. Will McDade apply to relator's attorneys? Yes, if the statute is applied literally. There are no cases. Think how McDade might apply to a relator's attorney whose offices are located in State X (and thus, works on your case there) while appearing as the attorney for the Government (as the attorney for different relators) in federal courts in a dozen other states.

Caveat: Will this approach induce the United States to reconsider its decision not to intervene? Will the judge allow a reconsideration of the non-intervention decision if not made for the purposes of settlement? Last, consider the state of your city's (and your office's) relations with your U.S. Attorney's Office when deciding to take the steps outlined here.

Notes

1. *See* Patient Protection and Affordable Care Act, Pub.L. 111–148, 124 Stat. 119, amending, among other things, 31 U.S.C. § 3730(e)(4)(A)(i)-(iii) (2010). "The major changes effected by the 2010 amendments to the FCA are to clarify that the public disclosure bar only applies if the 'criminal, civil, or administrative hearing' at which disclosure occurred was a federal proceeding and to make the bar applicable only if the United States government or its agent was a party to that hearing." U.S. v. Smith & Nephew, Inc., 749 F. Supp. 2d 773, 781 (W.D. Tenn. 2010).

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