UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Steve Jankowski and
Peter Scott,

Plaintiffs,

v.

City of Duluth and
Jim Nilsson, individually and
in his official capacity as Police
Officer for the City of Duluth,

Defendants.

MEMORANDUM OPINION
AND ORDER
Civil No. 11-3392

Mark W. Peterson, Mark W. Peterson Law Office, and Nathan W. Kellum and Jonathan Scruggs, Alliance Defense Fund, Counsel for Plaintiffs.

M. Alison Lutterman, Deputy City Attorney, and Steven Hanke, Assistant City Attorney, Counsel for Defendant City of Duluth.

This matter is before the Court for review of the Report and Recommendation of Magistrate Judge Leo I. Brisbois, recommending that the Court grant Plaintiffs' motion for preliminary injunctive relief. The City has filed an objection to the Report and Recommendation, asserting that a prerequisite to Plaintiffs' claim under 42 U.S.C. § 1983 is that the conduct rules established by

the Bentleyville Tour of Lights, Inc. ("non-profit") constitutes state action. For Plaintiffs to prevail, the City argues that Plaintiffs must demonstrate that the non-profit's act of promulgating such conduct rules could fairly be viewed as an act of the City. Based on the facts of this case, the City argues that Plaintiffs cannot meet this burden.

Pursuant to statute, the Court has conducted a de novo review of the record. 28 U.S.C. § 636(b)(1)(B); Local Rule 72.2(b). Based on that review, the Court will adopt the Report and Recommendation and enter appropriate injunctive relief.

Summary of Decision

Plaintiffs brought claims against the City of Duluth and one of its officers (the "City"), asserting the City violated their rights under the First Amendment at the Bentleyville Tour of Lights in 2010, and that the City has given Plaintiffs no assurance that they will be able to exercise their First Amendment rights at the Bentleyville Tour of Lights this year. Because the Court finds that the location of the Bentleyville Tour of Lights, the Bayfront Festival Park, is and remains a public park, and therefore a traditional public forum, despite the agreement between the City and the promoters of this event, Plaintiffs are entitled to engage

in expression protected by the First Amendment, absent a compelling or significant government interest that allows the City to infringe on such rights. At this time, the City has failed to set forth any government interest served by prohibiting Plaintiffs from exercising their First Amendment rights at the Bentleyville Tour of Lights. Plaintiffs are thus entitled to the injunctive relief requested as against the City.

I. Background

The Report and Recommendation sets forth a detailed recitation of the facts, and such facts are incorporated herein by reference. Briefly, the Plaintiffs assert that they wish to engage in religious expression on the grounds where the Bentleyville Tour of Lights takes place at the Bayfront Festival Park ("Park") located in the city of Duluth. On November 27, 2010, Plaintiff Peter Scott was engaged in such expression, which included the distribution of literature and engaging others in dialogue about his faith, when he was asked by Defendant Officer Nilsson to cease such activity on the basis that the Bentleyville Tour of Lights event was not an appropriate place for such expression. Scott did cease, and left the grounds, but returned when he observed Officer Nilsson leave. Upon his return, after again engaging in religious expressions, he was confronted by

officials of the non-profit. A heated discussion ensued concerning the First Amendment, ending when the officials seized the camera that Scott's friend was using, causing Scott to call the police. Upon their arrival, the police were able to control the situation. The police officers did not order Scott and his friend to leave, nor did they give him any assurances that he was free to return to continue his religious expression.

Plaintiff Steve Jankowski also wished to engage in religious expression on the grounds of the Bentleyville Tour of Lights, and had done so on two occasions prior to the Scott incident. On November 28, 2010, Jankowski received an email from the City Attorney's Office regarding the Scott incident. In the email, Jankowski was informed of the following:

> The Office of the City Attorney has been advised that you have been within the grounds of Bentleyville engaged in your educational activity. I have been asked to contact you regarding your activities.
>
> Bentleyville Tour of Lights, Inc., a private not for profit corporation, has a contract with the city that allows it exclusive rights to the use of the Bayfront area for its presentation of a holiday lighting display known as Bentleyville. These exclusive rights include the right to exclude persons. Bentleyville is not an area intended for the exercise of 1st Amendment activity. The management of Bentleyville have been advised of its right to exclude persons from the area within its contractual exclusive use.
>
> Please be advised that if Bentleyville personnel request that you leave and

> you refuse to go, your refusal constitutes a trespass which is a misdemeanor under Minnesota law and may subject you to arrest.
>
> You may engage in your educational activity on city sidewalks; however, you may not block the sidewalk, you may no conduct yourself in a loud and boisterous manner that constitutes disorderly conduct, you may not amplify your voice, you may not interfere with pedestrian or vehicle traffic. All of these action would violate either Minnesota law or Duluth city code.

(Ex. F [Doc. 10-6].)

In April 2011, Plaintiffs' counsel sent a letter to the City demanding that the City allow Plaintiffs to enter the Park during the Bentleyville Tour of Lights event in 2011 to peacefully distribute literature, display signs and converse. (Ex. H [Doc. 10-8].) In response, the City informed counsel that the City had concluded that the non-profit is not a state actor and that it therefore had the right to establish rules of conduct for the Bentleyville Tour of Lights. (Ex. I [Doc. No. 10-9].) "Consequently, Duluth lacks the legal authority to require the non-profit to allow Scott to engage in his desired activities." (Id.)

Plaintiffs' counsel again contacted the City, and clarified that Plaintiffs were not asking the City to force the non-profit 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. J [Doc. No. 10-10].) The City did not respond to

this request.

Plaintiffs thereafter brought this action, asserting claims under 42 U.S.C. § § 1983 and 1988, that the City "enforces the decisions of Bentleyville officials to silence and exclude speakers from Bayfront Festival Park for any reason whatsoever, including content-based and viewpoint-based reasons, which effectuated a First Amendment ban on [Plaintiff's] expression." (Complaint ¶ 73.)

Currently before the Court is Plaintiffs' motion for injunctive relief. By this motion, Plaintiffs are seeking an Order enjoining Defendants and all persons acting in concert or participation with them from applying a ban on Plaintiffs and other third party speakers from engaging in protected expression in Bayfront Festival Park during the 2011 Tour of Lights event and all other future Tour of Lights events. (Complaint, Prayer of Relief, ¶ C.)

II. Standard

The Eighth Circuit Court of Appeals has established the standard for considering preliminary injunctions. Dataphase Sys. Inc. v. CL Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc). This Court must consider (1) the threat of irreparable harm to the moving party if an injunction is not granted, (2) the harm

suffered by the moving party if injunctive relief is denied as compared to the effect on the non-moving party if the relief is granted, (3) the public interest, and (4) the probability that the moving party will succeed on the merits. Id.

A. Is the Non-Profit Necessary Party

The City initially argued that pursuant to Fed. R. Civ. P. 19, the non-profit is a necessary party that must be joined in this action. Rule 19 provides that absent persons must be joined if such person is necessary to the fair and complete adjudication of the claims at issue, and that the non-profit is a necessary party. A required party is one that "is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction" and must be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (I) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19 (a)(1).

The Magistrate determined that the non-profit was not a necessary party, and that this matter could proceed without joining the non-profit. In its response to the Report and Recommendation, the City did not object to the Magistrate's ruling concerning Rule 19. The Court will therefore adopt that portion of the Report and Recommendation without further discussion.

B. Likelihood of Success on the Merits

To be entitled to injunctive relief, Plaintiffs must demonstrate a likelihood of success on the merits of their claim alleging a violation of their First Amendment rights. As this is an action pursuant to § 1983, Plaintiffs must demonstrate state action. In addition, to be entitled to relief: 1) the Court must determine whether the expressive activity at issue is speech protected by the First Amendment; 2) if so, the Court must then "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic"; and 3) the Court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 797 (1985).

1. State Action

The City argues that Plaintiffs cannot show state action, because the asserted First Amendment ban is one promulgated by a private actor. The record demonstrates that the non-profit promulgated rules which prohibits persons visiting the Bentleyville Tour of Lights event from religious preaching or attempts to proselytize for converts. (Bentley Aff., ¶ 7.)

Plaintiffs are not challenging any action taken by the non-profit, conceding that the non-profit is not a state actor. Rather, Plaintiffs are challenging Officer Nilsson's conduct on November 27, 2010, when he asked Plaintiff Scott to leave, telling him that his religious expression was not appropriate at the Tour of Lights event. Plaintiffs are also challenging the City's failure to give Plaintiffs assurance that they will be able to exercise their First Amendment rights at the Tour of Lights event. As is clear from the email and letter sent to Plaintiffs by the Office of the City Attorney, the City has taken the position that the non-profit had exclusive use of the Park and could therefore exclude persons if it chose to do so. By taking this position, it appears that the City has adopted a policy which implicates their First Amendment rights.

In a case factually similar to this case, the Sixth Circuit held that the plaintiffs had alleged state action where plaintiffs challenged the acts of an off-

duty police officer that presented himself as a police officer and the city's policy of endorsing the permit holder's unfettered discretion "to determine what activities will be permitted at the event." Parks v. City of Columbus, 395 F.3d 643, 653 (6th Cir. 2005). This Court similarly finds that Plaintiffs have successfully alleged state action on the part of the City and its officers.

2. Protected Speech

The Plaintiffs assert that their dissemination of their religious message is protected speech under the First Amendment. The City has not challenged that assertion, and there is little question that the Plaintiffs' speech is so protected. See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981) ("[T]he oral and written dissemination of . . . religious views and doctrines is protected by the First Amendment.").

3. Nature of the Forum

The level of scrutiny applied to government regulation of protected speech depends on the nature of the forum in which the speech is regulated. There are three basic categories of fora: traditional public fora, designated public fora, and nonpublic fora. Bowman v. White, 444 F.3d 967, 974 (8th Cir. 2006). The parties here dispute whether the Bentleyville Tour of Lights at the Park should be

considered a traditional public forum. The Court therefore faces two related questions: First, it must determine whether the Park is a traditional public forum in general. If the Park is such a forum, the Court must then determine whether the agreement with the non-profit can and does change the nature of the Park while the non-profit occupies it.

Traditional public fora "are places which by long tradition or by government fiat have been devoted to assembly and debate." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). They have "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] historical[ly] and traditional[ly] [have] been used for expressive conduct." Bowman, 444 F.3d at 975.

The Plaintiffs contend that the Park is a traditional public forum as it is a public park, and parks are quintessential public forums. The City resists this characterization, arguing 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." Instead, the City argues that it intended only to create "a publically owned facility suitable for the presentation of festivals and concerts

by private promoters."

In deciding whether a particular piece of publicly owned property is a traditional public forum, the Court must determine whether the area manifests physical characteristics suggesting that it is "open for public passage," while also examining "the traditional use of the property, the objective use and purposes of the space, and the government intent and policy with respect to the property." Bowman, 444 F.3d at 977-978. Parks have long been considered traditional public fora because they, like public streets, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); see United States v. Grace, 461 U.S. 171, 177 (1983) ("'[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'."). Given the long-standing recognition of parks as paradigmatic traditional public fora, the City faces an uphill battle in its attempt to characterize the Park in a different light. The City argues that it is too simplistic to assume that because the Park is named a "park" it must be a traditional public forum. This may be correct, but other

facts belie the argument that the Park does not exhibit the characteristics necessary for it to be considered a traditional public forum.

To begin, the Park is generally free and open to the public. No gates keep the public from accessing the Park and visitors are free to move through and about the park without restriction. Moreover, amenities at the Park encourage this unrestricted public use; there are paved walkways and pathways, benches, tables, playgrounds, an ice skating rink, and other spaces where members of the public may gather and enjoy any number of activities. In short, the Park "has the physical characteristics of a public thoroughfare" and is "open for public passage." Bowman, 444 F.3d at 975, 977. Given the Park's many amenities, it is not surprising that it is used for public gatherings and activities—from picnicking to proselytizing. Thus, in addition to its physical characteristics, the Park's "objective use" is also "inherently compatible with expressive conduct." See id. at 975.

The Park's physical characteristics and uses are at odds with the City's contention that it intended for the Park to provide only "a publically owned facility suitable for the presentation of festivals and concerts by private promoters." All of the Park's amenities remain open to the public throughout the

year, even when private festivals and concerts do not occupy the Park. As the Plaintiffs have noted, a plaque at the Park itself commemorates the donation of the land on which the Park sits by "sisters Caroline and Julie Marshall . . . for public use and enjoyment." (See Jankowski Aff. ¶ 14. (emphasis added).) For these reasons, the Court is dubious that the City's intention was to create something other than a public park.

Even if the Court were persuaded that the City's intent was to create something other than a park for public use and enjoyment, "the government['s] intent and policy with respect to the property" is only one non-dispositive factor used to determine whether the area is a traditional public forum. Bowman, 444 F.3d at 978 n.6. If governmental intentions were the controlling factor in this analysis, "any new public area, even a new street or park, could be created 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). "This result would make a mockery of the protections of the First Amendment." Id.

In sum, the factors set out in Bowman point to the conclusion that the Park is a traditional public forum. The Park displays all the telltale physical

characteristics of a public gathering place; its objective use and purpose are compatible with expressive activities; and, while the City disagrees, the evidence developed thus far indicates that the City itself intended to create a public park, open for the public to gather and enjoy. For these reasons, the Park is a traditional public forum.

The parties dispute whether a traditional public forum may lose its public character when it is rented or otherwise occupied by private entities. The Plaintiffs contend that a traditional public forum simply cannot be altered. While the City argues that the Park is not a traditional public forum, implied in its argument is an assertion that, at the very least, the Park is not a traditional public forum when it plays host to a private organization's event, such as the Bentleyville Tour of Lights.

The law in this area is not as clear as either party asserts. The cases cited by the City for the proposition that leasing the Park to the non-profit renders it private are inapposite because they do not resolve whether and under what circumstances a traditional public forum may lose its public character. See Rundus v. City of Dallas, 634 F.3d 309, 315 (5th Cir. 2011); Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 956-57 (9th Cir. 2008) (en banc); Reinhart v.

City of Brookings, 84 F.3d 1071, 1073-74 (8th Cir. 1996); United Auto Workers v. Gaston Festivals, 43 F.3d 902, 911 (4th Cir. 1994). None of the courts in those cases had occasion to reach this issue because, in each case, the Court concluded that the challenged activity did not constitute state action. This ended the inquiry before any analysis of the nature of the forum could be undertaken.

The Supreme Court has indicated that a municipality may not "destroy the 'public forum' status of streets and parks which have historically been public forums." U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 133 (1981). The Plaintiffs contend that this means that the Park must always, under all circumstances, be considered a traditional public forum. Yet, logic dictates that there must be temporary exceptions when private actors lease all or of part public park for their private use. A family that rents an area at a park for a private wedding cannot be expected to accommodate the speech of unwelcome and uninvited guests without recourse. This is not inconsistent with the Supreme Court's statement in Council of Greenburgh; to say that a forum may temporarily lose its traditional public forum status through rental by a private party is not say that such status is forever destroyed.

The courts that have addressed this issue directly have concluded that, while traditional public fora may lose their public character under some circumstances, they do not do so when a private actor assumes non-exclusive control of an area to hold an event to which the public has free and open access. See Parks, 395 F.3d 643, 652 (6th Cir. 2005); accord Startzell v. City of Philadelphia, 533 F.3d at 197; Dietrich v. John Ascuaga's Nugget, 548 F.3d 892, 899 (9th Cir. 2008). The takeaway from these cases is that a municipality "cannot . . . claim that one's constitutionally protected rights disappear [where] a private party is hosting an event that remain[s] free and open to the public." Parks, 395 F.3d at 652.

It is important to note that the Parks rule does not extend to situations where a private entity holds an event that is not free and open to the public. Families renting public parks for weddings and groups organizing music festivals which charge admission remain free to exclude unwanted speech or speakers. Of course, in such situations, it is also less likely that an inquiry will uncover the requisite state action. See, e.g., Villegas, 541 F.3d at 956.

This Court recently followed the Parks line of cases in Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park & Recreation Bd.,

721 F. Supp. 2d 866, 873 (D. Minn. 2010). There, the Plaintiff ("Twin Cities Pride") was a group that organizes an annual gay pride festival ("Pride Festival") in a Minneapolis park. To use the park, Twin Cities Pride obtained a permit which "did not grant [Twin Cities Pride] exclusive control of [the] Park." Id. at 868. The defendant was an evangelical Christian who sought to "express[] his religious beliefs by engaging in conversation and distributing Bibles" at the festival. Id. at 869. Noting that the festival was free and open to the public and that the city had not ceded exclusive control of the park to Twin Cities Pride, the Court followed Parks and concluded that neither Twin Cities Pride nor the police could bar the defendant "from distributing literature, wearing signage conveying his message, and taking surveys on the Pride Festival grounds in [the] Park" without violating his First Amendment rights. Id. at 873.

The facts at issue here are very similar to those in Minneapolis Park & Recreation Bd. The City did not grant the non-profit authority to exclude anyone from the Park. On the contrary, the agreement between the City and the non-profit expressly required the non-profit to keep the park free and open to members of the public. This important fact distinguishes this case from other

situations where private actors might have a right to exclude members of the public from their events.

For the foregoing reasons, the Court concludes that the Park remains a traditional public forum even when occupied by the non-profit for the Bentleyville Tour of Lights.

4. Application of the Appropriate Level of Scrutiny

In a traditional public forum, content based regulations of speech are subject to strict scrutiny and must therefore be "necessary to serve a compelling government interest and be narrowly drawn to achieve that interest." Bowman v. White, 444 F.3d at 975. Content neutral regulations of the time, place, and manner of speech are subject to intermediate scrutiny and must be "narrowly tailored to serve a significant government interest and leave[] open ample alternative channels of communication." Id.

To determine whether a speech regulation is content based or content neutral the Court must consider if "the message conveyed determines whether the speech is subject to the restriction." Neighborhood Enter., Inc. v. City of St. Louis, 644 F.3d 728, 736 (8th Cir. 2011). The scope of the City's regulation of speech is unclear—it appears to be ready to arrest anyone who engages in First

Amendment speech in contravention of the non-profits' code of conduct. Such a comprehensive bar on First Amendment speech appears to be content neutral. On the other hand, the Bentleyville policy "prohibit[s] unauthorized retail or non-retail advertising, political campaigning, religious preaching or attempts to proselytize for converts." (Bentley Aff., ¶ 7.) This policy is clearly content based because an analysis of the "message conveyed" is necessary in order to determine whether particular speech is prohibited. See Neighborhood Enter., Inc., 644 F.3d at 736.

The Plaintiffs argue that the prohibition against their speech amounts to a prohibited, content based, "heckler's veto." "The prohibition of hecklers' vetoes is, in essence, the First Amendment protection against government effectuating a complaining citizen's viewpoint discrimination." Frye v. Kansas City Mo. Police Dept., 375 F.3d 785, 793 (8th Cir. 2004) (Bye, J., dissenting). In this case, the Plaintiffs are therefore arguing that the City's threat to arrest them is simply the City's "effectuat[ion of the non-profit's] viewpoint discrimination." Id.

At this stage of the litigation, the Court concludes that it does not need to decide the merits of Plaintiffs' heckler's veto argument or determine whether the City's enforcement of the non-profit's ban on expressive activities is content

neutral or content based. The City has failed to set forth any interest which is served by enforcing the ban.

Even if the Court were to presume that the non-profit's declared interest in providing a "family-friendly, welcoming" environment were shared by the City, that interest would not pass muster even under the more lenient intermediate scrutiny applied to content-neutral speech regulations. See, e.g., Phelps-Roper v. Nixon, 545 F3d 685, 692 (2008) (applying intermediate scrutiny and finding no significant state interest in protecting the dignity and privacy of funeral attendees from offensive picketing). If the governmental efforts to protect funeral attendees from inflammatory picketers cannot survive intermediate scrutiny, it is unlikely that the City could justify restricting the Plaintiffs' activities, which by all accounts, are peaceful and respectful.

For these reasons, the Court concludes that Plaintiffs' have demonstrated a likelihood of success on the merits of their claim that the City's actions violate the Plaintiffs' First Amendment rights to spread their religious message in the Park during the Bentleyville Tour of Lights.

C. Irreparable Harm

Plaintiffs assert they will suffer irreparable harm if their First Amendment

rights are violated. The law is well-settled that a loss of First Amendment freedoms, no matter for how long, constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976). Because the Court finds that Plaintiffs have demonstrated a likelihood of success on the merits of their First Amendment claim, Plaintiffs have also established irreparable harm. Phelps-Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008).

D. Balance of Harms

"The balance of equities, [] generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." Nixon, 545 at 690. This factor thus weighs in favor of the requested injunctive relief.

E. 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." Id. (citations omitted). Accordingly, this factor weighs in favor of the requested injunctive relief.

IT IS HEREBY ORDERED that Plaintiffs' Motion for Preliminary Injunctive Relief [Doc. No. 6] is **GRANTED** as follows:

> Defendants are hereby enjoined from interfering with or prohibiting Plaintiffs and other third party speakers from engaging in protected expression, in the form of peaceful distribution of literature, display of signs and engaging in dialogue, in Bayfront Festival Park during the 2011 Tour of Lights event and all other future Tour of Lights events that are governed by the Bentleyville Tour of Lights Agreement 2010-2013, or until further Order of this Court.
>
> The bond provisions of Rule 65(c) of the Federal Rules of Civil Procedure are hereby waived, and this preliminary injunction shall issue immediately.

Date: December 20, 2011

s/Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court