

## **MEMORANDUM**

TO: The Manager, Mayor, and Board of Alderman

FROM: Nick Herman

RE: Picket, Parade, and Public Assembly Regulations for the Town After Charlottesville

DATE: August 24, 2017

The tragic event in Charlottesville, Virginia led to an August 18, 2017 discussion between Town staff and the Mayor (including Damon Seils) about ways in which the Town might address free-speech issues and the safety and welfare of the Town's citizens regarding public events and lawful expression under the First Amendment. This Memorandum follows up on that discussion by summarizing: (I) the general scope of the Town's authority to regulate free speech under the First Amendment; (II) elements of a constitutional ordinance regulating the time, place, and manner of speech; and (III) Carrboro's current Code & potential revisions.

### **I. The General Scope of the Town's Authority to Regulate Free Speech Under the First Amendment**

Municipalities have the right to enact ordinances that require a permit for pickets, parades, or public assemblies. Under the First Amendment, these ordinances comport with free-speech guarantees if they reasonably regulate the time, place, and manner of speech in a way that: (1) is not—in any way—based on the “content” of the speech; (2) the regulations are “narrowly tailored” to serve “significant municipal interests;” and (3) the regulations leave open ample alternatives for communication when a specific picketing, parade, or public assembly request is denied. To be “narrowly tailored,” the ordinance need not be the least restrictive or least intrusive means of effectuating a significant municipal interest, but the ordinance may not burden substantially more speech than is necessary to further the municipality's legitimate interests. Because any ordinance requiring a permit before engaging in protected speech under the First Amendment is a prior restraint on speech, the burden of proving the constitutionality of the ordinance is on the municipality. The federal and state case law on this subject is complex and, in many respects (depending on the particular facts) conflicting.

United States Supreme Court decisions (uniformly followed by federal and state courts) have been unwavering in zealously protecting “political speech” under the First Amendment. On the other hand, certain categories of speech are not protected by the First Amendment. These include: (1) subversive advocacy speech, consisting of speech directed to inciting or producing *imminent* lawless action and speech that is likely to incite or produce such action; (2) fighting words speech, consisting of words spoken in a face to face exchange such as personal insults or epithets which by their very utterance are likely to cause the person to whom they are addressed to respond with violence directed at the speaker (not including political statements that the hearer finds deeply offensive to his or her beliefs); (3) true-threats speech, consisting of statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals; (4) certain types of speech constituting “obscenity” or “child pornography;” and (4) commercial speech that concerns illegal activity, or commercial speech that is false or misleading. These unprotected forms of speech under the First Amendment are entirely distinguishable from protected “political speech.”

The distinction and interplay between “political speech” protected by the First Amendment and speech not protected by the First Amendment (like subversive advocacy, fighting words, or threats speech) is critically important to understanding the constitutional validity of a municipal ordinance which, by a permit requirement, operates as a prior restraint upon protected speech. That is, a municipal permit requirement for a picket, parade, or public assembly violates the First Amendment if the decision on the permit is based on the prospect or consideration that otherwise lawful speech might lead to either (1) unprotected speech, or (2) disruption or violence by unruly spectators (sometimes referred to as the “heckler’s veto”). The point is that if the speech proposed by the prospective picket, parade, or public assembly is lawful speech (like “political speech”), a municipality cannot ban or otherwise restrict such speech simply because it may be egregiously offensive, immoral, or otherwise reprehensible to the listener, or because others who might hear the speech might react in some adverse way. In short, as stated above, all municipal-permit regulations on the exercise of lawful, free speech must be strictly “content neutral”—i.e., entirely *unrelated* to the subject matter or viewpoints expressed by the lawful speech, however undesirable or heinous that speech might be to normative, reasoned, or moral sensibilities, or however such speech might give rise to unlawful activity of the listener to such speech. Indeed, many decisions by federal and state courts have involved successful challenges to municipal ordinances brought by the Klu Klux Klan and Neo-Nazi groups.

## **II. Elements of a Constitutional Ordinance Regulating the Time, Place, and Manner of Speech**

Under the First Amendment principles described above, pickets, parades, and public assemblies may be regulated by municipal-permit requirements that include the following:

- That a permit be required from a Town official, such as the Town Manager in consultation with the Police Chief and other Department Heads of the municipality, or by the governing board or with input by the governing board.
- That the application for the permit be submitted within a reasonable prescribed time before the event (e.g., at least 72 hours in advance) and contain specific information, such as the date, time, place, route, general description of the event, number of persons, activities, projected number of spectators, need for police protection or other resources, use of banners, signs, flags, or sound amplification equipment, etc.;
- That the Town official (or Board) responsible for issuing the permit, approve, reject, or modify the permit request within a specified time after the application is submitted, and make a decision based on specific criteria, such as the extent to which the event affects traffic, public health or safety, the availability of police and emergency services resources, etc.; and, if the specific plan for the event is denied, provide one or more alternative times, places, or manners in which the event may be held;
- That the applicant may appeal the denial of the permit by following certain prescribed appeal procedures;
- That participants in the event adhere to certain prescribed conditions, including (but not limited to) not possessing any object or instrumentality with an apparent or potential to cause physical injury to other persons or damage to property;
- That the event sponsor provide insurance for or an indemnity agreement to cover any personal or property damages occasioned by the event and/or pay for the costs of additional police/emergency services necessitated by the event, and pay for necessary clean-up after the event;

- That the Town official (or Board) deciding on the permit establish other reasonable conditions that are narrowly tailored, under the circumstances, to advance legitimate public health, safety, and welfare interests of the Town in connection with the event.

As stated above, to be valid, these types of requirements or regulations must be sufficiently *specific*, and applicable to pickets, parades, or public assemblies without reference *to the content* of the speech exercised at such events.

### **III. Carrboro's Current Code & Potential Revisions**

Carrboro's current Code at Chapter 7, Article III-Street Events, Sections 7-16 through 7-25, applies to events "that require the temporary closing or obstruction of a street, sidewalk, or other public right-of-way or any segment thereof or that substantially hinders or prevents the normal flow of vehicular or pedestrian traffic along any street or other public right-of-way." As written, this Code provision essentially applies to streets and sidewalks. The provision does not address other public places of assembly in the Town, such as its parks or other common areas.

This Code provision provides for a permit and certain procedures for obtaining a permit for the exercise of First Amendment rights on the streets, sidewalks, and right-of-ways of the Town. In general, those provisions are sound from a constitutional standpoint, but they are less than comprehensive and do not apply to other public areas of the Town, such as its parks and other common areas.

Retaining, and expanding upon, certain provisions of this Article may be warranted. However, it is recommended that the Town develop and adopt a more expansive Picketing, Parade, and Public Assembly Ordinance in the Town Code that would more comprehensively address the matters raised above.