

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2023-000409

02/02/2023

HONORABLE BRADLEY ASTROWSKY

CLERK OF THE COURT  
C. Lockhart  
Deputy

BRAMLEY PAULIN

JOHN N THORPE

v.

KATE GALLEGO, et al.

KATE GALLEGO  
PHOENIX CITY HALL  
200 W WASHINGTON ST  
PHOENIX AZ 85003

JEFF BARTON  
PHOENIX CITY HALL  
200 W WASHINGTON ST  
PHOENIX AZ 85003  
LESLIE S TUSKAI  
JUDGE ASTROWSKY

**ORDER RE: PLAINTIFF'S FIRST AMENDED VERIFIED COMPLAINT**

The Court considered the following: Plaintiff's Application for Preliminary Injunction (filed January 26, 2023); Plaintiff's First Amended Verified Complaint for Declarator and Injunctive Relief (filed January 26, 2023); Defendants' Opposition to Plaintiff's Second Application for a Temporary Restraining Order (filed January 27, 2023); the testimony and evidence presented at the consolidated hearing on the merits, held pursuant to Rule 65(a)(2), Ariz.R.Civ.P.; and the arguments of counsel. For the reasons set forth herein, the Court finds in favor of Plaintiff as set forth herein.

The origin of this dispute began on October 12, 2022, when the Phoenix City Council (the "City") adopted Resolution 22073. The purpose of the resolution was to establish a Special

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Promotional and Civic Event area in downtown Phoenix to support events and activities related to Super Bowl LVII. This Resolution permitted the use of temporary signs that would ordinarily not be permitted in the downtown area, consistent with Phoenix Zoning Ordinance, Section 705.F.1.b. However, Resolution 22073 added to the ordinary sign approval process the requirement that all temporary signs needed to be authorized by the NFL or the Arizona Super Bowl Host Committee (“Host Committee”).

Plaintiff owns two pieces of property in downtown Phoenix, including a property at the intersection of 1st Street and Moreland, near the Margaret T. Hance Park. In celebration of the Super Bowl, downtown Phoenix will host multi-day festivities, including a music festival and an “NFL Experience” event at Hance Park. Over 1.5 million people are expected to attend these events. Plaintiff desires to erect temporary signage on his property, particularly the one near Hance Park, to take advantage of the high public visibility any signage would garner during Super Bowl festivities. Plaintiff began looking into using his property for such purpose shortly after the City passed Resolution 22073. For example, Plaintiff communicated with Coca-Cola, but it was not willing to enter into any agreements with him because Plaintiff’s property was in an area that required NFL or Host Committee approval for any such advertisements.

Given the power provided to the NFL and Host Committee, Plaintiff filed his first Complaint and Application for Temporary Restraining Order on January 9, 2023. In his first Complaint, in relevant part, Plaintiff argued that Resolution 22073 was an unconstitutional prior restraint on speech and an unconstitutional delegation of power. “Prior restraints on speech and publication are the most serious and the least tolerable infringement” on free expression. *Phoenix Newspapers, Inc. v. Otis*, 243 Ariz. 491, 495 ¶ 13 (App. 2018). Accordingly, prior restraints “come with a heavy presumption against constitutional validity.” *Nash v. Nash*, 232 Ariz. 473, 481–82 ¶ 32 (App. 2013). Such a restriction can survive only if it survives strict scrutiny—meaning, only “if the restriction serves a compelling governmental interest, is necessary to serve the asserted compelling interest, is precisely tailored to serve that interest, and is the least restrictive means readily available for that purpose.” *Id.* Plaintiff further alleged that Resolution 22073 was a prior restraint because it prospectively forbids the expression of any message until it is reviewed and approved by a private third party. This makes it a content-based restriction on speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 173 (2015); *Wortham v. City of Tucson*, 128 Ariz. 137, 141 (App. 1980). The Court agrees.

The Court also agrees that Resolution 22073 is an unconstitutional delegation of government power. A statute, ordinance, or resolution may delegate governmental power only if “it contains reasonably definite standards which govern the exercise of the power, and ...

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procedural safeguards in the nature of a right of review are provided.” *Schechter v. Killingsworth*, 93 Ariz. 273, 285 (1963). The Resolution provides no standards to guide decision-makers’ discretion. It was also unconstitutional of the City to delegate this power to an unaccountable private actor. “[I]t is a well-established theory that a legislature may not delegate its authority to private persons over whom the legislature has no supervision or control.” *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 203 Ariz. 557, 559 ¶ 7 (App. 2002). The Court finds that handing over power to an unaccountable third party is totally antithetical to the principles of limited government enshrined in Arizona’s Constitution. See Ariz. Const. art. II, § 2 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”).

At the first hearing in this matter, the Court was inclined to grant Plaintiff’s request for a Temporary Restraining Order and enjoin the City from enforcing Resolution 22073. To the City’s credit, it agreed to an Order enjoining the City from enforcing the resolution until the following week when the City planned on rescinding that resolution. The City did, in fact, rescind Resolution 22073. In its place, however, the City passed Resolution 22095 (“Resolution”) on January 25, 2023. The Resolution was substantially similar to the prior one but eliminated the delegation of power to the NFL and Host Committee.

The Resolution, however, did not enable Plaintiff to get the required permits to be able to place temporary signs on his property. The day before the passing of the Resolution, Plaintiff met with officials from the City. He presented two temporary sign applications to David Williams, the Sign Section Supervisor in the City’s Planning and Development Department. After their in-person meeting on January 24, 2023, Mr. Williams sent an e-mail to Plaintiff that same day at 5:30 p.m. That e-mail informed Plaintiff that his temporary sign applications could not be considered unless and until he either applied for and obtained his own use permit or he received permission from the Host Committee to utilize their use permit. Mr. Williams testified that a use permit is required before anyone can get approval to put up temporary signs within a Special Promotion and Civic Event Area. To obtain a use permit one must go through a process that typically takes four to six weeks, according to the testimony of Tricia Gomes, the Acting Deputy Director of Planning for the City. Therefore, as of the date the City agreed to enjoin the enforcement of Resolution 22073 and certainly as of the date the City passed the Resolution, it was too late for Plaintiff to obtain a use permit. Accordingly, his only remaining option was to rely upon the grace of the Host Committee in approving him to utilize their use permit.

Promptly after learning of this sole remaining option, Plaintiff filed his First Amended Verified Complaint for Declaratory and Injunctive Relief and related Application for Preliminary

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Injunction, on January 26, 2023. Plaintiff does not contend that the Resolution is unconstitutional on its face. Instead, he argues that it is unconstitutional in its application. Plaintiff argues that he was unable to do anything about getting permission to put temporary signs on his properties because on October 12, 2022, the City passed an unconstitutional resolution, and then replaced it on January 25, 2023, with the Resolution that required him to either obtain his own use permit or to get permission from the Host Committee to utilize theirs. Given that the process to obtain a use permit would end well after either the Chiefs or the Eagles are handed the Vince Lombardi Trophy, it would be futile for Plaintiff to begin the use permit process. The only remaining option would be similar to the unconstitutional option of Resolution 22073, i.e., getting the approval of a non-Government entity, the Host Committee. Accordingly, Plaintiff contends the Resolution is unconstitutional in its application. Plaintiff requests the Court order the City immediately approve his temporary signage applications pursuant to the existing use permit for the downtown area, subject to its ordinary, content-neutral rules for temporary signage within a special event area.

The City argues that the Resolution is constitutional and, without admitting that Resolution 22073 was unconstitutional, any possible offending language or requirements of Resolution 22073 were cured by the elimination of same in the new Resolution. Furthermore, the City argues that a use permit is always required before one may obtain approval to post temporary signs, and Plaintiff's own delay, and not City action, to make an application for a use permit is the cause of his current issue. The City contends that the mandamus relief requested is not appropriate because it is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Sensing v. Harris*, 217 Ariz. 261, 263, ¶ 6, 172 P.3d 856, 858 (App.2007). Here, given Plaintiff's own delay, it would be improper to use this extraordinary remedy as it would encourage others to file lawsuits to obtain relief in circumstances in which they didn't comply with the law, the City argued to the Court. Finally, the City believes that an Order directing the City to ignore its own ordinances and approve Plaintiff's temporary signage applications is a violation of the separation of powers clause. A.R.S. Const. Art. 3.

The problem with the City's laches argument is that the City created the delay. Laches is an equitable doctrine based on the principle of fundamental fairness. *Harris v. Purcell*, 193 Ariz. 409, 414, ¶ 24, (1998). Laches will generally bar a claim when the delay [in filing suit] is unreasonable and results in prejudice to the opposing party." *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 6, 13 P.3d 1198, 1200 (2000). In determining whether the delay was unreasonable, "we examine the justification for delay, including the extent of plaintiff's advance knowledge of the basis for challenge." *Harris*, 193 Ariz. at 412, ¶ 16. The delay must also result in prejudice, either to the opposing party or to the administration of justice. *Id.* Here, the City passed an unconstitutional resolution in October 2022. That unconstitutional resolution was not rescinded

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by the City until January 25, 2023. Plaintiff's ability to exercise his right to free speech and apply for the requisite approval for any temporary signs was chilled by the City's enactment of an unconstitutional law. The City only enacted a non-facially unconstitutional resolution concerning the sign issue on January 25, 2023. Therefore, the first time Plaintiff could take action on a facially constitutional law was at a time when it was too late for him to obtain his own use permit. Any delay is the cause of the City's conduct and not that of Plaintiff.

Mandamus is proper here because the City has refused to consider Plaintiff's request for a sign because they claim it is too late. Again, as the City caused the delay by enacting an unconstitutional law, and then correcting the problem in way that denies Plaintiff the opportunity to apply to post speech on his property, the only remedy available at this time is a Court order.

Finally, there is no separation of powers issue here, as the Court will not direct the City to allow Plaintiff to place whatever sign he desires on his property. Instead, the Court directs the City to, in a content-neutral way, consider Plaintiff's application – not necessarily grant it. The City still has the ability to exercise their discretion in a manner consistent with their ordinances and the ordinary exercise of their executive branch discretion.

Without Court intervention, the application of the Resolution is an unconstitutional content-based prior restraint on speech. Given the timing of the Resolution, which was dictated by the discretion of the City, Plaintiff may only submit a temporary sign application if permitted by the Host Committee – an entity interested in protecting NFL sponsors and the NFL. This does not mean that the Super Bowl Host Committee is evil or has any evil intent. However, it does mean that Plaintiff has no manner in which he is guaranteed to have his request for speech to be approved in a content-neutral way at this time, without Court intervention. See *Reed*, 576 U.S. at 173. The City, hence, set up a circumstance in which a private entity is given the authority to make content-based decisions on speech. There is no legitimate government interest in content-based regulation of signs, let alone regulation of signs based on the content preferences of private businesses that are given special privileges by the government. Courts have recognized two substantial government interests that can sometimes justify regulations on commercial signage: public safety and aesthetics. See, e.g., *Outdoor Sys., Inc. v. City of Mesa*, 169 Ariz. 301, 306 (1991). The government, not the Plaintiff, bears the burden of proving that the restriction serves these ends with proper narrow tailoring, *Salib v. City of Mesa*, 212 Ariz. 446, 451 ¶ 10 (App. 2006), and it has not done this.

Furthermore, the Resolution as applied violates Plaintiff's rights to due process under the Arizona Constitution, see Ariz. Const. art. II, § 4, because it fails to establish minimum procedural

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safeguards. The Host Committee may not permit Plaintiff to piggy-back onto their use permit for good cause or for no reason at all. The Host Committee is not required to advise Plaintiff of their reasons, and Plaintiff has no avenue to review their decision. See *Herrera v. Jamieson*, 124 Ariz. 133, 134 (App. 1979); *Elia v. Ariz. Bd. of Dental Exam'rs*, 168 Ariz. 221, 228 (App. 1990).

Plaintiff does face irreparable harm without intervention by the Court. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *Am. Trucking Ass'n v. City of L.A.*, 559 F.3d 1046, 1059 (9th Cir. 2009) (“[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.”)

In summary, the City created the need for this litigation by enacting an unconstitutional resolution. They further exacerbated the problem, by only choosing to remedy their error when it was too late for Plaintiff to apply to exercise his right to speech. The City’s offer that Plaintiff can file his temporary sign application only if permitted by a private entity renders the application of an otherwise facially constitutional resolution to be unconstitutional. Accordingly, Court intervention is required. Given the delay already occasioned by the City and the testimony provided by David Williams that the City typically responds to an application for temporary signage within three to five days, the Court will order an expedited consideration of Plaintiff’s applications. When confronted with a constitutional flaw in a law, Courts should try to limit the solution to the problem. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006). This is what this Court does here. The Order contained below is a ruling on the merits of Plaintiff’s First Amended Verified Complaint. As the Court is required to address the issue of costs, it cannot enter a Rule 54(c) final judgment at this time.

**IT IS ORDERED** the City shall consider Plaintiff’s temporary signage applications utilizing the existing Host Committee’s Use Permit and approve or deny Plaintiff’s applications subject to its ordinary, content-neutral rules for temporary signage in a Special Promotional and Civic Events zone. The City shall make a decision concerning Plaintiff’s applications within 48-hours of receiving same. This Order does not otherwise impact the enforcement of Resolution 22095 and related city ordinances concerning any other party, i.e., this Order only concerns Plaintiff.

**IT IS FURTHER ORDERED** that Plaintiff’s request for an award of attorneys’ fees is denied as this award only impacts Plaintiff and not a large number of people; thus, the private attorney general doctrine does not apply. See *Cave Creek Unified School District v. Ducey*, 233 Ariz. 1 (2013).

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**IT IS FURTHER ORDERED** that as the prevailing party, Plaintiff is entitled to an award of costs, per A.R.S. § 12-341. Plaintiff shall file a Statement of Costs along with a draft form of judgment, per Rule 54(c), Ariz.R.Civ.P., no later than February 8, 2023. The City shall file any objections to same no later than February 15, 2023. No Reply is permitted without prior approval of the Court.