Preparing for the Next Protest

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On November 26, 1981, in an effort to bring publicity to the plight of the homeless, 20 protestors pitched tents and slept overnight across the street from the White House in Washington D.C.'s Lafayette Park in violation of National Park Service regulations that prohibited camping in the Park. At dawn the next day, the United States Park Police advised the protestors to leave and a half-hour later arrested the six activists who remained. A few days later, the protestors applied for and received a permit from the Park Service to erect nine tents in the Park on the condition they not sleep in them overnight. For the next several years a tent city remained across the street from the White House while the activists pursued their right to sleep overnight all the way to the Supreme Court. (Clark v. Community For Creative Non-Violence (1984) 468 U.S. 288 [104 S. Ct. 306, 582 L. Ed. 2d 221].)

The experience of the federal government in the 1980's was far different from what occurred in United States cities across the country during the last few months of 2011. As Occupy protestors took to public plazas, parks and streets, including locations throughout Northern California, many public officials initially expressed support for the movement and in some cases even joined the protestors at overnight camps and in marches through city streets. Local examples include the Cities of San Francisco, Oakland and Santa Rosa where city officials initially said they had no plans to dismantle the Occupy camps. At the same time, numerous Occupy "camps" violated ordinances prohibiting overnight camping and marches often proceeded without protestors obtaining required permits. By their acquiescence, some municipalities may have unwittingly limited their ability to regulate future demonstrations of a similar nature on public property.

With a presidential election year upon us, and the recent success of various protest movements suggesting mass demonstrations are going to be a continuing part of the political landscape, it is incumbent on municipal officials to ensure their ordinances, regulations and rules governing the use of public property are Constitutionally-defensible and carried out in a fair and equitable manner. At the same time, elected officials need to make it abundantly clear when they are speaking on, or participating in, protest movements on their own behalf, and not as a member of the elected body, to ensure an adequate separation is maintained between the two roles.

Laws Governing Access to Public Property

All local governments, whether large or small, have to place some limits on the use of public property, whether it be the right to restrict public access to the city's water treatment plant, or the right to ensure every resident has equal access to a public park. Many cities, for example, forbid the overnight use of public parks or otherwise require persons first obtain a permit before engaging in such use. While the First Amendment limits the government's ability to restrict speech on public property traditionally made available for public expression, most local

governments have, or should have, in place what are known as “content-neutral time, place, and manner restrictions” that regulate speech taking place on “traditional public forums” such as streets, sidewalks and parks.

Although the foundations of the public forum doctrine were set in place when the first Congress adopted the Bill of Rights, it took almost 150 years before the Supreme Court recognized that “streets and parks…have immemorially been held in trust for the use of the public…for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.” (Hague v. Committee for Industrial Organization (1939) 307 U.S. 496 [59 S. Ct. 954, 83 L. Ed. 1423].)

Over the years, the Court has balanced this broad right of access against the practical fact that nothing in the Constitution “requires the Government freely to grant access to all who wish to exercise their free speech on every type of Government property.”(Cornelius v. NAACP Legal Def. & Educ. Fund, Inc. (1985) 473 U.S. 788 [105 S. Ct. 3439, 87 L. Ed. 2d 567].) Out of this tension evolved the Court’s practice of forum-based analysis, in which public property is divided into different categories, each more restrictive to free speech than the next. (International Soc’y for Krishna Consciousness, Inc. v. Lee (1992) 505 U.S. 672 [112 S. Ct. 2701, 120 L. Ed. 2d 541].) Access to the least-restrictive “traditional” public forum can still be limited, but the government cannot base its restrictions on the content of the speech or the speaker’s viewpoint on that content. “Any restrictions on the content of public forum speech must be “necessary, and narrowly drawn, to serve a compelling state interest.” (Perry Educ. Ass’n v. Perry Local Educators’ Ass’n. (1983) 460 U.S. 37[103 S. Ct. 948, 74 L. Ed. 2d 794].)

Unfortunately, many local agency ordinances are often ill-equipped to address the complexities of public forum analysis and situations arise that test even the most learned First Amendment experts. Last year was the first time many government officials encountered protest groups seeking to occupy public property on a 24-hour basis, and their counsel had to quickly determine whether the occupation involved speech, expressive conduct, recreational camping, or some combination of all three. Due to this uncertainty, and the politically-charged nature of the Occupy Movement, in several cases protestors were permitted to occupy public property for several weeks in violation of local laws. Only once the encampments became a serious health and safety issue, did the agencies take action to remove them.

One of the implications of this delayed response is that it left open an argument for the next protest group that occupying public property is acceptable, as long as it does not create a health and safety issue. Even the most restrictive laws governing the use of public property can be overcome if the government intentionally opens the property up for public discourse. (Cornelius at p. 802.) To determine if the government did so, courts examine not only local ordinances, but also the local government’s practices, the nature of the property, and the property’s compatibility with expressive activity. Id. When members of the Occupy Movement were permitted to set up tents at city halls, public plazas, and other public places in violation of local law, one could argue that not only are such locations perfectly suited for expressive activity, but that the city was consenting to its use for such purposes. As a result, the next group that seeks to set-up a 24-hour protest on the same piece of property may have a good argument that it has a Constitutional right to do so based on the city’s previous practice. Local agencies should therefore not only make it a

practice to regularly scrutinize their ordnances, but also their policies regarding public property access, permitting and enforcement.

The Dual Role of Elected Officials

Every elected official owes a duty to his or her public agency to ensure that the agency's laws are carried out in a fair and equitable manner. At the same time, this does not mean he or she loses the right to participate in the political process as a private citizen. The problem arises when an official attempts to do both in a way that makes it impossible for the official to carry out his or her official duties.

Many elected officials that supported the Occupy Movement also represented cities that had ordinances prohibiting overnight camping or requiring a permit for the use of public property. This created a potential conflict for an official speaking out in favor of the Movement, or participating in Movement events, since he or she was also a member of a body elected to represent the city. The distinction was made more difficult by press coverage that often did not discern between the official's two roles.

While elected officials can always choose to avoid participating in public protests that conflict with their duties as government representatives, or choose to avoid running for office altogether, the citizenry would be underserved if persons motivated enough to participate in matters of public concern were somehow prevented from running for public office. This is not the case, but in certain instances it may require a fair amount of dexterity on the part of the elected official. The official should attempt to make it abundantly clear when he or she is speaking and acting as a member of the public, rather than as an elected representative, to ensure such distinction is maintained in the eye of the public.

Conclusion

The Occupy Movement posed specific and unique challenges to local governments and elected officials last fall but also offered public agencies an opportunity to reacquaint themselves with their laws governing access to public property. The many types of public property are only outnumbered by the many uses the public seeks to make of each parcel and the Supreme Court's forum analysis is at best a rudimentary means of addressing how the government must govern access. In a country with a long history of public protest, however, there is no question that municipal officials will continue to be required to address the challenges left for them by the Founding Fathers.