



CITY OF DETROIT
LAW DEPARTMENT

COLEMAN A. YOUNG MUNICIPAL CENTER
2 WOODWARD AVENUE, SUITE 500
DETROIT, MICHIGAN 48226-3535
PHONE 313•224•4550
FAX 313•224•5505
WWW.DETROITMI.GOV

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Michael J. Steinberg
Brooke Merriweather-Tucker
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201

Raymond J. Sterling
Christine A. Hopkins
Sterling Attorneys at Law
33 Bloomfield Hills Parkway, Suite 250
Bloomfield Hills, MI 48034

Re: *Moratorium Now, et. al. v. Detroit 300 Conservancy, et. al.*
United States District Court for the Eastern District of Michigan
Case No. 2:15-cv-10373-BAF-RSW (Hon. Bernard Friedman)

Dear Counsel:

I. Introduction

I am sending this letter to reflect the mutual understanding reached by the parties after our meeting on February 24, 2015, in the above-stated matter, involving the protection of First Amendment rights at Campus Martius Park. This case arises out of two instances that allegedly occurred a year ago (February 2014) and over a year and a half ago (June 2013), respectively, as asserted by Moratorium Now!, a nonprofit organization, Cheryl Labash, Thomas Michalak, Joan Mandell, and Wallis Anderson (“Plaintiffs”). Plaintiffs allege that Defendants prohibited them from passing out handbills and petitioning in Campus Martius Park in Detroit, Michigan, in violation of their First Amendment Right of Free Speech and 42 U.S.C. Sec. 1983. The claims have been plead in a Complaint and Motion for Preliminary Injunction, filed in the U.S. District Court for the Eastern District of Michigan.

The City has no evidence that the actions asserted in the lawsuit actually occurred. Nevertheless, First Amendment rights for all our citizens must be respected in our public places, and rather than aggressively litigating the individual claims in this case, it would better serve the public’s interest to resolve the underlying issues raised in the pleadings in mutual collaboration. Therefore,



after the pleadings were filed, counsel for the parties began communicating by phone conferences, emails and in person, in a good faith attempt to reach a resolution.

Based on our discussions, it is my sense that we have reached a meeting of the minds along the following lines with respect to the issues raised by Plaintiffs in their motion for preliminary injunction: the City, on behalf of Defendants, (1) commits to protecting the First Amendment rights of its citizens in all its parks, including Campus Martius Park, and (2) will establish and enforce policies that assure the protection of such rights, now and in the future. Please note that this commitment extends only to the Defendants subject to the Motion for Preliminary Injunction. Guardsmark has not been a part of these discussions. Further, this commitment does not resolve the damages component of Plaintiffs' claims against the Defendants.

II. Facts

Campus Martius is a City park – a public park – even though it is managed by Detroit 300 Conservancy. As such, First Amendment rights are to be afforded to all who come to the Park. That said, Campus Martius is a *unique* park in many significant respects. It has a relatively small footprint (only 1.2 acres), bounded on all sides by traffic on Woodward and Cadillac Square. It is very heavily programmed year-round, with space dedicated to specific functions: the restaurant (Fountain Bistro), ice skating rink (in the Winter), beach area (in the Summer), central fountain, historic markers, the Soldiers and Sailors Monument, plantings, and performance stage with portable seating on the adjacent lawn.

III. Applicable Law

There is no dispute that leafleting, petitioning and silently marching while carrying signs are forms of speech protected by the First Amendment. *Schenk v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). The City also agrees that City parks are public fora for First Amendment purposes. *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Occupy Nashville v. Hasham*, 769 F. 3d 434, 445 (6th Cir 2014) (“Public parks are certainly quintessential public forums.”). Furthermore, the City recognizes that its parks remain public fora where leafleting, petitioning, and marching are forms of speech protected by the First Amendment, even where, like Campus Martius Park, they are operated by private, non-governmental entities. *ACLU v. Las Vegas*, 333 F.3d 1092 (9th Cir. 2003); *Johnson v. Minneapolis Park & Recreation Department*, 2012 U.S. Dist LEXIS 8014.

Nevertheless, the City may apply reasonable “time, place and manner restrictions” upon such speech provided that such restrictions are content-neutral, and are (1) narrowly tailored to serve a significant government interest, and (2) leave open ample alternative channels of expression. *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983); *United States v. Grace*, 461 U.S. 171 (1983). These regulations may, under certain circumstances, include permitting



requirements and restricting demonstrations to certain portions of public property. *Thomas v. Chicago Park District*, 534 U.S. 316 (2002); *National Council of Arab Americans v. City of New York*, 478 F.Supp.2d 480 (S.D. N.Y 2007).

The City of Detroit has a "substantial interest in maintaining its parks . . . in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them." *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 at 296 (1984)).

IV. Immediate Adoption of Interim Policies and Rules Regarding First Amendment Protected Speech at City Parks

Through an Opinion by the City's Corporation Counsel, the following rules will be implemented in City parks until ordinance amendments to the Detroit City Code are adopted by the Detroit City Council. These rules have been informed by a careful examination of prevailing case law and a review of the agreement reached between the ACLU of Maryland and the City of Baltimore, under analogous circumstances.

A. General Rules Applicable To All Parks:

Definitions:

- **"Leafleting" is the distribution of non-commercial printed material or items while walking or standing and addressing the person to whom the material is offered in a manner consistent with laws applicable to such conduct in a public place.**
- **"Petitioning" is the seeking and gathering of signatures on petitions in a manner consistent with laws applicable to such conduct in a public place.**
- **"Demonstration" shall mean any demonstration, picketing, speechmaking, marching, holding of vigils, and all other like forms of conduct which involve the communication or expression of views or grievances, engaged in by one or more persons in a manner consistent with laws applicable to such conduct in a public place.**
- **"Solicitation" shall mean any act by which one person requests an immediate donation of money or other thing of value from another or others in person, regardless of the solicitor's purpose or intended use of the money or other thing of value, in a manner consistent with laws applicable to such**



conduct in a public place. The solicitation may be oral, written, or by other means of communication. Solicitation is not intended to mean sales or vending.

- “Public Event” shall mean sports events, pageants, celebrations, historical reenactments, regattas, entertainments, exhibitions, fairs, festivals and similar events (including such events presented by the City), which do not satisfy the definition of “Demonstration” outlined above, and which are engaged in by one or more persons in a manner consistent with laws applicable to such conduct in a public place. This term includes any event for which an entry fee is charged.
- Subject to the provisions in Sections B and C below, Leafleting, Petitioning, Solicitation and Demonstration activities by forty-five or less people will be allowed without a permit, unless:
 1. The activity unduly interferes or conflicts with a previously-issued permit for the same area;
 2. The location sought is not suitable because of landscaping, planting or other environmental conditions reasonably likely to be negatively impacted by the proposed activity;
 3. The activity unduly impedes vehicular or pedestrian traffic, or endangers the person(s) engaging in such activities or the public;
 4. The activity unduly impedes scheduled activities;
 5. The activity unduly impedes the operation and functioning of authorized commercial activities on park grounds;
 6. The activity violates any federal, state or local law, ordinance or regulation; or
 7. The activity requires sound amplification (except that a hand-held, battery operated megaphone is allowed without a permit, so long as its use will comply with relevant noise ordinances).
- Groups of more than 45 people who desire to engage in leafleting, petitioning, solicitation or demonstration activities must request a permit from the Detroit Recreation Department.
- Permit fees, if any, shall comply with the standards set forth in *Cox v. New Hampshire*, 312 U.S. 569 (1941) and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).
- Permit fees will be waived for any person or group that attests that they cannot afford them or that payment of the fee will inhibit his/her/its ability to engage in the permitted activity.



- In the case of a Public Event, if the Recreation Department Director determines that the proposed activity will require the commitment of municipal resources or personnel, security, cleanup expenses or other significant costs beyond those which are normally available or normally provided by the City, the Director may also require the applicant to meet reasonable insurance, bonding or indemnification requirements, subject to First Amendment limitations.
- Applicants for permits for Leafleting, Petitioning, Solicitation and Demonstration activities must apply for permit at least **2 business days prior** to the event. However, in order to respond to **imminent events or concerns**, the Recreation Department will **waive** the 2-day advance notice requirement if the size and nature of the activity will not reasonably require the commitment of municipal resources or personnel beyond those which are normally available or which can reasonably be made available within the necessary time period.
- Applicants for permits for a Public Event must apply for a permit at least **7 business days** prior to the event.
- Applicants for a permit must supply the following information in the application:
 1. The name, address and day and evening phone number of the person or organization or other entity seeking the permit.
 2. The name, address and day and evening phone number of the person who will be responsible for conducting the public event, picnic or private gathering.
 3. The nature of the public event, picnic or private gathering. The Director reserves the right to request additional information if necessary.
 4. The date or dates, and hours during which the public event, picnic or private gathering is proposed to be held, including set up and disassembly time.
 5. The number of persons who will be engaged in such activities.
 6. The location to be used.
 7. The equipment and structures to be used during the activity.
 8. Information about any fees to be charged for the activity.
- The Recreation Department shall issue a decision on permit applications within **2 days** of submission, and will send the decision and the grounds for the decision to the applicant in writing.
- The permit holder, or the person in charge of an expressive activity without a permit under Section B below, shall exercise reasonable care under the circumstances to prevent damage to City property by those participating in the activity.
- The Recreation Department **need not issue a permit if** the Department finds that:



1. The application is incomplete or contains a material falsehood;
2. The individual applying for the permit has intentionally damaged park property within six months from the date of the application. Such applicant, if issued a permit, will be required to post a bond consistent with First Amendment protections;
3. The activity will unduly interfere or conflict with a previously-issued permit for the same area;
4. The location sought is not suitable because of landscaping, planting or other environmental conditions reasonably likely to be negatively impacted by the proposed activity;
5. The activity will unduly impede vehicular or pedestrian traffic, or will endanger the applicant or the public;
6. The activity will unduly impede scheduled activities;
7. The activity will unduly impede the operation and functioning of adjacent commercial activities;
8. The activity is of such a nature or duration that it cannot reasonably be accommodated in the particular area requested in the permit application;
9. The activity will violate any federal, state or local law, ordinance or regulation;
10. The activity is of such a nature or duration that it cannot reasonably be accommodated in the particular area requested in the permit application;

The term “unduly impede” shall not be construed to include minor inconveniences or disruptions, such as can reasonably be expected whenever a large group of people are gathered together.

- The permit may be **revoked** by the Recreation Department for any of the following reasons:
 1. Violation of the terms or conditions of the permit;
 2. The activities or conduct of the permit holder constitute a clear and present danger to the public health, welfare and safety;
 3. The number of persons engaged in the permitted activity exceeds the number stated in the permit, subject to Section B below;
 4. The activities of the permit holder constitute a violation of any applicable law or regulation.
- In granting a permit for a demonstration, the Issuer will exercise no discretion over the issuance of a permit hereunder, except as provided for in these Rules. Nothing in these Rules will be construed to interfere with the right of public assembly except as constitutionally permitted.



- In the event a permit is denied, the Issuer shall notify the applicant in writing immediately of the reasons for that determination.

An applicant whose permit application has been denied under this rule can seek review in a court of law.

B. Instant Permission to Engage in Expressive Activity

1. If a person or group otherwise qualified for a permit for expressive activity (that is, the proposed event or activity will not violate grounds 2 through 10 justifying a denial of a permit specified above), including leafleting, petitioning, solicitation or demonstration, appears at a location where this expressive activity is allowed, with the purpose of engaging in this expressive activity, but does not have a permit to do so, and a member of the Detroit Police Department who responds to the location, such officer should contact the Head of Permits for the Detroit Recreation Department of Recreation and Parks, or his/her designee, by telephone or email or other similar means to report the situation and to determine whether there are any events with permits scheduled for that location. If there are no conflicting permits, the police shall allow the expressive activity to proceed, unless precluded by one of the following:
 - (a) The issuance of instant permission to engage in expressive activity would result in any actual diminution, caused by the lack of advance notice, in the ability of the police department, or the ability of other governmental agencies, appropriately to organize and allocate their personnel and resources so as to fulfill their general missions and to protect the rights of both persons exercising free speech and other persons wishing to use the streets, sidewalks, and other public ways, and parks;
 - (b) The proposed event will create a substantial possibility of violent, disorderly conduct likely to endanger public safety or to result in significant property damage;
 - (c) The proposed event will create a substantial possibility of unreasonable interference with pedestrian or vehicular traffic or for danger to the public notwithstanding the deployment of available governmental personnel;
2. In assessing whether the applicant shall be allowed to proceed with the activity requested without a permit, the fact that activity protected by the First Amendment is involved shall create a strong presumption that the activity should be allowed to proceed, assuming that no conflicting permit has been issued to others. However, if, after having been notified that a person or group desires to engage in expressive activities without a permit, the Head of Permits for the Detroit Recreation Department determines that the proposed event or activity will



violate grounds 2 through 10 justifying a denial of a permit specified above, the Head of Permits for the Detroit Recreation Department may request that the Police Department ask the person or group to disperse or relocate their activities.

3. The police officer should ask the person or group leader for a contact name, address, telephone number and email, and for the reason why the person or group did not or could not apply for a permit under the normal permit application rules. The officer should convey that information to the Head of Permits. The response to the officer's inquiries or the failure to provide a response shall in no way be considered in deciding whether to grant or deny permission to engage in the expressive activity at issue.
4. If the Head of Permits or his/her designee cannot be reached, and it cannot be determined whether there are any previously scheduled activities or events for the location at the time of the proposed expressive activity, the police shall allow the non-permitted expressive activity to take place, subject to the provisions above. In the event that a person or group with a permit to conduct an activity at the same time and place arrives at the location, persons engaged in non-permitted activities shall vacate the area for use by the permit holder and may be directed to disperse or relocate their activity. The fact that a person or group otherwise qualified for a permit for expressive activity, such as leafleting, petitioning, solicitation, and demonstration, does not have one shall not, by itself, be a basis to order the group to disperse, even if the Head of Permits cannot be reached.
5. If, at any time after the grant of permission to engage in expressive activity without a permit, there is a material change in any of the criteria listed above in section B, which would have warranted denial of permission to engage in expressive activity without a permit, that permission may be withdrawn.
6. If a private security guard employed to patrol the area where the expressive activity is taking, or will take, place responds to the location before the police, the security guard shall immediately contact the police which shall take action in accordance with the provisions outlined above. The private security guard shall allow the expressive activity to commence or continue until the police arrive unless the proposed event will create a substantial possibility of violent, disorderly conduct likely to endanger public safety or to result in significant property damage or will interfere with a previously scheduled permitted activity.

C. Rules Specifically Applicable to Campus Martius Park

- Campus Martius Park possesses **unique characteristics**, justifying special rules in order to balance the interests of those desiring to engage in expressive activities against the interests of the City in protecting the park and others who desire to use the park. These include the following:



1. Small size, compared with other parks and public spaces;
 2. Located in middle of busy downtown thoroughfare (Woodward Avenue), which raises safety concerns;
 3. Private businesses have leased space within the Park for private purposes consistent with recreation;
 4. Heavily programmed with other events;
 5. Expensive and fragile plantings, easily damaged by foot traffic.
- Proposed special rules applicable to Campus Martius Park:
 1. No leafleting, petitioning, solicitation or demonstration activities shall be permitted within 10 feet of the outdoor dining area set aside for the Fountain Bistro during the Bistro's outdoor dining hours of operation.
 2. No leafleting, petitioning, solicitation or demonstration activities shall be permitted on the ice rink installed each winter in the Park.
 3. No leafleting, petitioning, solicitation or demonstration activities shall be permitted on stages or in tents which may be erected in connection with other scheduled events in the Park.
 4. No leafleting, petitioning, solicitation or demonstration activities shall utilize any monuments, public art or trees planted in the Park.
 5. No sound amplification shall be allowed to accompany leafleting, petitioning, solicitation or demonstration activities without a permit.
 6. Groups of more than 25 people who desire to engage in leafleting, petitioning, solicitation or demonstration activities must request a permit from the Detroit Recreation Department.
 7. During festivals or events open to the general public, leafleting, petitioning, solicitation or demonstration activities shall be permitted in Campus Martius in a manner consistent with these Park Rules and laws applicable to such activities.

The City recognizes that the sidewalk surrounding Campus Martius, including that portion abutting the Soldiers and Sailors Monument, shall always remain available for First Amendment activity unless such activity would endanger the public, unduly impede pedestrian or vehicular traffic, or in the event that the sidewalk is closed to the general public

The proposed rules described above relating to the City's parks, and more specifically relating to Campus Martius Park, are subject to change, based on further negotiations with the ACLU or other groups or individuals.



V. Amendment of City Ordinances and Departmental Rules

The City's Law Department will recommend to City Council amendments to its ordinances to better ensure First Amendment protections. In fact, as explained at the February 24th meeting, the City had already begun a wholesale review, amendment and re-codification of the entire Detroit City Code well before this action was filed. This process, however, will take many additional months to complete, and is not expected to be completed until at least July of this year. The City welcomes the input of the ACLU and other members of the public in this process.

Section 40-1-4 of the Detroit City Code states that "The recreation department shall establish reasonable rules and regulations for the protection of rights and property vested in the city and under control of the department, for the uses, care, maintenance and management of all parks . . ." Consistent with this authority, the City has begun the process of promulgating departmental rules to supplement the planned changes to the Detroit City Code, which would also better address protected speech activities in the City's parks. However, like the amendment of its ordinances, this will likely take several months to complete. Again, the City will welcome the input of the ACLU and other members of the public in this process.

VI. Training

The City of Detroit shall provide reasonable training on the interim policies and rules outlined above to all Detroit employees and agents, and all private entities, responsible for implementing and/or enforcing these regulations in any of the city's public parks. Private entities responsible for managing or operating any of the city's public parks shall also take reasonable steps to ensure that its employees and agents are trained on proper implementation and enforcement of the regulations outlined above.

VII. Public Education

The City of Detroit will make the Park Rules and Guidelines contained in this agreement reasonably and readily accessible to the public by posting the regulations and permit forms on the City's website and the website of any private entity responsible for operating or managing a public park within the city. The City of Detroit and any private entity responsible for operating or managing a public park shall also ensure that a summary of these rules are posted in an area of high visibility inside the park.

VIII. Conclusion

In summary, the City of Detroit remains committed to protecting the First Amendment rights of its citizens to engage in protected speech in Campus Martius Park, and in the City's other parks and public spaces. The City has already begun the process to ensure that its ordinances and departmental rules adequately protect such rights, while also serving the City's interests in protecting its parks and the rights of others who wish to enjoy them. Until these steps can be completed, the City shall implement the interim guidelines regulating expressive activities in its parks summarized in this letter. In our view, these proposed guidelines and the commitments expressed in this letter



adequately address the concerns raised in your clients' complaint and motion for preliminary injunction. Therefore, the parties have agreed that in light of Defendants' commitment to enforce First Amendment rights, as outlined above, through a formal Opinion from the Corporation Counsel, Plaintiffs have withdrawn their Motion for Preliminary Injunction.

Sincerely,

Melvin B. Hollowell
Corporation Counsel

cc: Jill Wheaton, Esq.
Alicia Bradford, Recreation Director