UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Steve JANKOWSKI et al,

Plaintiffs,

v.

City of Duluth et al,

Defendants,

Civil No. 11-CV-3392 (MJD/LIB)

REPORT AND RECOMMENDATION

On November 18, 2011, Plaintiffs Steve Jankowski and Peter Scott brought this action pursuant to 42 U.S.C. §§ 1983 and 1988 against Defendants City of Duluth and Sergeant Jim Nilsson, a Police Officer for the City of Duluth, alleging violations of their First Amendment right to free expression and due process.[1]

The matter came before the undersigned United States Magistrate Judge upon Plaintiffs' Motion for Preliminary Injunction. The motion has been referred to the Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1. A hearing was held on December 12, 2011. For the reasons outlined below, the Court recommends that Plaintiffs' motion be granted.

I. BACKGROUND

Plaintiff Steve Jankowski (Jankowski) describes himself as an evangelical Christian who wishes to share his message about Jesus Christ with others in public. (Aff. of Steve Jankowski [Docket No. 8] ¶ 3). He is a minister and his message is that people need "to place their faith and trust in Jesus for salvation." (Id. ¶¶ 4-6). Although he shares his message with others in

[1] At the hearing, counsel for the City explained that she will be filing a separate answer for Officer Nilsson, but that Officer Nilsson has not responded to this motion because she believed "that the motion is not really directed toward him."

public, he maintains that he does not ask for money or gifts and does not ask anyone to join his ministry or any other organization. (Id. ¶ 7). He states that he makes a conscious effort "never [to] harass anyone, . . . block anyone . . . [and he is] always willing to step aside out of people's way while [he is] expressing his beliefs. (Id. ¶ 8-9). He reports that he has often engaged in Christian expression at Bayfront Festival Park (the Park), particularly when he "anticipates that people will be at the park." (Id. ¶ 18).

Plaintiff Peter Scott (Scott) describes himself as a professing Christian who participates in Jankowski's ministry and joins Jankowski in sharing his message to the public. (Aff. of Peter Scott [Docket No. 9] ¶¶ 3-4). Similar to Jankowski, Scott maintains that he does not ask for money, "sell any products or ask for signatures to any petitioners." (Id. ¶ 7). Because he is "commanded to love other people," when expressing his beliefs, he states that he does his best not to harass anyone or block anyone's path. (Id. ¶ 8).

Plaintiffs both wish to share their message at Bayfront Festival Park in Duluth, Minnesota during the 2011 Bentleyville Tour of Lights event held at the Park. Bayfront Festival Park is owned in part by the City of Duluth and in part by the Duluth Economic Development Authority. (Aff. of Timothy Howard [Docket No. 19] ¶ 1). Plaintiffs argue that the Park is "open and free for use by the general public." (Aff. of Steve Jankowski [Docket No. 8] ¶ 11). It includes areas open to the public, walkways and pathways, benches, tables, and public restrooms. (Id. ¶ 13). The numerous picture exhibits provided by Plaintiffs demonstrate that the Park has many open areas for the public to engage in different activities such as "picnicking, walking, jogging, . . . kite flying, throwing the Frisbee," among others. (Id. ¶ 16). Though there is some fencing in the park, it does not limit anyone's access into the Park and people may freely access it during the entire year. (Id. ¶ 17). Indeed, at the hearing, counsel for the City admitted that absent an event

at the Park, there are no fences or signage erected at the Park that prohibit any individual from entering and utilizing the Park amenities and spaces.

Bentleyville Tour of Lights ("the non-profit") is a Minnesota non-profit organization that presents a holiday lighting display, known as "Bentleyville," at Bayfront Festival Park. (Aff. of Nathan Bentley [Docket No. 22] ¶¶ 1-4). Originally, the lighting display began at the home of Nathan Bentley. (Id. ¶ 3). As the event grew in popularity, Mr. Bentley decided to form a non-profit and present the display for larger audiences. (Id.) The first such display at Bayfront Festival Park occurred in 2009. (Id. ¶ 4).[2] Subsequently, in March of 2010, the non-profit and the City entered into a written agreement that allows the non-profit to present its lighting display at Bayfront Festival Park each year through 2013. (Id.) The purpose of the non-profit is to "create a family-friendly, welcoming holiday event for the community." (Id. ¶ 7). During the event, people are invited to enjoy the many glimmering light displays, eat food and drink hot chocolate, roast marshmallows in one of the designated fire pits, or even take pictures with "Santa Claus." (Aff. of Steve Jankowski [Docket No. 8] ¶ 11). Because it believes that "allowing various groups or individuals to advocate whatever they want at the event does not contribute to the atmosphere the non-profit is seeking to create," the non-profit purports that it has established its own rules of conduct. (Aff. of Nathan Bentley [Docket No. 22] ¶ 7).[3] The rules, established by the non-profit's Board of Directors, prohibit "unauthorized retail or non-retail advertising, political campaigning, religious preaching or attempts to proselytize for converts." (Id.) The City argues that it does not participate in the ownership or management of

[2] It appears from the advertised history of the Bentleyville event that the 2009 move to Bayfront Festival Park came about due to a 2008 invitation from the Mayor of Duluth. (Aff. of Steve Jankowski [Docket No. 8] ¶ 19 (http://bentleyvilleusa.org/)).

[3] Here the Plaintiffs are seeking to express religious beliefs in the Park, and the Court would note that some of the light displays of Bentleyville themselves express various religious themes. (See,e.g., Docket No. 10, Ex. 5 at 2) (depicting a nativity scene).

the non-profit and has not been involved in establishing the rules. (Id. ¶ 7). However, as more fully discussed below, the City does still play a significant role in the management of the event.

The non-profit has been able to keep the event free to the public by "collecting donations and through the agreement with the City that allows the non-profit to lease [the Bayfront Festival Park] rent-free." (Id. ¶ 6). The agreement sets forth various responsibilities and obligations on the City as well as the non-profit. Under the agreement, "the City agrees to permit the [non-profit] the full utilization of the Bayfront Festival Park and Family Center including grounds and structures." (Ex. Mot. for Prelim. Inj. [Docket No. 10], Ex. 7 at 1). In 2010, the dates of permitted use included November 20 to December 26. (Id. at 2). In the years 2011 through 2013, the City permits the non-profit to use the park the "first Saturday after the Christmas City of the North Parade" until December 26, 2011. (Id.) Importantly, Article 4 of the Agreement explicitly states that "[t]he event shall be open to the public each day between the hours of 5:00 p.m. and 9:00 p.m." (Id.) Article 7 explicitly states that the non-profit "shall not charge an admission fee to the event." (Id. at 3). Article 7.6 states that the non-profit "shall **make available to the public** at no charge beverages and cookies." (Id.) Article 7.7 requires the non-profit to provide fire pits "each night the event is **open to the public**." (Id.) The only area of the park which the non-profit has been provided for its exclusive use, pursuant to the agreement, is Lot A, as identified on the park map. (Id. at 2).[4] The City is obligated to assist the non-profit with marketing and fund-raising (Section 8.6); the City is "responsible for all snow removal on all pathways and the parking lot" (Section 8.3); the City is obligated to provide cleaning services and public restrooms (Sections 8.1 and 8.2); the City has an obligation to help recruit volunteers for the event (Section 8.5); the City even permits the non-profit to use the "City owned holiday light displays" (Section 8.4); the City retains final decision making authority to resolve disputes

[4] This is a small parking area set aside for the use of Bentleyville volunteers only.

with other events (Section 7.13); the City is responsible for any electricity costs exceeding $5,000.00 (Section 5.3). (Id. at 2, 5). The City also specifically "retain[ed] sole final decision making authority to resolve any disputes that arise between [the non-profit] and said other events," anticipated for the Park area such as "the Warmer-by-the-Lake Community Festival, Memory Walk, and Ultra Run." (Id. at 4).

On November 27, 2010, Plaintiff, Peter Scott, and Michael Winandy (a friend of Scott's) decided to express their beliefs at Bentleyville. (Aff. of Peter Scott [Docket No. 9] ¶ 11).[5] Scott wore a sweatshirt that read "Fear God. Hate Sin. Trust Jesus" on the front and read "The Blood of Jesus Washes Away Sins" on the back." (Id. ¶ 13). Winandy wore a vest that read "Trust Jesus" on the front and back. (Id.) They also distributed literature and attempted to engage others in dialogue about their faith. (Id.) They did not use any machines to make their voices louder and believed that they were not disrupting any of the event activities. (Id. ¶ 15). For more than an hour and a half, they expressed their beliefs without disruption. (Id. ¶ 16). At approximately 8:50 p.m., Officer Jim Nilsson, a Police Officer for the City of Duluth, walked past Scott, at which point Scott attempted to talk to him about Jesus. (Id. ¶ 16). Uninterested, Officer Nilsson walked passed but remained nearby to watch Scott and Winandy continue to express their beliefs. (Id.) Several minutes later, Officer Nilsson approached Scott and Winandy and "ordered [them] to stop all [of their] expressive activities." (Id. ¶ 17). Scott responded that he was legally entitled to express his beliefs in that area, but because he feared arrest, he stopped his expressive activity and left the area. (Id. ¶ 18). After observing Officer Nilsson leave the Park, Scott and Winandy resumed their expressive activities. (Id. ¶¶ 20-21). Soon thereafter, officials from the non-profit approached Scott and Winandy. The officials "had little interest in

[5] The following facts are derived from Plaintiffs' affidavits, and for purposes of the motion for preliminary injunction, they have not been contradicted by any submission of the City.

hearing about Jesus' love," and engaged Scott and Winandy in a discussion of the First Amendment. (Id. ¶¶ 22-23). The discussion grew more heated and eventually the officials seized the camera that Winandy was using to tape the events. (Id. ¶ 25). Scott called the police, who shortly arrived and took control of the situation. (Id. ¶ 26-29). The officers did not tell Scott and Winandy that they had to leave but also never gave them "any type of assurance that [they] could return to the park during Tour of Lights and express [their] beliefs." (Id. ¶ 30). In light of Officer Nilsson's previous order, and the lack of assurance from the recent altercation, Scott concluded that he "would face arrest if [he] ever did try to express [his] beliefs in Bayfront Festival Park during Tour of Lights again." (Id.)

The next day, on November 28, 2010, Scott informed Plaintiff, Steve Jankowski, about the events that had transpired the previous evening. (Id. ¶ 31). Then, on November 29, 2010, M. Alison Lutterman, on behalf of the Office of the City Attorney, sent an email to Jankowski regarding Scott and Winandy's activities at Bentleyville. (Ex. Mot. for Prelim. Inj. [Docket No. 10], Ex. 6 at 1). Ms. Lutterman's email stated that Bentleyville "has a contract with the city that allows it exclusive rights to the use of the Bayfront area," which include "the right to exclude persons." (Id.) She further informed him that Bentleyville "is not an area intended for the exercise of 1st Amendment activity," and officials at Bentleyville had "been advised of [their] right to exclude persons from the area within its contractual exclusive use." (Id.) Finally, she advised Jankowski that "if Bentleyville personnel request that [he] leave and [he] refuse[d] to go, [his] refusal [would] constitute[] a trespass which is a misdemeanor under Minnesota law and may subject [him] to arrest." (Id.) However, Ms. Lutterman did inform him that he was free to conduct his activities on the city sidewalks. (Id.)

Subsequently, Jonathan Scruggs, an attorney from the Alliance Defense Fund, on behalf of Scott, sent a letter dated April 11, 2011, to the City's officials to demand that the City allow "Scott to enter Bayfront Park during the Tour of Lights event and peacefully distribute literature, display signs, and converse." (Ex. Mot. for Prelim. Inj. [Docket No. 10], Ex. 8 at 6). Ms. Lutterman's response letter of June 16, 2011, stated again that the City "has issued the non-profit a permit to present its holiday lighting display," and based on that permit, the non-profit "has the right to establish the rules of conduct for Bentleyville." (Ex. Mot. for Prelim. Inj. [Docket No. 10], Ex. 9 at 1). Ms. Lutterman's letter further stated that the City "lacks the legal authority to require the non-profit to allow Scott to engage in his desired activities." (Id.) Finally, Ms. Lutterman suggested that Mr. Scruggs contact Bentleyville's attorney to discuss the non-profit's rules of conduct. (Id. at 2). Mr. Scruggs responded on July 7, 2011, by clarifying his request from the City stating Plaintiffs "are not requesting the City of Duluth to force the private organization to do anything. We are asking for assurance that the City will not use its police officers to enforce the rules of this private organization." (Ex. Mot. for Prelim. Inj. [Docket No. 10], Ex. 10 at 1). Neither Scott nor Mr. Scruggs received a response to this last letter. (Mem. in Supp. of Mot. for Prelim. Inj. [Docket No. 7] at 6).

In light of these events, Plaintiffs argue that "Duluth has adopted and continues to enforce a First Amendment ban against Jankowski and Scott and any other speaker that Tour of Lights officials happen to find objectionable." (Id. at 7). Absent the City's actions "in enforcing this policy, Jankowski and Scott would return to Bayfront Festival park during the 2011 [Bentleyville] Tour of Lights event." (Id.)

II. DISCUSSION

Before proceeding to the merits of the preliminary injunction motion, the Court addresses the City's intertwined arguments that there is an absence of state action in this case and that the non-profit is a necessary, indispensable party to this action.

In a § 1983 action for deprivation of civil rights, the plaintiff must demonstrate state action. Parker v. Boyer, 93 F. 3d 445, 448 (8th Cir. 1996). "The injury complained of must have been caused by the exercise of some right or privilege created by the state, by a rule of conduct imposed by the state, or by a person for whom the state is responsible." Id. Such a requirement "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." Id. (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982)). In this case, the City has taken sufficient action in upholding the actions of the non-profit such that the injury complained of—Plaintiffs' inability to express their religious beliefs—has been caused, at a minimum, by the conduct of the City or someone for whom it is responsible. First, Officer Nilsson, a City of Duluth Police Officer, has already once ordered Plaintiff Scott to stop his expressive activity at the Bayfront Festival Park. Second, the City of Duluth, via a letter, has expressly affirmed that it will uphold and enforce any directive by the non-profit to remove Plaintiffs from the Bayfront Festival Park pursuant to the non-profit's self-developed rules of conduct. As Plaintiffs characterized the issue, "[the City] provides the muscle behind the [non-profit's] exclusion [of Plaintiffs]." (Mem. in Supp. of Mot. for Prelim. Inj. at 15).

In the November 29, 2010 email to Plaintiff Jankowski, the City stated that "Bentleyville is not an area intended for 1st Amendment activity." (Ex. Mot. for Prelim. Inj. [Docket No. 10], Ex. 6 at 1). Alleging that the non-profit had been given exclusive control of the Bayfront Festival Park, the City informed Plaintiff Jankowski that they also have the power to exclude people from the Park. (Id.) In a demonstration that the City fully intends to enforce the non-

profit's supposed exclusory power, the City stated "if Bentleyville personnel request that [he] leave and [he] refuse[d] to go, [his] refusal [would] constitute[] a trespass which is a misdemeanor under Minnesota law and may subject [him] to arrest." (Id.)

The state action of the City in this case is similar to the action of the city in Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 2005). In Parks, the Sixth Circuit held that state action existed for two reasons: 1) an officer of the city's police department ordered the speaker to leave the event; and 2) the city sent a letter to the speaker informing him that the city would enforce any attempt by the permit holder to remove the speaker. Parks, 395 F.3d at 652-53. Similar to the letter from the City in this case, the City's letter in Parks defended the actions of the permit holder and argued that the permit allows the permittee to use the street for its purpose and exclude whomever it chooses. Id. In finding that state action existed, and noting that the permit issued by the city was "non-exclusive and open to the public," the court explained that "the [c]ity and its agents supported the permitting scheme that ostensibly provided a permit-holder with unfettered discretion to exclude someone exercising his constitutionally protected rights from a public street." Id.

The City in this case makes essentially the same argument that the city in Parks unsuccessfully made. It argues that it has done nothing to restrict Plaintiffs' right to expression, but rather, it is the non-profit's rules that impede Plaintiffs' desire to express their beliefs. It argues that because the non-profit has exclusive use and control of the Bayfront Festival Park, the non-profit has the power to exclude any persons from the area. As such, it asserts, it is merely enforcing criminal statutes regulating conduct and trespassing. However, this argument presupposes that the non-profit in the present case has exclusive use and control of the Bayfront Festival Park. The facts of the present case do not support this conclusion on the record now

before the Court. Article 4 of the agreement between the City and the non-profit explicitly provides that "[t]he event shall be open to the public each day between the hours of 5:00 p.m. and 9:00 p.m." Article 7 of the agreement explicitly states that the non-profit "shall not charge an admission fee to the event." The only provision that grants the non-profit any exclusive use during the event is Article 6, which applies only to the small Parking Lot A. Under the agreement, the non-profit obtains only those property rights allocated by the City: the municipal owner of the property. The City appears to acknowledge that "the City [has not] given over control of the Bayfront venue to a non-governmental entity." (Mem. of the City of Duluth Opposing the Mot. at 16). The Court also notes that the City's own duties and obligations under the agreement with the non-profit further weigh against exclusive control of the Park by the non-profit: the City is obligated to assist the non-profit with marketing and fund-raising (Section 8.6); the City is "responsible for all snow removal on all pathways and the parking lot" (Section 8.3); the City is obligated to provide cleaning services and public restrooms (Sections 8.1 and 8.2); the City has an obligation to help recruit volunteers for the event (Section 8.5); the City even permits the non-profit to use the "City owned holiday light displays" (Section 8.4); the City retains final decision making authority to resolve disputes with other events (Section 7.13); the City is responsible for any electricity costs exceeding $5,000.00 (Section 5.3). Such involvement, in addition to the plain language of the contract requiring that the event be open to the public free of charge, is hardly indicative of the City's relinquishment of the property to the non-profit for its exclusive use and control. The record before the Court does not support a holding that the City has given the non-profit exclusive use and control of the Bayfront Festival Park. The park is not rented out "to a private party for a private event," as the City argues. To the contrary, the facts

establish that the non-profit is contractually obligated to maintain the property free and open to the public, and the City retains a significant level of control over, and involvement in, the event.

At the hearing, the City attempted to analogize the non-profit's power to exclude to that of a private store owner determining who may or may not engage in expressive conduct in the store. The City overlooks, however, the distinguishing feature of its analogy: a private store owner will not have a contractual obligation with the government that the store must remain open to the public. Although the City characterizes its actions as merely enforcing the non-profit's power to remove trespassers, the argument fails because the non-profit has no rights to be trespassed upon except as provided to them by the City in their agreement. Because the agreement requires on its face that the non-profit make the event available and open to the public, including each Plaintiff, free of charge, members of the public are not trespassing upon the property.[6] The Court notes that this conclusion is different from, and does not affect, the City's authority to enforce criminal conduct laws in the Park. As conceded by Plaintiffs at the hearing, were they to violate any such laws including, but not limited to, those regulating physical harassment and disorderly conduct, the City would be entirely within its authority to subject Plaintiffs, or any other members of the public, to appropriate sanctions. See Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Board, 721 F. Supp. 2d 866, 874 (D. Minn. 2010) (explaining, that although the court did not allow the event organizers to stop the expressive activity, it did not foreclose the ability to "restrict[] the exercise of First Amendment rights that may be disruptive or pose a threat to crowd safety."). Therefore, the City's actions in first ordering Scott to leave the event and then sending a letter affirming its

[6] The City conceded at the hearing that the agreement between it and the non-profit for the use of the Park is silent as to the non-profit having the ability or control over the Park to establish rules of conduct that could result in the exclusion of members of the public.

intent to enforce the non-profit's unbridled discretion to exclude Jankowski for speech related conduct constitutes sufficient state action.

Regarding the necessity of the non-profit to be a party to this suit, the City argues that the non-profit is a necessary party because Plaintiffs' seek relief from the non-profit's actions. They argue that the non-profit is necessary under Federal Rule of Civil Procedure 19(a)(1)(A) and 19(a)(1)(B). (Mem. of the City of Duluth Opposing the Mot. at 7-9).

Plaintiffs argue that they have no interest in including the non-profit as a party to this suit because the actions of the non-profit do not concern them. Plaintiffs assert that, under the agreement, the non-profit has no independent authority to regulate the admission or conduct of any members of the public who attend the event; it is only the threatened use of the City's police powers that is the subject of their motion for a preliminary injunction.

Rule 19(a)(1)(B) applies when the person sought to be joined "claims an interest relating to the subject of the action." Although the non-profit is aware of the pending case against the City—as the president of the non-profit, Nathan Bentley, has submitted an affidavit in the case—the non-profit has not claimed an interest. Therefore, Rule 19(a)(1)(B) is inapplicable. See American Ins. Co. v. St. Jude Med. Inc., 597 F. Supp. 2d 973, 978 (D. Minn. 2009) ("As an initial matter, the plain language of Rule 19(a)(1)(B) requires that a person not only have an interest related to the subject of the action, but that person must affirmatively 'claim[ ] an interest.'").

Similarly, Rule 19(a)(1)(A) also does not classify the non-profit as a necessary party. A party is necessary under Rule 19(a)(1)(A) only if "in that person's absence, the court cannot accord complete relief among existing parties." The relief Plaintiffs seek here is not an assurance that the non-profit will stop attempting to enforce its rules prohibiting Plaintiffs'

conduct. Rather, Plaintiffs seek to ensure that the City will not enforce the rules on behalf of the non-profit. In Saieg v. City of Dearborn, 720 F. Supp. 2d 817, 830 (E.D. Mich. 2010), overruled on other grounds by 641 F.3d 727 (6th Cir. 2011), the court rejected the same argument about indispensable parties as presented by the City in this case. Explaining that "[b]ecause Plaintiff seeks to enjoin [the police] from enforcing what is alleged to be an unconstitutional speech restriction," the court held that "the City and its Police Chief are the proper party defendants." Saieg, 720 F. Supp. at 830-31. Based on the prior actions and written statements of the City, as discussed above, Plaintiffs' concerns that the City will "act as the muscle for the non-profit" are not misplaced. The non-profit is not a necessary party in this case to afford complete relief as between the Plaintiffs and the City.

Having addressed who the necessary parties are in this suit, the Court proceeds to the merits of the motion. Whether a court will grant a preliminary injunction depends on four factors: 1) the threat of irreparable harm to the movant; 2) the state of the balance between this harm and the injury in granting the injunction will inflict on the other party; 3) the probability of the movant succeeding on the merits; and 4) the public interest. Phelps-Roper v. Nixon, 545 F.3d 685, 689-90 (8th Cir. 2008); Minneapolis Park and Recreation Board, 721 F. Supp. 2d at 870. The Court addresses each factor, however, the Court first discusses the likelihood of success on the merits, because "[i]n a First Amendment case, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." Nixon, 545 F.3d at 690.

1) Likelihood of Success on the Merits

Plaintiffs argue that the City's policy "restricts [protected] expression on public property." (Mem. in Supp. of Mot. for Prelim. Inj. [Docket No. 7] at 7-8). Whether the City

may prohibit Plaintiffs' activities turns on a three-element analysis: 1) whether the speech is "protected by the First Amendment"; 2) "the nature of the forum"; and 3) whether the government's "justifications for exclusion from the relevant forum satisfy the requisite standard." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985); Minneapolis Park and Recreation Board, 721 F. Supp. 2d at 873.

i) Whether Plaintiffs' speech is Protected by the First Amendment

Plaintiffs desire to "communicate their religious beliefs by speaking, engaging in one-on-one conversation, distributing literature, and displaying messages on signs and clothing." (Mem. in Supp. of Mot. for Prelim. Inj. at 8). The City has not argued, either in its brief or at the hearing, that Plaintiffs' desired expression is not protected speech. The Court concludes that Plaintiffs' activity is protected by the First Amendment. "Oral and written dissemination of . . . religious views and doctrines is protected by the First Amendment." Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981).

ii) The Nature of the Forum

The area where Plaintiffs desire to express their beliefs is known as Bayfront Festival Park. Plaintiffs argue that the area is a traditional public forum. (Mem. in Supp. of Mot. for Prelim. Inj. at 8). The City argues that the Park is not a traditional public forum because "the intent of the City was not to create a park that is traditionally viewed as a forum for speech activity." (Mem. of the City of Duluth Opposing the Mot. for Prelim. Inj. [Docket No. 18] at 19).

The Eighth Circuit has defined a traditional public forum as "a type of property that has the physical characteristics of a public thoroughfare, the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive

conduct, and historically and traditionally has been used for expressive conduct." Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006) (internal quotation marks omitted). "[P]ublic places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, **without more**, to be 'public forums.'" U.S. v. Grace, 461 U.S. 171, 177 (1983).

First, Bayfront Festival Park has all of the "physical characteristics of a public thoroughfare." Bayfront Festival Park is, as its name implies, a park. It is generally free and open to the public. Indeed, at the hearing, counsel for the City admitted that absent an event at the Park, there are no fences or signs at the Park that prohibit any individual from walking throughout it or utilizing the many amenities of the Park installed there clearly for the benefit of the public. The numerous picture exhibits provided in the record demonstrate that the Park has many open areas that the general public can use for various activities throughout the year. Its paths provide an opportunity for the public to walk and jog; its benches provide an opportunity for the public to rest and enjoy the scenery; its open areas provide an opportunity for the public to fly kites, play sports, or engage in other recreational activities. Naturally, the many open areas and paths also provide an opportunity for members of the public to communicate, assemble, and discuss public issues.

Second, the Bayfront Festival Park was created and constructed in such a way as to be consistent with a purpose of open public access. The City argues that the Park does not fall within the traditional public forum definition because the City never subjectively intended it to be used as such. Instead, the City intended to only create "a publically owned facility suitable for the presentation of festivals and concerts by private promoters." (Mem. of the City of Duluth Opposing the Mot. for Prelim. Inj. at 19). The City's argument is entirely unpersuasive. The

government's subjective intent is relevant only in considering the use and purpose for which a space was created and "is not otherwise relevant to a determination of whether a space is a traditional public forum." Bowman, 444 F.3d at 984 n.9 (Bye, J., concurring). In rejecting the notion that the government intent is the sole factor in determining the existence of a traditional public forum, the Ninth Circuit has noted such a notion would allow the government to create "any new public area, even a new street or park, . . . as a nonpublic forum as long as the government's intent to do so were memorialized in restrictive statutes or statements of purpose." Am. Civil Liberties Union v. City of Las Vegas, 333 F.3d 1092, 1105 (9th Cir. 2003).[7] Such a result, the Ninth Circuit explained, "would make a mockery of the protections of the First Amendment." Id. The Court accepts that one of the developmental purposes of the Park in the present case was to provide for an outdoor event area, but that intent alone does not take away from the fact that by the nature of its design, construction, and use, the Park is also effectively held open to the public as a park. Additionally, as was made clear by Bowman and Am. Civil Liberties Union, the government's intent cannot alone establish the nature of the forum. Furthermore, intent is not merely assumed as stated by the government—"the government's policy and past practice, as well as the nature of the property and its compatibility with expressive activity" must be taken into account. Bowman, 444 F.3d at 984 n.9 (quoting Paulsen v. Cnty of Nassau, 925 F.2d 65, 69 (2d Cir. 1991)). The City attempts to characterize the Park as no more than a venue for concerts and other private events. However, the Court cannot overlook that the City has in no way attempted to limit the access or use of the Park whenever events are not occurring there. The City also saw fit to include benches, paths, picnic tables, public restroom facilities, and open areas generally available for the public to use; again even when no

[7] The Court would note that the City in the present case has not provided any citation to any city ordinance or contemporaneous formal official statement of intent by the City made at the time it initially built Bayfront Park that it intended it to be at all times a nonpublic forum.

event was taking place. Even the plaque explaining the Park's history demonstrates the purpose of the Park: "In the early 1970s, sisters Caroline and Julia Marshall . . . purchased and gave a unique trace of waterfront land to the City '**for public use and enjoyment**.'" (Aff. of Steve Jankowski [Docket No. 8] ¶ 14).

Third, it is also well-established that parks, in general, have been seen as a public forum and have been used for expressive conduct. See Grace, 461 U.S. at 177; Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the tile of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). "Streets, sidewalks and parks are the quintessential traditional public fora." Bowman, 444 F.3d at 984 (Bye, J., concurring). That this Park has been used for private events in the past does not change its traditional character. Though the City was unable to provide the specifics for how many days out of the year the Park is used for private events, it acknowledged that events are certainly not held there "every day," and when events are not being held, the City further admitted that there are no indicators to the public that the Park is not a public space open to the use of the public as such. It strains credulity to suggest that in the times the Park is not being used by a private event, it remains desolate and empty to First Amendment expression. It hardly needs citation to acknowledge that areas of many public parks are often times rented out for private events such as weddings, picnics, family reunions, concerts, and yes, even holiday displays. That a city allows such private events to take place from time to time does not convert a park, where the public enjoys the benefits of the space freely, from a traditional public forum into something different. This park in the present case, as other public parks, has been

traditionally used as such, and therefore, this Court concludes Bayfront Festival Park is a traditional public forum.

This is not to say that a traditional public forum can never become a private space such that a private party may exercise discretion in allowing access and forbidding certain conduct. Plaintiffs acknowledged as much, at the hearing, that a traditional public forum may be converted into private property under certain circumstances. When the government grants exclusive use and control of a public property to a private party, the private party may exercise discretion in admitting individuals and regulating their conduct. See, e.g., United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 910-11 (4th Cir. 1995) ("If a party obtaining a permit to use public property for a specific event were constitutionally required to admit unconditionally everyone seeking admission, it would be virtually impossible to hold the event for which the permit was obtained."); Wickersham v. City of Columbia, 371 F. Supp. 2d 1061, 1064-65 (W.D. Mo. 2005) (When the government turns "over a city park to a private organization . . . [for a private event] . . . the private group merely has the use of public property and, therefore, could exclude whoever they wanted even though the event is occurring on public land and open to the public."). Citing United Auto Workers, Reinhart v. City of Brookings, Villegas v. Gilroy Garlic Festival Assocation, and Rundus v. City of Dallas, the City appears to acknowledge this premise. (Mem. of the City of Duluth Opposing the Motion at 18-19). It is important to note, however, that the relationship between the event organizer and the governmental entity in each of those cases was different from the facts of this present case. In the present case, the event is expressly required to be open and available to the public free of charge, which was generally not the circumstance in the cases cited by the City. See Rundus, 634 F.3d 309, 311-12 (5th Cir. 2011) ("[the event organizer] has primary control over the grounds, and it also decides who to admit

into Fair Park in the days immediately preceding and following the Fair. A ticket is required for admission to the Fair, and ticket prices are within [the organizer's] sole discretion. [The organizer] also enacts its own rules and regulations, including the restriction—which prohibits the distribution of literature without a booth rental."); Reinhart v. City of Brookings, 84 F.3d 1071, 1072-73 (8th Cir. 1996) (explaining that although the festival was free, "[i]t [was] undisputed that the festival committee had sole discretion to establish the rules concerning the operation of the festival"); United Auto Workers, 43 F.3d at 905 ("And the City plays no active role in planning or managing the festival. [The organizer] alone decides which individuals and organizations will participate in the Fish Camp Jam."); Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 954, 956 (explaining that people had to pay a fee to gain admission to the event and that the city had not relinquished control of the public areas). Plaintiffs acknowledged that if the City allowed the Tour of Lights to be a private event, such as the yearly Blues Festival which the City also regularly permits at the Park, where patrons must pay to enter, the event organizers could possibly restrict expressive conduct. Instead, the Plaintiffs argue that when an event remains free and open to the public, as required by the agreement in this present case, even if the event is held by a private entity, the party may not pick and choose, at its own liking (backed by the enforcing police power of the municipality), which members of the public it may admit or allow to engage in certain types of expression. The Court agrees.

Only last year, this Court held that when a governmental entity grants a private entity a **non-exclusive** permit to use a public park, the private entity may not restrict members of the public from exercising their First Amendment rights to distribute literature or display signage. Minneapolis Park and Recreation Board, 721 F. Supp. 2d at 875. As already discussed, the City's argument that the non-profit in the present case has exclusive use and control of the park

is not supported by the record before this Court. Thus, the City fails to effectively distinguish Minneapolis Park and Recreation Board.

If the non-profit in the present case indeed had been granted exclusive use and control of the Park, and the Tour of Lights event, then as Plaintiffs acknowledged, the circumstances of the case would be different. As contracting parties, the City and the non-profit were free to draft their contract to establish whatever relationship they desire and expressly provide for exclusive use and control of the Park for an event that was not free and mandated to be open to the entire public; however, the facts now before the Court present a different case. The City has leased a traditional public forum to the non-profit for an event, retained obligations to and involvement in the organizing and management of the event, and specifically required that the event be open to the public everyday free of charge.[8] Although the City here may have allowed a private entity use of the Park, because it required the non-profit to maintain the park as an area open to the public, the City has not converted the status of the park from a traditional public forum into a private space.

iii) Whether the government's justifications for exclusion from the relevant forum satisfy the requisite standard.

When the government seeks to restrict speech based on content within a traditional public forum, the restriction "must be necessary to serve a compelling government interest and be narrowly drawn to achieve that interest." Bowman, 444 F.3d at 975. When the restriction is not based on content, but merely "restricts the time, place, or manner in which the speech may be communicated," the restriction must be narrowly tailored to serve a significant government interest and leave[] open ample alternative channels of communication." Id. At the outset, the

[8] The Court need not address any hypothetical contractual relationships that may exist in the future between the parties.

Court notes that the City has not presented any interest justifications for why they seek to restrict Plaintiffs' expressive activities. Instead, they have focused their entire argument on the premise that they have done nothing to restrict Plaintiffs' speech—they continually argue that it is the non-profit who restricts the speech. However, as discussed already, the City has taken specific action to reaffirm that it intends to enforce the policy and rules made by the non-profit. The restriction that the City imposes is that the City is willing and able to enforce and silence Plaintiffs' expression for any reason that the non-profit requests. Such a restriction is often termed a "heckler's veto": it allows a private party to determine which expressive activities will not be tolerated and then the government enforces the decision of the private party. See Lewis v. Wilson, 253 F.3d 1077, 1082 (8th Cir. 2001) (rejecting the government's attempt to censor the speaker's activity because of the potential responses of its recipients and noting that "[t]he First Amendment knows no heckler's veto"); Frye v. Kansas City Mo. Police Dept., 375 F.3d 785, 793 (8th Cir. 2004) (Bye, J., dissenting) ("The prohibition of hecklers' vetoes is, in essence, the First Amendment protection against the government effectuating a complaining citizen's viewpoint discrimination."). "Listeners' reaction to speech is not a content-neutral basis for regulation." Forsyth Cnty v. Nationalist Movement, 505 U.S. 123, 134 (1992).

The restriction in this case is similar to the restriction in Parks. As already discussed, in Parks, "the [c]ity and its agents supported the permitting scheme that ostensibly provided a permit-holder with unfettered discretion to exclude someone exercising his constitutionally protected rights from a public street." 395 F.3d at 653. In Parks, the speaker was removed from the event, even though he was "acting in a peaceful manner and the only difference between him and the other patrons was that he wore a sign communicating a religious message and distributed religious leaflets." Id. at 653-54. The court held that it is "difficult to conceive [the removal]

was based on something other than the content of his speech." Id. at 654. Because, the city in Parks had not offered any interest, the court's analysis was rather brief and did not even reach the "second prong of [the] strict scrutiny analysis." Id.

Similarly, on the present record in this case, Scott was peacefully expressing his beliefs by engaging patrons in conversation, wearing religious statements on his clothing, and distributing literature. The City does not argue that Scott was harassing anyone or engaging in disruptive conduct. It has not provided any governmental interests "to explain why it prohibited [Plaintiff] from exercising his First Amendment rights in a traditional public forum."[9] Id.

Therefore, for all of the reasons above, the Court finds that Plaintiffs have established a likelihood of success on the merits.

2) The Threat of Irreparable Harm to the Movant

"It is well-settled law that a 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" Nixon, 545 F.3d at 690 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). Thus, in a First Amendment preliminary injunction motion, if the movants "can establish a sufficient likelihood of success on the merits of [their] First Amendment claim, [they] will also have established irreparable harm as the result of the deprivation." Id.

Nonetheless, the City argues that Plaintiffs will not suffer irreparable harm because "they are able to share their message on the public sidewalks at the entrances to Bentleyville." (Mem. of the City of Duluth Opposing the Motion for Prelim. Inj. at 19). The City, essentially argues that Plaintiffs have other places where they can exercise their First Amendment rights. However, the City has not provided a single case that holds a person will not suffer irreparable harm if they

[9] Additionally, the Court again notes that although the non-profit and the City have sought to exclude Plaintiffs' religious activities, certain religious messages are communicated through various displays at Bentleyville. (See, e.g., Docket No. 10, Ex. 5 at 2) (depicting a nativity scene).

are denied the opportunity to express their beliefs in a specific public forum location where they have a right to do so, merely because another area remains available somewhere else for the person to express their activity. Even the time, manner, place test requires that there be ample alternatives **and** that the government have a significant interest in prohibiting the expressive conduct at the speaker's preferred location. The test is conjunctive. Saieg, 641 F. 3d at 740.

Because the Court has already found that Plaintiffs are likely to succeed on the merits, it also finds that while Plaintiffs are prevented from expressing their activity at Bayfront Festival Park during the 2011 Bentleyville Tour of Lights, they will suffer irreparable harm.

3) The Balance of the Harms

The harm currently occurring to Plaintiffs is that they are prevented from exercising their First Amendment right to express their beliefs. Generally, "[t]he balance of equities [also] . . . favors the constitutionally protected freedom of expression." Nixon, 545 F.3d at 690.

The City argues that it if the injunction is granted it will suffer great harm because the City will be unable to assure any anticipated future promoters of private events in the Park that they can control the message and atmosphere of their events, which will reduce "[t]he ability of the City to rent the facility for [other private] events." (Mem. of the City of Duluth Opposing the Motion for Prelim. Inj. at 21). Specifically to Bentleyville, the City notes that "Nathan Bentley advised the Court that the non-profit's willingness to continue the event at Bayfront under the conditions demanded by Plaintiffs would be uncertain because the message and atmosphere the non-profit intends to create would be destroyed." (Id. at 21-22). Thus, the City argues, its ability to "recoup its investment of the public's money would be significantly harmed." (Id. at 21).

Such an argument, however, presupposes that the City will never be allowed to allocate exclusive use of the Bayfront Festival Park to a private entity.[10]

The Court is not convinced nor concerned that if it grants the preliminary injunction under the facts as limited to the present case that it would doom the Bayfront Festival Park to becoming an economically worthless property where no private entities will be willing to use its facilities for fear that anyone at any time may enter in order to exercise their First Amendment rights. As already explained, the Court believes that First Amendment jurisprudence does not establish so broad a rule that a private entity who has been extended exclusive use and control of a traditionally public forum for a limited time period cannot ever exclude or control the behavior of people at its own private event. Such a holding would indeed be contrary to common sense because "[e]very family that barbecues at a public park would theoretically be barred from excluding uninvited guests on constitutionally suspect grounds." United Auto Workers, 43 F.3d at 911. On the facts now before the Court, and based on the plain language of the current agreement between the non-profit and the City, the non-profit does not have exclusive control of the Park. Because the Court's holding in this case is clearly limited to the facts now before it, the Court's holding has no direct impact on the City's ability to contract with private entities for any future events, including any future Bentleyville events, and the potential harm to the City is not so dire as it argues.

Furthermore, the City's argument that a preliminary injunction will subject it to inconsistent legal obligations is unpersuasive. As already discussed, and conceded by Plaintiffs, the City remains at all times free to enforce its disorderly conduct or other criminal laws. However, to the extent that the City seeks to use its police power to enforce the alleged, and in

[10] As discussed previously and as acknowledged by Plaintiffs, such a presupposition is unfounded.

this present case unfounded, right of a private entity in the arbitrary exercise of its own discretion to exclude peaceful, expressive conduct based on a claim of unlawful trespass, this it cannot do.

4) The Public Interest

"[T]he determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights." Nixon, 545 F.3d at 690. Notwithstanding the diminished revenue arguments that the Court has already addressed, the City has made no arguments as to why the public interest would be served by not allowing Plaintiffs to continue peacefully expressing their religious beliefs. The Court finds that the public interest in allowing individuals to exercise their constitutional rights in a traditional public forum prevails in this case.

III. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED that Plaintiff's Motion for Preliminary Injunction [Docket No. 6] be **GRANTED**.

Dated: December 13, 2011

s/Leo I. Brisbois
LEO I. BRISBOIS
United States Magistrate Judge

N O T I C E

Pursuant to Local Rule 72.2(b), as amended by this Notice, any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties **by December 16, 2011**, a writing that specifically identifies the portions of the Report to which objections are made and the bases for each objection. Written submissions by any party shall comply with the applicable word limitations provided for in the Local Rules. Failure to comply

with this procedure may operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals. This Report and Recommendation does not constitute an order or judgment from the District Court, and it is therefore not directly appealable to the Court of Appeals.