

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF NORTH CAROLINA
 CHARLOTTE DIVISION
Case No.: 3:07-CV-395

PHILIP BENHAM, as an individual)
 and as a representative of)
 OPERATION SAVE AMERICA, INC.;)
 SHERYL CHANDLER, as an individual)
 and as a representative of)
 OPERATION SAVE AMERICA, INC.;)
 OPERATION SAVE AMERICA, INC.,)
 a non-profit corporation,)
)
 Plaintiffs,)
)
 vs.)
)
 CITY OF CHARLOTTE,)
 a political subdivision of the state of)
 North Carolina; EMILY WESTBROOK,)
 in her individual capacity;)
 KEITH PARKER, in his individual capacity,)
)
 Defendants.)
 _____)

**PLAINTIFFS’ MEMORANDUM IN
 OPPOSITION TO DEFENDANTS’
 MOTION FOR SUMMARY
 JUDGMENT**

STATEMENT OF THE NATURE OF THE MATTER/CASE

On July 31, 2008, Defendants filed a Motion for Summary Judgment (Doc. # 22) and supporting Memorandum of Law (Doc. # 24) (hereinafter “Def. memo, pg. ___”).

Defendants’ admirably discuss the facial challenge (with a few errors in bringing forth the proper legal standard), but then gloss over the as applied challenge so central to this controversy. When counsel conferred during depositions the week before, on May 28, 2008, counsel’s discourse made clear the Court was more interested in hearing the parties’ positions on the as applied challenge. This Court stated in its Order on Preliminary Injunction, “This Order is

limited to resolving the instant motions and is not intended to forecast the Court's ultimate view of the merits of this case." Doc. # 15, pg. 13. This Court explained, "The record before the Court lacks meaningful detail about the events, so it is not possible to determine whether there has been a pattern of discriminatory enforcement of the ordinance." Doc. # 15, pg. 10. Although this Court and counsel know the as applied challenge is the focus of this controversy, Defendants dedicate only two (2) pages out of twenty-five (25) to the as applied controversy along with a cursory review of the Equal Protection Clause. Without waving Old Glory too briskly, our freedoms – those contained in the Bill of Rights – are still the blueprint to manage a government's anxiety.

It is well settled that as applied challenges are the most troublesome – for Courts and for citizens. As applied challenges are too easily explained away by local governments after the fact. This is why the record is so very critical in as applied cases.

INTRODUCTION

The City's internal disagreement over the proper interpretation of the public assembly ordinance explains the reason for the denial of Plaintiffs' permit application. The facts reveal that the officials responsible for interpreting the ordinance do not agree. Ms. Westbrook takes one position on the ordinance – the interpretation applied in this case. However, both the Assistant City Manager – Mr. Keith Parker – and the official who trained Ms. Westbrook – Mr. Brad Richardson – take an entirely different position on interpreting the same ordinance. Even Ms. Westbrook's attorney stipulated that Ms. Westbrook's interpretation was not correct. The facts reveal Ms. Westbrook made a fatal mistake and failed to properly understand the ordinance. Mr. Parker, Mr. Richardson and the City's attorney have now abandoned Ms. Westbrook's

interpretation of the ordinance and stated that a public assembly “demonstration” permit should be granted under the ordinance.

In addition – and entirely distinct from the above free speech claims – is the additional violation of equal protection and procedural due process.¹ This harm is amplified by the *ad hoc* granting of public assembly “festival” permits for events which are obviously for or against a person or cause. As the facts reveal, Ms. Westbrook regularly grants public assembly “festival” permits for events that are clearly “demonstrations” – at least according to her interpretation. Ms. Westbrook testified that the first step is always to decide whether or not the event is a “festival” or a “demonstration.” If Ms. Westbrook was applying the ordinance even handedly, many “festival” permits she has granted should have been “demonstrations” because the events were clearly “for or against a person or cause.” It is obvious Ms. Westbrook does not consistently apply the ordinance.

ARGUMENT

STATEMENT OF DISPUTED MATERIAL FACTS

A. Ms. Westbrook’s Interpretation Conflicts with the Ordinance.

Plaintiffs filed a “Public Assembly” permit application. Exhibit 13. The crucial first decision is whether Ms. Westbrook decides the event is a “festival” or a “demonstration.” Exhibit 2, Westbrook deposition (Vol. II) taken April 30, 2008, pg. 8, lines 16 - 25. If Ms. Westbrook decides the event is a “festival,” she works with the event organizer to grant a public assembly “festival” permit. However, if Ms. Westbrook decides the event is a “demonstration,” she automatically denies the permit application – at least some of the time. Ms. Westbrook

¹ As discussed more fully below, this is one of the errors in Defendants’ memo – Defendants incorrectly argue substantive due process rather than procedural due process.

explained that if she decides the event is a “demonstration,” she informs the event organizer that the ordinance does not allow her to issue a public assembly “demonstration” permit. Exhibit 14. Rather, she explains the event organizer must follow the regulations under the “picketing ordinance” rather than the public assembly ordinance.

Ms. Westbrook’s interpretation was applied in this case to deny Plaintiffs’ permit application. In her letter dated December 20, 2006, Ms. Westbrook denied Plaintiffs’ application stating that “the nature of your event is a ‘demonstration’ and not a ‘festival’ within the meaning of the City’s Public Assembly and Parades Ordinance. While the Public Assembly Ordinance provides for permitting of ‘festivals’ at Independence Square Plaza, it does not contemplate permitting ‘demonstrations’ at that location. Instead ‘demonstrations’ at Independence Square Plaza are covered by the City’s Picketing Ordinance.” Exhibit 14.

Mr. Parker has divorced himself from Ms. Westbrook’s interpretation. After reading the ordinance more closely, Mr. Parker reversed his prior written opinion and testified his previous written opinion upholding Ms. Westbrook’s denial letter wrongly interpreted the ordinance. On January 10, 2007, Mr. Parker issued his written opinion upholding Ms. Westbrook’s denial by stating: “The Roe v. Wade Memorial would constitute a public demonstration or sentiment for or against a cause (i.e. the subject of abortion) and is, therefore, a ‘demonstration’ within the meaning of the Public Assembly Ordinance and a ‘picket’ within the meaning of the Picketing Ordinance.” Exhibit 15, pg. 3.

During the course of his deposition, Mr. Parker reversed himself and admitted he had failed to properly interpret the ordinance. Early in his deposition, Mr. Parker testified:

Q. If you classify it as a demonstration, it’s not capable of being regulated under the public assembly ordinance. Is that what you concluded?

- A. Let me go back and look through. (Witness reviews document.) That is correct.
- Q. And that's your understanding of how the city code operates, and that's how you made your decision in this case, that once you reached the conclusion that it was a demonstration -- that is, being for or against a person or cause -- it's not capable of being permitted or regulated by the public assembly ordinance?
- A. That's correct.

Exhibit 3, Parker deposition taken April 29, 2008, pg. 25, lines 10 - 22.

During his deposition, Mr. Parker changed his opinion and testified he failed to properly interpret the ordinance.

- Q. Is it not true that [Plaintiffs'] event could have been granted a public assembly permit even though it's a demonstration?
- A. I'm going to say yes.

Exhibit 3, Parker deposition taken April 29, 2008, pg. 37, line 24 - pg. 38, line 2.

Later in his deposition, after more closely reading the ordinance, Mr. Parker also admitted that conclusion number 2 of his written opinion was incorrect and the ordinance was capable of permitting a public assembly "demonstration" – even at Independence Square, testifying:

- Q. So my last question, then, you do agree, then, with me that a demonstration is capable of being permitted under the public assembly ordinance even at Independence Square?
- A. Yes.

Exhibit 3, Parker deposition taken April 29, 2008, pg. 44, lines 1 - 5.

Even Ms. Westbrook's attorney – the City attorney – reversed himself and disagreed with Ms. Westbrook's interpretation of the ordinance. In the City's Opposition to Plaintiffs' Motion for Preliminary Injunction, the City's attorney argued:

A careful reading of the Article XI definitions reveals that "demonstrations" on City-controlled plazas and parks fall outside the definition of "public assembly" and are, therefore, not regulated by Article XI. Instead, demonstrations at these locations are properly treated as "pickets" under Article X.

Doc. # 10, Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 5.

However, the City's attorney has now stipulated to the exact opposite interpretation of the ordinance. During Mr. Parker's deposition, the City's attorney stipulated that a public assembly "demonstration" permit could be granted under the public assembly ordinance.

Q. I'm just trying to find out whether or not a demonstration is capable of being regulated under the public assembly ordinance. It's in black and white right in front of you. I'm just asking whether you want to --

MR. HAGEMANN: We'll stipulate that it is.

Exhibit 3, Parker deposition taken April 29, 2008, pg. 34, lines 2 - 7.

The facts clearly reveal Ms. Westbrook wrongly interpreted the public assembly ordinance when she decided she could not grant Plaintiffs' public assembly permit.²

B. Ms. Westbrook Grants Public Assembly "Demonstration" Permits, Despite Denying Plaintiffs' Application under the Guise She Could Not Permit "Demonstrations."

1. Ms. Westbrook admits she grants public assembly "demonstration" permits.

Contrary to her own interpretation of the ordinance, Ms. Westbrook grants public assembly "demonstration" permits. Ms. Westbrook admitted she granted a public assembly "demonstration" permit to the Mec Dec event in exactly the same location, at exactly the same time of day, that she claimed she could not grant Plaintiffs' permit – at Independence Square.

Q. So you're saying that you have granted public assembly permits for demonstrations in the past?

A. I can think of one.

Q. Which is what?

² The official who trained Ms. Westbrook for her duties, Mr. Brad Richardson, also testified that Ms. Westbrook incorrectly interpreted the ordinance in her denial letter. Exhibit 5, Richardson deposition (Vol. II) taken May 1, 2008, pg. 16, lines 13 - 21. Mr. Richardson also testified that conclusion 2 incorrectly interpreted the ordinance. Exhibit 5, Richardson deposition (Vol. II) taken May 1, 2008, pg. 17, line 24 - pg. 18, line 21.

A. We permitted the Mec Dec Day. They're a newer event, so the first year they applied for street closures. They had a festival component to their event, the jollification that we talked about yesterday. They closed the streets, they set up food vendors, they set up beverage vendors. They had a festival after the observance.

Exhibit 2, Westbrook deposition (Vol. II) taken April 30, 2008, pg. 24, lines 15 - 25.

Mr. Krumbine testified the event was held as planned without any interference. Exhibit 6, Robert Krumbine deposition taken July 28, 2008, pg. 7 - 17. Ms. Westbrook granted the Mec Dec public assembly "demonstration" permit for an event held at Independence Square – the exact same location, and at the exact same time of the day, that Plaintiffs' permit application requested, but which Ms. Westbrook denied.

2. Ms. Westbrook admits she grants public assembly "festival" permits that are really "demonstrations" as defined under the ordinance.

a. American Red Cross.

The American Red Cross permit application "Brief Description of Event" states, "The event is designed to promote the 90th Anniversary and generate publicity to further the mission of connecting stronger to the community." Exhibit 16, (attached as Exhibit 2 to Krumbine deposition taken July 28, 2008). Ms. Westbrook granted a public assembly "festival" permit to the American Red Cross, despite the event clearly being "for or against a person or cause." Exhibit 17, (attached as Exhibit 3 to Krumbine deposition taken July 28, 2008).

Like the Mec Dec event, Mr. Robert Krumbine submitted the permit application for the American Red Cross. Exhibit 6, Robert Krumbine deposition taken July 28, 2008, pg. 26, lines 17 - 21. Mr. Krumbine testified the event was held as planned without any interference. Exhibit 6, Robert Krumbine deposition taken July 28, 2008, pg. 17 - 40. The American Red Cross permit application is almost identical to the Plaintiffs' permit application. Like the Mec Dec

event, the event was held in exactly the same location where Ms. Westbrook claimed she could not grant a public assembly permit to the Plaintiffs – at Independence Square. Like the Mec Dec event, the event was held at the exact same time of the day that Plaintiffs’ permit application requested, but which Ms. Westbrook denied.

b. Charlotte Criterium.

The Charlotte Criterium permit application “Brief Description of Event” states, “Professional cycling event in it’s 4th year, to raise money for Brain Tumor Fund for the Carolinas.” Exhibit 18, (attached as Exhibit 1 to Kimberly Henderson deposition taken July 21, 2008). Ms. Kimberly Henderson testified the purpose of the event was to raise money for the Brain Tumor Fund for the Carolinas.

Q. Why do you have the event? Why does Presbyterian Hospital sponsor the event? What's the purpose of it?

A. Because the proceeds go to benefit brain tumor research.

Q. For the organization that's called the Brain Tumor Fund for the Carolinas?

A. Correct.

Exhibit 8, Kimberly Henderson deposition taken July 21, 2008, pg. 13, lines 4 - 11.

Ms. Westbrook granted a public assembly “festival” permit to the Charlotte Criterium, despite the event clearly being “for or against a person or cause.” Exhibit 19, (attached as Exhibit 2 to Kimberly Henderson deposition taken July 21, 2008). The Charlotte Criterium event was located in exactly the same location where Ms. Westbrook claimed she could not grant a public assembly permit to the Plaintiffs.

c. Outreach and Evangelism Explosion.

The permit application “Brief Description of Event” states, “A community outreach effort hosted by University Park Baptist Church to minister to residents of the University Park & Druid

Hills Communities both physically and spiritually (gospel music, sermon, ministry to participants, cookout – bags of food and clothing will be given to participants to take with them). The event will take place on the property of the church as well the parking lot across the street from the church.” Exhibit 20, (attached as Exhibit 1 to Nina Wright deposition taken July 28, 2008). Ms. Westbrook granted a public assembly “festival” permit to the University Park Baptist Church, despite the event clearly being “for or against a person or cause.” Exhibit 21, (attached as Exhibit 3 to Nina Wright deposition taken July 28, 2008).

Ms. Wright testified the event was evangelistic, including sermons and distribution of Bibles to the general public:

The sermonette or the short sermon, if you will, at the end of that, the invitation to salvation is given. Those who choose to come forward to hear more, learn more, or to accept Christ are given the opportunity to have some one-on-one counseling in a private area in the facility, and if they accept Christ at that point or would like more information because they’re not ready to accept Christ, then they’re provided that information and offered the Bible.

Exhibit 7, Nina Wright deposition taken July 28, 2008, pg. 24, line 23 - pg. 25, line 7.

The Outreach and Evangelism Explosion permit application is almost identical to the Plaintiffs’ permit application.³

d. United Family Services Victim Assistance & Rape Crisis.

The United Family Services Victim Assistance & Rape Crisis permit application “Brief Description of Event” states, “United Family Services Victim Assistance & Rape Crisis Survivors Fest’s goal is to increase public awareness of various healing resources and techniques and is a celebration of all who have survived a crime. There will be interactive activities for

³ Ms. Westbrook classified the event as a “festival” and issued a permit for a “festival” despite the event taking place on the church’s property.

children and adults, and information distributed regarding resources available to victims.”

Exhibit 22, (attached as Exhibit 1 to Mary Russ deposition taken July 28, 2008). Mr. Richardson granted a public assembly “festival” permit to the United Family Services Victim Assistance & Rape Crisis, despite the event clearly being “for or against a person or cause.” Exhibit 23, (attached as Exhibit 2 to Mary Russ deposition taken July 28, 2008). Ms. Russ testified the event was held as planned without any interference. Exhibit 9, Mary Russ deposition taken July 28, 2008, pg. 8 - 13.

e. Pride Charlotte.

As in every other year since 2005, the Pride Charlotte event is granted a public assembly “festival” permit, despite the event clearly being “for or against a person or cause.” Exhibit 24, (Permit issued by Ms. Westbrook on July 21, 2008).

The 2008 Small Business Sponsorship Opportunities brochure distributed prior to the event and posted on the event’s website states, “Pride Charlotte exists to empower all LGBT and allied peoples to stand as unique individuals and together as a community, with the purpose of uniting as a creative, social, economic, and influential force. Pride also serves to educate the public on our issues, to build trust and bonds with our supporters, to raise funds and awareness for and about our community.” Exhibit 25, (attached as Exhibit 7 to deposition of Daryl Hall taken on July 21, 2008).

The 2008 Individual Sponsorship Opportunities brochure distributed prior to the event and posted on the event’s website states, “The Lesbian & Gay Community Center, Pride Charlotte, and you our sponsor can together create a visible, positive, creative and cohesive community – one that will make all Charlotte residents proud. It is people like you, and the

organizations you represent, that make change possible.” Exhibit 26, (attached as Exhibit 6 to deposition of Daryl Hall taken on July 21, 2008).

During the 2008 Pride Charlotte event, exhibits were obtained which clearly advocate causes for lesbian, gay, bi-sexual and transgender issues. Exhibit 27, Declaration of Plaintiff Philip Benham Authenticating Exhibits (with attached Exhibits A - R). These exhibits include many advocacy claims from numerous legal and political advocacy organizations including the ACLU (multiple examples including advocating federal legislation and asking the public to petition Congress for change); the National Organization for Women (advocating same sex marriage laws); Charlotte NOW (advocating “Lesbian rights” and “Constitutional Equality”); Planned Parenthood; Human Rights Campaign Political Action Committee, Pride Alliance, The Lesbian & Gay Community Center’s sponsorship of events supporting the Servicemembers Legal Defense Network and requests for donations; soliciting donations for Equality North Carolina; political literature supporting the Obama campaign; political literature opposing the McCain campaign; political literature supporting the campaigns of other local officials.⁴

As in prior years, various speakers advocated for lesbian, gay, bi-sexual and transgender issues. Mr. Daryl Hall testified regarding the Stage Schedule which lists various political and advocacy speakers – including the Human Rights Campaign Political Action Committee.

Exhibit 28, (attached as Exhibit 3 to deposition of Daryl Hall taken on July 21, 2008). The

⁴ Although the Pride Charlotte event clearly advocates political issues and candidates, Ms. Westbrook denied a public assembly permit application for a Hilary Clinton Rally scheduled for April 28, 2008. Ms. Westbrook denied the application because she will never grant a permit for any political event during the week, reasoning her interpretation allows her to deny all political events as “demonstrations.” Exhibit 2, Westbrook deposition (Vol. II) taken April 30, 2008, pg. 18, line 3 - pg. 19, line 4.

Human Rights Campaign Political Action Committee also sends a speaker to distribute advocacy literature and present a speech promoting lesbian, gay, bi-sexual and transgender issues. Exhibit 10, Daryl Hall deposition taken July 21, 2008, pg. 30, lines 6 - 21. Mr. Hall testified the event was held as planned without any interference. Exhibit 10, Daryl Hall deposition taken July 21, 2008, pg. 10 - 45.

Ms. Westbrook denied Plaintiffs' public assembly application and claimed Plaintiffs' activities were "covered by the City's Picketing Ordinance." Defendants' memo recites the Picketing Ordinance as follows:

Picket or picketing means to make a public display or a demonstration of sentiment for or against a person or cause, including protesting, which may include the **distribution of leaflets or handbills, a display of signs and any oral communication or speech**, which may involve an **effort to persuade or influence**, including all expressive and symbolic conduct, whether active or passive.

Def. memo, pg. 2 (emphasis supplied).

The facts and exhibits clearly reveal the Pride Charlotte events fall squarely within the definition of the Picketing Ordinance.⁵

Ms. Westbrook claims she classifies all Pride Charlotte events as "festivals" because they have a festival component and they sell food and beverages. However, Ms. Westbrook classified the Mec Dec event as a "demonstration" even though the Mec Dec event also had a festival component and they sold food and beverages.

- Q. So you're saying that you have granted public assembly permits for demonstrations in the past?
- A. I can think of one.

⁵ The Pride Charlotte event has been permitted as a public assembly "festival" every year. Exhibit 29, (attached as Exhibit 2 to Daryl Hall deposition taken July 21, 2008) Exhibit 30, (attached as Exhibit 5 to Daryl Hall deposition taken July 21, 2008).

Q. Which is what?

A. We permitted the Mec Dec Day They're a newer event, so the first year they applied for street closures. They had a festival component to their event, the jollification that we talked about yesterday. They closed the streets, they set up food vendors, they set up beverage vendors. They had a festival after the observance.

Exhibit 2, Westbrook deposition (Vol. II) taken April 30, 2008, pg. 24, lines 15 - 25.

C. Ms. Westbrook Will Never Grant a Public Assembly "Demonstration" Permit During the Weekday Because it Will Impact Traffic, but She Will Grant Public Assembly "Festival" Permits Despite Those Events Having the Exact Same Impact on Traffic.

Ms. Westbrook testified that if she decides a public assembly permit is a "demonstration" and it requests street closing during the week, it is automatically denied. She testified she would never grant a public assembly permit for a "demonstration" during the week for any reason. Ms. Westbrook's reasoning is that if it is a "demonstration" and it requests a street closing, then she automatically denies the application because it would interfere with traffic during the week.⁶

Q. So under your permitting process, whether or not you close a street during a weekday makes no difference for you?

A. It depends on the classification and the event.

Q. Well, why does that matter? In other words -- well, let me ask the question differently. Under your permitting process, do you close streets during weekdays?

A. Yes.

Q. For festivals?

A. Yes.

Q. For demonstrations? For parades?

A. For parades, yes. For demonstrations, it is our practice not to close streets during the weekdays in areas that would disrupt rush hour traffic and the normal flow of business.

Q. Why is it not your normal practice to allow the closure of streets during weekdays for demonstrations, but to allow closure of streets for festivals and parades during weekdays?

⁶ The reader should proceed carefully, noting in this discussion Ms. Westbrook changes her position multiple times which might become confusing. Ms. Westbrook changes her testimony and admits the public assembly ordinance does allow permitting for "demonstrations." Yet, the various justifications for her decisions shift depending upon the context.

- A. Festivals are perceived as community events for the public good. So when we close streets on the weekdays and disrupt traffic, we weigh the public benefits and economic impact against the inconvenience of closing the streets.

Exhibit 1, Emily Westbrook deposition (Vol. I) taken April 29, 2008, pg. 22, line 13 - pg. 23, line 12.

Ms. Westbrook has granted public assembly “festival” permits for many years for events benefitting the local economy – Speedweek and Taste of Charlotte are prime examples. Ms. Westbrook testified Speedweek “promotes NASCAR and the racing community in Charlotte.” Exhibit 1, Emily Westbrook deposition (Vol. I) taken April 29, 2008, pg. 52, lines 3 - 4. She grants public assembly “festival” permits to Speedweek every year and closes the downtown streets to all traffic (even during rush hour around Independence Square) for days. Exhibit 1, Emily Westbrook deposition (Vol. I) taken April 29, 2008, pg. 49, line 14 - pg. 52, line 7.

Taste of Charlotte is granted a public assembly “festival” permit every year to “promote various restaurants.” Exhibit 1, Emily Westbrook deposition (Vol. I) taken April 29, 2008, pg. 65, lines 10 - 12. Ms. Westbrook grants public assembly “festival” permits to Taste of Charlotte every year and closes the downtown streets to all traffic (even during rush hour around Independence Square) for days. Exhibit 1, Emily Westbrook deposition (Vol. I) taken April 29, 2008, pg. 65, line 18 - pg. 66, line 25.

Just looking at 2005, Ms. Westbrook granted public assembly “festival” permits to all types of events which close the downtown streets to traffic during the weekday on normal business days.

IS-230 Lexus promotion – pg. 34, line 18 - pg. 36, line 2.

Fall Festival – pg. 36, line 17 - pg. 37, line 2.

Meineke Car Care Bowl – pg. 43, line 6 - pg. 44, line 10.

Animal Planet Expo – pg. 52, line 9 - pg. 54, line 2.
Art and Soul of South End – pg. 54, line 6 - pg. 55, line 18.
Red Bull Freestyle Motocross – pg. 55, line 19 - pg. 57, line 7
Nascar-Nextel Allstar Challenge Trophy Tour – pg. 58, line 12 - pg. 60, line 3
Tom Joyner Show – pg. 60, line 5 - pg. 64, line 17.
Charlotte Shout Culinary Experience – pg. 71, line 6 - pg. 73, line 2.

Exhibit 1, Emily Westbrook deposition (Vol. I) taken April 29, 2008 – page numbers listed.

Ms. Westbrook testified her justification for denying all public assembly “demonstration” permits during the week – the demonstration would interfere with traffic. However, Ms. Westbrook testified that she routinely grants public assembly “festival” permits during the week despite the fact a “festival” has exactly the same impact upon traffic. Although both demonstrations and festivals have the same impact upon traffic, Ms. Westbrook will never grant a “demonstration” permit, but she will continue to grant “festival” permits during the week.

Despite her own interpretation, however, Ms. Westbrook granted the Mec Dec permit application even though she admits she classified it as a “demonstration” and it requested a street closing during the week. The public assembly “demonstration” permit was granted to Mec Dec during the week at Independence Square – the exact same location and at the exact same time of the day that Plaintiffs requested. Ms. Westbrook also granted the American Red Cross permit for a weekday – Friday, March 9, 2007.

Using the ordinances in the manner suggested by Ms. Westbrook, she can deny any permit application for an event merely by classifying the event as a “demonstration” rather than a “festival.” If she classifies the event as a “demonstration” during the week, as she did with

Plaintiffs' permit application, then she will always deny the permit. If she classifies the event as a "festival" during the week, then she will grant the permit.⁷

As shown above, Ms. Westbrook grants and denies permits on a whim. At one time, she testified the ordinance did not allow her to grant Plaintiffs' public assembly permit application with the explanation the ordinance is not capable of regulating "demonstrations." After being confronted with the Mec Dec evidence, she changes her mind and claims she is able to grant public assembly "demonstration" permits, but she will not grant any during the week (even though nothing in the ordinance provides this authority). She then changes her reasoning to assert the Plaintiffs' application could not be granted because Plaintiffs did not request a street closure. However, she then contradicts her other testimony revealing yet another change in how the ordinance is interpreted. Ms. Westbrook testified:

Q. So then whether they request street closures or not is not the sole determination on whether or not it would be a festival or demonstration?

A. Correct.

Exhibit 2. Emily Westbrook deposition (Vol. II) taken April 30, 2008, pg. 26, lines 11 - 14.

Ms. Westbrook also admits that requesting a street closure does not make a demonstration into a festival.

Q. So you're saying the street closures, that makes it a festival?

A. No.

Exhibit 2. Emily Westbrook deposition (Vol. II) taken April 30, 2008, pg. 25, lines 24 - pg. 26, line 1.

⁷ As discussed below, this evidence reveals the ordinance fosters unequal protection and unconstitutional due process.

Under the ordinance, a street closure is not the deciding factor in granting or denying a public assembly permit. Under section 1, Ms. Westbrook could have granted Plaintiffs a public assembly “demonstration” permit even if the event involved a street closure. In fact, Plaintiffs did explain they would accept a street closure if that would help the event go more smoothly.

Q. Do you remember a discussion where Reverend Benham and Ms. Chandler offered that, if the City wanted them to close the streets, if that would be helpful, that they would be willing to do that? Do you remember that discussion?

A. I do remember that coming up, yes.

Exhibit 3, Parker deposition taken April 29, 2008, pg. 26, lines 18 - 23.

However, Ms. Westbrook testified she will never grant Plaintiffs a public assembly “demonstration” permit if a street closure is requested during the week, so Plaintiffs’ application would be denied on those grounds.⁸ Under section 2, if Ms. Westbrook had classified Plaintiffs’ event as a “festival,” the public assembly “festival” permit could have been granted even without requesting a street closure because it would be a “festival” on Independence Square. However, because Ms. Westbrook classified Plaintiffs’ event as a “demonstration,” they cannot obtain a permit under section 2. Using Ms. Westbrook’s interpretation, Plaintiffs will never be allowed any permit whether they request a street closure or they do not request a street closure.

Again contradicting her own interpretation, Ms. Westbrook granted a public assembly “festival” permit to the 2005 Pride Charlotte, but the permit application did not request street closures. Exhibit 1, Emily Westbrook deposition (Vol. I) taken April 29, 2008, pg. 42, line 23 - pg. 43, line 14.

⁸ However, Ms. Westbrook granted the Mec Dec “demonstration” permit under these facts.

Oddly enough, the ordinance defines “Public assembly” a “a festival **or demonstration** which is reasonably anticipated to obstruct the normal flow of traffic upon any public street and that is collected together in one place.” City Code Sec. 19-311 (emphasis supplied). The ordinance allows for public assembly “demonstration” permits that would obstruct traffic, but Ms. Westbrook refuses to grant them – except for Mec Dec “demonstrations.” Ms. Westbrook testified she does not know what the ordinance means by the terms “reasonably anticipated to obstruct the normal flow of traffic.” Despite her not knowing how to interpret the ordinance, Ms. Westbrook has no difficulty coming to the conclusion that she may deny any public assembly “demonstration” permit for any event during the week that might interfere with traffic.

In preparing for Plaintiffs’ event, the police department’s incident commander believed Plaintiffs’ event was “reasonably anticipated to obstruct the normal flow of traffic.” Sergeant Oliver Cunningham testified he prepared for interruptions in traffic during Plaintiffs’ event by staffing “traffic supervisors, one sergeant; and 13 officers.” Exhibit 11, Oliver Cunningham deposition taken May 1, 2008, pg. 11, lines 19 - 20. Sergeant Cunningham even totaled the number of hours devoted to traffic during Plaintiffs’ event – 35 hours at a cost of \$459.00.

- Q. Were you anticipating you would need some officers to direct traffic?
A. Possibly direct traffic, maybe try to keep crowds up on the sidewalks, off the street.
Q. And then they had the roll call, the end time, total hours 2.5. There’s a cost there. It says traffic, 35 hours, \$459. What does that mean?
A. That’s how we track -- when we do events, we like to know how much it cost us for each event, something that’s outside of the scope of patrol, and so we track all of them. We do that for -- I think the last one we did, we did it for -- I think Dick Cheney’s visit was one of the last ones we did it for.

Exhibit 11, Oliver Cunningham deposition taken May 1, 2008, pg. 12, lines 10 - 23.

Sergeant Cunningham's After Action Report also lists under **Issue #1** "Noise complaints" revealing the actions taken by the police during Plaintiffs' event. Sergeant Cunningham testified Plaintiffs' event received the first complaint within twenty (20) minutes after beginning.

- Q. So my understanding of how it went, they started the event 11:30-ish, and then we found out there were three noise complaints. And then it says here: Gave the first noise violation warning at 11:55. In other words, within 25 minutes of them starting, they were warned about a noise violation warning?
- A. Yes, sir.
- Q. So I guess the call would have had to come in before even the 25 minutes expired?
- A. Yes, sir.
- Q. About how long?
- A. How long would the call would have had to come in?
- Q. Yes, maybe 20 minutes into it?

Exhibit 11, Oliver Cunningham deposition taken May 1, 2008, pg. 18, lines 1 - 14.

Defendants parse words carefully and claim Plaintiffs' event went forward "without legal incident." However, Sergeant Cunningham's After Action Report details how Plaintiffs were very nearly arrested during the event.⁹

- Q. So tell me again what the steps were again because I know we want to revisit that. The first one you give them a warning?
- A. A warning.
- Q. The second one would be a warning?
- A. Warning, citation, arrest.
- Q. A warning, then a citation --
- A. And arrest.

Exhibit 11, Oliver Cunningham deposition taken May 1, 2008, pg. 21, line 21 - pg. 22, line 3.

Plaintiffs only applied for the public assembly permit because an officer with the Charlotte police department advised them to do so. Following the arrest for violation of the noise ordinance at Plaintiffs' 2006 event, Sergeant Bud Cessina advised Plaintiffs to apply for the

⁹ The After Action Report contains an incorrect heading (Bobcat Arena), but otherwise properly discusses Plaintiffs' event at Independence Square.

public assembly permit instead of the noise permit. Exhibit 12, Philip Benham deposition taken May 1, 2008, pg. 49, line 1 - pg. 50, line 19. Defendants' memo incongruously argues that Reverend Benham could not explain what he would have done differently if the public assembly permit had been granted. In fact, Reverend Benham simply stated he could not speculate how the event would have gone differently because the event was not permitted. Exhibit 12, Philip Benham deposition taken May 1, 2008, pg. 44, line 19 - pg. 48, line 8.

Ms. Westbrook clearly denied the Plaintiffs' public assembly permit application by wrongly interpreting the ordinance, stating "While the Public Assembly Ordinance provides for permitting of 'festivals' at Independence Square Plaza, it does not contemplate permitting 'demonstrations' at that location. Instead 'demonstrations' at Independence Square Plaza are covered by the City's Picketing Ordinance." Exhibit 14. Contrary to her own interpretation, Ms. Westbrook granted the public assembly "demonstration" permit to Mec Dec at the same location and time of day she denied Plaintiffs' application. Ms. Westbrook's denial of Plaintiffs' application under this guise is not an isolated event. Ms. Westbrook also did not grant a public assembly permit to the 2007 Charlotte Torch Rally after she determined the event was a demonstration against genocide in Darfur.

- Q. Do you ever talk to the people that are applying and say to them, "Your event looks more like a demonstration than a festival"? You talked about the steps you go through. Do you then say to them that, "This is going to be a demonstration so you can't get a permit"?
- A. If it's not clear in the application, then, yeah, I would follow up with them. I can think of one, the Torch Rally, the Charlotte Torch Rally, which I think was last December. They had originally wanted to close the streets until my communication -- he had never done this before -- with the event organizer was about closing streets, and then it was decided that, "Well, we don't really need to close the streets because we're not going to have that many people." And I said, "What is this event for? Do you have any more information?" And it was a demonstration against the violence in Darfur. So then, since they weren't requesting a street closure and they wanted to use Independence Square Plaza, then I said,

"You don't need a permit from me for a demonstration, and you can go through the police department and get, you know, an amplified sound permit if you're amplifying sound." So that is one incidence that I can think of where that conversation happened and it was determined what the nature of their event was.

- Q. Did you say to them that you could not grant them a demonstration public assembly permit because it wasn't permitted under the ordinance?
- A. They weren't requesting street closures anymore.
- Q. I'm just asking what you may have told them or explained to them about how your ordinance operates.
- A. I explained to them that the activities that they wanted to do on that day and in that place were covered through -- I don't think he even asked what ordinances or anything, but I said, you know, "The process for doing what you want to do now falls under the police department, not me." So I sent him that way. I don't think the general public, I mean, understands about ordinances.

Exhibit 2. Emily Westbrook deposition (Vol. II) taken April 30, 2008, pg. 26, line 21 - pg. 28, line 12.

POINTS AND AUTHORITIES

This Court explained, "The record before the Court lacks meaningful detail about the events, so it is not possible to determine whether there has been a pattern of discriminatory enforcement of the ordinance." Doc. # 15, pg. 10. The evidence above clearly reveals the discriminatory enforcement of the ordinance. The issue presented is whether or not the ordinance is properly applied to all citizens on an equal basis with the necessary constitutional standards to protect due process. All courts agree that *ad hoc* discretion threatens the very core of constitutional freedoms.

American Jewish Congress v. City of Beverly Hills, 90 F.3d 379, 385 (9th Cir. 1996) (*en banc*), struck down a similar permitting scheme, holding: "The *ad hoc* and structureless nature of the City's permitting process leaves open the possibility of improper discrimination by the City."

[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith

when the determination of who may speak and who may not is left to the unbridled discretion of a government official.... [W]e have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

Id., (citing *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64, 108 S.Ct. 2138, 2147, 100 L.Ed.2d 771 (1988)).

Plaintiffs' counsel respectfully acknowledges this Court's opinion that the ordinance does not appear to be written in violation of constitutional protections – the facial challenge. Yet, the evidence of discriminatory enforcement reveals the inherent danger of the ordinance through unequal application and subjective decisions. Plaintiffs' case is seeking to protect the public interest by requesting a determination as to the constitutionality of the Policies as they are written (because the evidence above reveals the ordinance fosters discriminatory enforcement) in addition to how the City applied the ordinance against Plaintiffs in this case – the as applied challenge which is separate and distinct from the facial challenge.

Plaintiffs' case challenges the Defendants' *ad hoc* discretion to define Plaintiffs' speech as a “demonstration” as opposed to a “festival” thereby imposing different and additional discretionary restrictions; and, the additional challenges under the Equal Protection and Due Process Clauses. Contrary to Defendants' representation, those obtaining a “festival” permit are not subject to the same regulations as those who do not obtain a festival permit.

Defendants argue that Plaintiffs have their full rights because their activities are a “demonstration” and not a “festival” so they should continue forever with the City's definition of their activities as applied in the past. Defendants really argue that they have the right to

characterize speech on the City's terms and Plaintiffs' speech will always be a "demonstration." However, their argument misses the point of the Equal Protection and Due Process Clauses.

Because the City has such discretion, Plaintiffs must be subject to the additional discretionary restrictions imposed under the Picketing Ordinance which are not found in the festival regulations. Exhibit 31, Article XI, Section 19-303. In addition, a "festival" and "private use" takes priority over a "demonstration" at numerous locations in the City – including Independence Square. By defining Plaintiffs' message as a "demonstration" rather than a "festival," the City may entirely deny all of Plaintiffs' speech in favor of a "festival" or other "private use." The City has obviously created a discretionary scheme which fosters favoritism for "festivals" while creating additional burdens upon "demonstrations."

Defendants rely upon *Hill v. Colorado*, 530 U.S. 703 (2000), but fail to provide this Court with the Supreme Court's discussion of the central issue in this case. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. 703, 732 (2000). The evidence clearly reveals the ordinance "authorizes or even encourages arbitrary and discriminatory enforcement." *Id.*

Defendants' reliance on *Mom N Pops, Inc. v. City of Charlotte*, 979 F. Supp. 372, 387 (W.D.N.C. 1997), is also misplaced. Long ago the Supreme Court recognized that "Economic regulation is subject to a less strict vagueness test." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

Defendants seem to believe that it is constitutionally acceptable to deny festival permits as long as the City allows Plaintiffs to apply for other permits and comply with other discretionary regulations. This logic, if accepted, would allow the City to forever deny festivals at its discretion for any message the City deems should not be allowed. The City argues such ambiguous standards permissibly allow for proper enforcement. The courts unanimously disagree with the City's assertion by recognizing that such discretion furnishes the City with a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Thornhill v. State of Alabama*, 310 U.S. 88, 97-98 (1940).

As the definitions clearly reveal, either a festival or demonstration (the classification applied to Plaintiffs' message) that might be "reasonably anticipated" to impede traffic receives the same analysis under the City's definitions – "a festival or demonstration which is reasonably anticipated to obstruct the normal flow of traffic upon any public street and that is collected together in one place." Then who decides whether or not the festival or demonstration might be "reasonably anticipated" to impede traffic – the City, of course. This is decision is not left to the applicant, of course, because then the City would argue its public interest would be trumped by the applicant's representation. In other words, if the logic holds true, then the City would be required to grant or deny festival applications simply because the applicant represents that the event would not be "reasonably anticipated" to impede traffic. Ms. Westbrook testified she does not know what the ordinance means by the terms "reasonably anticipated to obstruct the normal flow of traffic."

Simply stated, Pride Charlotte does not even qualify to be a “festival” because it should be rejected for a festival permit because the event is “a public display of sentiment for or against a person or cause, including protesting.” Whether or not Pride Charlotte desired to provide additional services – alcohol, food – is beside the point. It simply does not fit logic to now claim this was the reason Pride Charlotte was granted a festival permit despite it being “a public display of sentiment for or against a person or cause, including protesting.” If the City was equally applying the code, Pride Charlotte would have been defined as a “demonstration” subject to the additional restrictions imposed upon Plaintiffs.

Precedent warns against the very schemes imposed in this case because such acts of discretion provide licensing officials with shifting criteria for denying freedom of speech when clear guideposts are not provided to limit discretion. “Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.” *American Jewish Congress*, 90 F.3d at 386 (quoting *City of Lakewood*, 486 U.S. at 758). The issue presented when challenging a policy on the grounds that it “delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.” *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133 n.10. (1992).

Respectfully submitted this 18th day of August, 2008.

s/Frederick H. Nelson
Frederick H. Nelson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mr. Bob Hagemann, Esq.
Senior Assistant City Attorney
600 East Fourth Street
Charlotte, NC 28202
(704) 336-2651 - voice
(704) 632-8331 - facsimile
rhagemann@ci.charlotte.nc.us

s/Frederick H. Nelson
Frederick H. Nelson, Esq.
Florida Bar No.: 0990523
American Liberties Institute
P.O. Box 547503
Orlando, FL 32854-7503
Telephone: (407) 786-7007
Facsimile: (407) 786-2978
Email: rick@ali-usa.org
Lead Trial Counsel for Plaintiffs