

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION**

**FILED**

**2011 OCT 25 PM 1:37**

**CASE NO:**

**U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS, FLORIDA**

**OCCUPY FORT MYERS, CINDY  
BANYAI, STEPHANIE DARST,  
CHRISTOPHER FAULKNER, F. FRANK  
GUBASTA, ZACHARY KUHN, HILARY  
MAINS, MATT MCDOWELL, MICHELLE  
MEYER, LUIS OSPINA, RYAN POGUE,  
FRANK PRATT, MARLENE ROBINSON,  
and JUSTIN VALO,**

**Plaintiffs,**

2: 11-cv-608 -FtM-29DNF

**v.**

**CITY OF FORT MYERS,**

**Defendant.**

**VERIFIED COMPLAINT**

**(With Injunctive Relief Sought)**

The **PLAINTIFFS** hereby commence this civil action, seeking declaratory relief, injunctive relief, and compensatory damages, for ongoing and threatened violation of the First Amendment rights of individuals and an unincorporated association seeking to engage in peaceful expressive conduct within the City of Fort Myers, Florida.

**JURISDICTION AND VENUE**

1. This action seeks declaratory relief, injunctive relief and compensatory damages pursuant to 42 U.S.C. §1983, for ongoing and threatened injury to the First Amendment rights of individuals and an unincorporated association engaged in lawful expressive activity within the City of Fort Myers,

Florida. This Court accordingly has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 as claims arising under the U.S. Constitution, and pursuant to 28 U.S.C. § 1343 (a), as a civil action to redress the deprivation of civil rights and privileges secured by the U.S. Constitution. Further, this court has jurisdiction over Plaintiffs' claims for declaratory relief in accordance with the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202.

2. Venue is proper in the Middle District of Florida - Fort Myers Division, under 28 U.S.C. §1391(b) (1), insofar as defendant City of Fort Myers is located in Lee County, Florida, and is thereby wholly located within the above-referenced judicial district.

### INTRODUCTION

3. The set of Plaintiffs is comprised of thirteen (13) persons who are active in Southwest Florida in bringing awareness of social and economic justice issues through demonstrations, marches, and rallies, and related expressive speech and conduct, and one (1) unincorporated association whose members are concerned about current political, social and economic issues, including those arising locally, nationally and globally. In the instant civil action, the Plaintiffs challenge several provisions of the City of Fort Myers' Municipal Code ("**Fort Myers Code**" or "**Code**"). The City of Fort Myers (hereinafter also "Fort Myers" or "defendant City") employs a permit scheme, for expressive activity in traditional public fora, that is violative of constitutional safeguards as an unlawful prior restraint, because it is content-based, overbroad, vague, and it suffers from additional infirmities. The permit scheme requires a "written permit from the chief of police" for every "parade, procession . . . or public open-air meeting." The ordinance lacks sufficient standards in multiple instances, to guide the decision of whether and under what conditions a permit will issue, to ensure that public officials must decide whether to issue or deny a permit in sufficient time to actually stage the event, and what conditions may be imposed on expressive activities. The absence of adequate standards in key areas means that the ordinance vests public officials with unbridled discretion and invites content-based decisions based on the nature of the speaker. These are forbidden grounds on which

to base a permit scheme that requires a license to engage in protected speech; the permit scheme violates Plaintiffs' First Amendment rights by impermissibly limiting their rights to speech, association, and assembly. Furthermore, the Fort Myers allows City officials to accommodate "athletic sporting events, or cultural or civic events" after public park closing hours, but allows no provision for accommodation of those who are participating in First Amendment-protected activity. This ordinance is content-based on its face and illustrates a governmental policy of preference for non-political speech. For these reasons, defendant City of Fort Myers must be enjoined from prohibiting the lawful exercise of First Amendment-protected activity. Further, the Plaintiffs seek a declaration that the City's "Park Operating Policy" is facially invalid as violative of protected expressive conduct, and seeks damages for the wrongful abrogation of protected free speech, association and assembly.

## **PARTIES**

### **Plaintiffs**

4. Plaintiff **OCCUPY FORT MYERS** ("alternately "OFM") is an unincorporated association of individuals, mostly from Lee County, Florida and surrounding areas, who are concerned about the direction of our country and who have gathered spontaneously to bring visibility to the influence of private money into the nation's political process. [Declaration of Justin Valo, dated October 22, 2011, hereinafter "Valo Decl.," at ¶ 3, attached hereto as Exhibit 1]. A core purpose of OFM is to bring awareness to the concerns about the U.S. political process and economic policy through symbolic, around-the-clock, peaceful protests referred to as "occupations." [Valo Decl., at ¶ 3]. OFM held their first rally and march on October 15, and began occupying Centennial Park in Fort Myers that evening. [Valo Decl. at ¶ 5].

5. Plaintiff **CINDY BANYAI** is a resident of Lee County, Florida. Plaintiff Banyai received a citation in the amount of \$135.00 while involved in symbolic First Amendment-protected speech on the evening of October 20, 2011. [Citation No. 1B25781]. Plaintiff is asserting her personal

constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

6. Plaintiff **STEPHANIE DARST** is a resident of Lee County, Florida. Plaintiff Darst received two citations in the amount of \$135.00 each while involved in symbolic First Amendment-protected speech on the morning of October 22, 2011. [Citation No. 1B23023 and 1B23022]. Plaintiff is asserting her personal constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

7. Plaintiff **CHRISTOPHER FAULKNER** is a resident of Lee County, Florida [Declaration of Christopher Faulkner, dated October 23, 2011, hereinafter “Faulkner Decl.,” at ¶2, attached hereto as Exhibit 2]. Plaintiff Faulkner received two citations in the amount of \$135.00 each while involved in symbolic First Amendment-protected speech on the evening of October 20, 2011 [Faulkner Decl. at ¶ 6]. Plaintiff Faulkner has received multiple citations since October, 20, for a total of eight, each in the amount of \$135.00. Plaintiff Faulkner fears the ordinances and policies of the City of Fort Myers will inhibit the exercise of his free speech [Faulkner Decl. at ¶8].

8. Plaintiff **F. FRANK GUBASTA** is a resident of Lee County, Florida. Plaintiff Gubasta received two citations in the amount of \$135.00 each while involved in symbolic First Amendment-protected speech on the evening of October 21, 2011 and again on the morning of October 22, 2011. [Citation No. 1B26251, 1B18250]. Plaintiff is asserting his personal constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

9. Plaintiff **ZACHARY KUHN** is a resident of Lee County, Florida. Plaintiff Kuhn received a citation in the amount of \$135.00 while involved in symbolic First Amendment-protected speech on the evening of October 20, 2011. [Citation No. 1B24948]. Plaintiff is asserting his personal constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

10. Plaintiff **HILARY MAINS** is a resident of Lee County, Florida. Plaintiff Mains received a citation in the amount of \$135.00 while involved in symbolic First Amendment-protected speech on

the evening of October 20, 2011. [Citation No. 1B25878]. Plaintiff is asserting his personal constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

11. Plaintiff **MATT MCDOWELL** is a resident of Collier County, Florida. [Declaration of Matt McDowell, dated October 24, 2011, hereinafter “McDowell Decl.,” at ¶2, attached hereto as Exhibit 3]. Plaintiff McDowell received a citation in the amount of \$135.00 while involved in symbolic First Amendment-protected speech, including participating as a citizen journalist, on the morning of October 22, 2011 [McDowell Decl. at ¶ 6]. Plaintiff McDowell fears the ordinances and policies of the City of Fort Myers will inhibit the exercise of his free speech [McDowell Decl. at ¶8].

12. Plaintiff **MICHELLE N. MEYER** is a resident of Lee County, Florida. Plaintiff Meyer received a citation in the amount of \$135.00 while involved in symbolic First Amendment-protected speech on the evening of October 20, 2011. [Citation No. 1B24226]. Plaintiff is asserting her personal constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

13. Plaintiff **LUIS OSPINA** is a resident of Lee County, Florida [Declaration of Luis Ospina, dated October 23, 2011, hereinafter “Ospina Decl.,” at ¶2, attached hereto as Exhibit 4]. Plaintiff Ospina received a citation in the amount of \$135.00 while involved in symbolic First Amendment-protected speech on the evening of October 20, 2011 [Ospina Decl. at ¶ 6]. Plaintiff Ospina fears the ordinances and policies of the City of Fort Myers will inhibit the exercise of his free speech [Ospina Decl. at ¶8].

14. Plaintiff **RYAN POGUE** is a resident of Lee County, Florida. Plaintiff Pogue received two citations in the amount of \$135.00 each while involved in symbolic First Amendment-protected speech on the evening of October 22, 2011. [Citation No. 1B23090, 1B23097]. Plaintiff is asserting his personal constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

15. Plaintiff **FRANK PRATT** is a resident of Lee County, Florida. Plaintiff Pratt received a citation in the amount of \$135.00 while involved in symbolic First Amendment-protected speech on the evening of October 20, 2011. [Citation No. 1B24949]. Plaintiff is asserting his personal constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

16. Plaintiff **MARLENE ROBINSON** is a resident of Lee County, Florida. Plaintiff Robinson received two citations in the amount of \$135.00 each while involved in symbolic First Amendment-protected speech on the evening of October 22, 2011. [Citation No. 1B25061, 1B25060]. Plaintiff is asserting her personal constitutional right to engage in free speech, assembly and association within the confines of the City of Fort Myers.

17. Plaintiff **JUSTIN VALO** is a resident of Lee County, Florida [Valo Decl., at ¶2]. Plaintiff Valo participates in ongoing demonstration activities, and assists in the organization of OFM's activities. [Valo Decl., at ¶3]. Plaintiff Valo asserts that unconstitutional ordinances being enforced by the City of Fort Myers have hindered and chilled his speech, the speech of all those who associate with OFM and all who may have wanted to associate with OFM in the future. [Valo Decl., at ¶16].

#### **Defendant**

18. Defendant **CITY OF FORT MYERS** is a body corporate and politic, with the capacity to sue and be sued. The City of Fort Myers is the legal entity responsible for the actions of its final policymaker for city policies, the Fort Myers City Council. As such, defendant City is responsible for the passage of City Code Sec. 2-271 to 2-273, Sec. 58-151 to 58-157, and Sec. 78-1 to 78-3 by the City Council, and for the implementation of that city law.

## **FACTUAL ALLEGATIONS COMMON TO ALL COUNTS**

19. Plaintiffs seek to exercise their First Amendment rights to demonstrate in Centennial Park, public property located in Fort Myers, Florida, in an attempt to bring visibility to the insidious influence of money into the U.S. political process, and to inform members of the general public on political issues such as social justice and economic equality.

### **Interaction Between Event Organizers and City of Fort Myers Officials**

20. On or about October 11, 2011, Mark Hetrick, who volunteered his services as a member of the OFM Legal Working Team, called the Fort Myers Police Department (“FMPD”) to inquire about obtaining a permit for a planned OFM rally and march in downtown Fort Myers on Oct. 15, 2011. [Valo Decl., at ¶6].

21. FMPD indicated that OFM could rally and march downtown on Oct. 15th, provided that OFM submit to certain restrictions. Specifically, OFM could not: use a megaphone, march in the street, or include “vulgar language” on signs. [Valo Decl., at ¶6].

22. Mr. Hetrick further inquired about OFM’s intentions to symbolically “occupy” Centennial Park beginning on the evening of Oct. 15, 2011. An FMPD contact said that the police would not interfere with any overnight “occupation,” including allowing the erection of tents, as long as there was no alcohol brought into the park. The FMPD advised OFM to contact the City of Fort Myers Recreation Division to obtain a permit for the overnight occupation. [Valo Decl., at ¶6].

23. On October 15, 2011, OFM held a noon rally at Centennial Park, and then conducted an approximately one mile-long march from Centennial Park to the Bank of America branch on First Street, and then back to Centennial Park. Approximately 500 people showed up to support the Occupy Fort Myers movement. The march and rally remained peaceful and respectful. [Valo Decl., at ¶6].

24. OFM began “occupying” Centennial Park on the evening of October 15<sup>th</sup>. The General Assembly of OFM, comprised of the entire gathering of persons engaged in a group decision-making process, agreed that the “occupiers” would respect the City and park by making sure that the participants maintained quiet after park closing hours, and by thoroughly cleaning up after themselves. The occupiers had no confrontations with members of the public, the City or FMPD from Oct. 15<sup>th</sup> through Oct. 20<sup>th</sup>. [Valo Decl., at ¶9]. The “occupiers” did continue their political activity by engaging in awareness-building with an information booth for questions for the general public set up at the entranceway of the encampment, print and television media, by displaying political signs, and through the symbolic presence of tents. [Faulkner Decl., at ¶ 3; *see also* digital photographs of the OFM encampment area, attached hereto as Exhibit 5].

25. On October 18, 2011, OFM obtained a “Special Events” pamphlet from the City, enclosed within it was a permitting scheme and a permit application. The “Special Events” pamphlet states that “[t]he Special Events Advisory Board may have final approval of all events as detailed in City Ordinance #3019.” OFM completed a permit application, and submitted it to the Recreation Division. OFM informed the Recreation Division, along with Officer Sanchez of the FMPD, through email communication that Occupy Fort Myers sought to cooperate with the City. [Valo Decl., at ¶10].

26. On October 19, 2011, at 10:19 a.m., Kelly MacDonald, Senior Program Coordinator in the Recreation Division informed OFM, through email, that, before the Special Event Committee could even review the permit application, OFM would need to obtain a \$1 million liability insurance policy and bring the Liability Insurance certificate to the Recreation Administrative Office. Ms. MacDonald informed OFM that the City was prepared to enforce Ordinance Sec. 58-153(3) if OFM did not comply with the liability insurance by 3:00 p.m. on the same day. [Valo Decl., at ¶10].

27. On October 19, 2011, Mark Hetrick contacted Ms. MacDonald by email and phone to let her know that OFM could not possibly comply with the 3:00 p.m. deadline to obtain an insurance policy. The City gave OFM the names of three insurance companies, and Ms. MacDonald agreed to allow

OFM an additional day to attempt to obtain insurance and thereby comply with City regulations. [Valo Decl., at ¶10].

28. On Oct. 19, 2011, OFM informed the City of Fort Myers Recreation Division and Police Department, through email, that the insurance companies designated by the City of Fort Myers would not provide the requested liability insurance policy to OFM. OFM informed Ms. MacDonald, Mr. Saeed Kazemi, the Public Works Director, and Officer Sanchez of the FMPD, through email, that OFM sought understanding and cooperation with the City, that the group would like to obtain a permit, but OFM could not satisfy the City's requirements. OFM asked that the City not attempt to dismantle OFM presence in Centennial Park. [Valo Decl., at ¶11].

29. Even if an insurer would agree to insure OFM, OFM has absolutely no funds with which to pay for a liability insurance policy and, it was conveyed by City personnel that the City of Fort Myers would require OFM to apply for another permit and obtain a re-issuance or new insurance policy every ten days. [Valo Decl., at ¶14]. OFM sought to review the procedures for requesting a waiver of the liability insurance requirement or for appeal of the denial of a permit, but there were no provisions for either to be found in either the City of Fort Myers ordinances or the Special Events pamphlet. [Valo Decl., at ¶12].

30. On October 20, 2011, members of OFM and their legal counsel spent most of the day attempting to negotiate, in good faith, with City employees in an attempt to obtain a permit for the ongoing symbolic demonstration. The City would not issue OFM a permit, nor would the City identify any procedure for requesting either waiver or appeal of the City's decision. [Valo Decl., at ¶15].

31. On the evening of October 20, at approximately 10:45 p.m., members of the FMPD showed up at Centennial Park and issued citations of \$135 each to any individual who was planning on remaining in the park after 10:30 p.m. [Valo Decl., at ¶15; Faulkner Decl., at ¶6; Ospina Decl., at ¶6].

32. On the morning of October 22, 2011, FMPD law enforcement officers arrived at OFM encampment area at approximately 6:15 a.m. and demanded the OFM occupiers to leave the park and remove their tents. [McDowell Decl., at ¶6].

33. Humana, the insurance corporation, was sponsoring an Alzheimer's Awareness event in Centennial Park on Saturday, October 22. FMPD Captain Viola informed OFM occupiers that Humana rented "the entire park," and that he didn't wish for OFM members to leave the park completely until noon. When Capt. Viola was further questioned by OFM members, he informed OFM that the Humana representatives did not want the tents in the park during their event. The occupiers who were present each received a citation in the amount of \$135 for being in the park after closing hours, even though Humana representatives were also in the park before 6:30 a.m. The occupiers who were present each received a citation in the amount of \$135 for being in the park after closing hours, even though Humana representatives were also in the park before 6:30 a.m. [McDowell Decl., at ¶6].

34. As a direct and proximate cause of the unconstitutional City ordinances, Plaintiffs have suffered damages, which include violation of their civil rights, limitation of their core political message to those who may be interested in participating in OFM events but whose speech has been chilled, and economic damages, in the nature of the value of the lost publicity, the value of volunteer staff time to adjust events and notify persons as to governmental harassment, the cost of transportation and related costs to attempt to comply with City demands, costs of litigation, and related expenses.

#### **City of Fort Myers Ordinances<sup>1</sup>**

##### ***Provision of the Special Events Advisory Board Ordinance, Sec. 2-273.***

35. The law, entitled "Powers and Duties," is a sweeping set of provisions vesting specific powers within the Special Advisory Board, as follows:

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<sup>1</sup>. Copies of the Challenged City Code sections are attached hereto as Exhibit 6.

“The special events advisory board shall:

(1) Act in an advisory capacity to the city council in matters relating to special events proposed by event managers, which are (a) Open to the public; (b) held within the city limits in spaces that are overseen by the city; © Expected to attract more than 1,000 people; **and** (d) Requesting the city council approve a waiver or a reduction of fees or a cash sponsorship.

...

(3) Recommend to the city council special events that should receive city sponsorship by a reduction or waiver in the fees charged for the use of public property and/or the cost of services to be provided by the city, based on a weighted scale of merit;

(4) Recommend regulations for the conduct of special events that will increase interest therein to the citizens, residents and visitors of the city generally . . . .”

***Provision of the Park Operating Policy, Sec. 58.***

36. Sec. 58-153, entitled “Recreational activity restrictions,” and Sec. 58-154, entitled “Prohibited Behavior,” impose impermissibly vague restrictions on symbolic speech and expressive activity, as follows:

58-153 “No unauthorized person in a park shall: (3) Set up tents, shacks, or any other temporary shelters for the purpose of overnight camping. No person shall live in a park beyond closing hours in any movable structure or special vehicle to be used or that could be used for such camping purpose, such as a tent, house-trailer, camp-trailer, camp-wagon or the like.”

58-154 “No unauthorized person in the park shall do any of the following: (6) Loitering and boisterousness. Sleep or protractedly lounge on the seats, benches, or other areas, or engage in loud, boisterous, threatening, abusive, insulting or indecent language, or engage in any disorderly conduct or behavior tending to a breach of the public peace.”

37. Sec. 58-156, entitled “Park Operating Policy,” is a content-based restriction on symbolic speech and expressive activity, as follows:

“(a) *Hours.* . . Normal park hours are 6:00 a.m. to 10:30 p.m. unless posted otherwise by the recreation manager. Such hours shall be deemed extended by the recreation manager as necessary to accommodate athletic sport events, or cultural or civic activities.”

38. Sec. 58-157, entitled “Violations; Penalties” states, as follows:

“A violation of this division will subject the violator to a find of not less than \$25.00 and not more than \$250.00. Such violators may be issued appropriate citations by city policy officers.”

***Provision of the Parades and Processions Ordinance, Sec. 86.***

39. Sec. 86, entitled “Parades and Processions,” is a content-based law that has three subsections that outline a permitting scheme without specific factors or guidelines and vests unbridled discretion in the Chief of Police, as follows:

86-153 “(a) No parade or procession upon any street of the city, and no open-air public meeting upon any public property shall be permitted unless a special permit shall first be obtained. Any person desiring a permit under this section shall make written application to the chief of police or some duly authorized member of the police department. Permits issued under this section shall be printed or written, duly signed by the chief of police or some duly authorized member of the police department after approval, and shall specify the day, hour, place and purpose of such parade, procession or open-air public meeting. (b) The fee for such permit shall be \$5.00 if the activity permitted requires no extra policing or will cause no extra cost or expense to the city. If such activity will require additional policing or supervision, or otherwise incur additional cost and expense to the city, there shall be charged such fee as will defray such additional cost to be determined by the chief of police.

86-154 “If the chief of police knows or has reasonable grounds to believe that to permit any parade, procession or open-air meeting under this article may or will result in violence, fighting, disturbance of the peace, or injuries to persons or damage to property, he may refuse to approve issuance of a permit hereunder by endorsing on the application or indicating in writing to the city clerk his reason for his refusal and such permit shall not be issued.”

**Application of City Code to OFM Events**

40. The City of Fort Myers required OFM to obtain a “special events” permit for their expressive conduct of “occupying” Fort Myers, even though OFM’s demonstration does not fall within the definitional parameters of a “special event,” especially since there was never any expectation that more than 1,000 would join the overnight encampment. Because the City arbitrarily subjected OFM to the special events requirements, OFM was subjected to restrictive permit requirements not suitable for small, spontaneous First Amendment-protected activity. Furthermore, since OFM was subjected to special events provisions, which are reviewed by the Special Events Advisory Board, City Code Sec. 2-273 allows the Board complete control, without defined appellate procedures, as to whether or not to entertain the waiver of any provisions.

41. The City of Fort Myers has issued citations to members of OFM for violations of City Code 58-153. However, the Code prohibits the erection of tents for the “purpose of overnight camping.” The application provision constitutes viewpoint discrimination, and clearly, OFM is not erecting tents for the “purpose of overnight camping.” The presence of both OFM-affiliated persons and the tents is in furtherance of their fundamental message of dissatisfaction with the political status quo in this nation. OFM is subject to the provisions of Sec. 58-154. This code is impermissibly vague since OFM would not be aware of what constitutes “boisterousness” or “protracted lounging.” Sec. 58-154 also divests members of OFM of a liberty interest by penalizing lounging in the park. The City of Fort Myers has issued citations to members of OFM for violations of City Code 58-156. This section of the City Code is clearly content-based viewpoint discrimination as it shows a policy of preference for non-political speech. The Recreation Manager also has unbridled discretion to extend park hours for sporting, cultural or civic events, but not for First Amendment-protected activity.

42. The FMPD allowed OFM to rally and march, pursuant to City Code 86-153, provided OFM agree to certain ad hoc restrictions. These restrictions reflect city policies vesting unbridled discretion in the Fort Myers Police Department and has an impermissible or, more accurately, an ethereal

permitting scheme. Because any “open air meeting” is subject to the provisions of this code, OFM members are divested of an important liberty interest.

## **CAUSES OF ACTION**

43. As to each cause of action delineated below in Counts One, Two, Three, and Four, the plaintiffs advance their federal constitutional claims against the City of Fort Myers in the City’s capacity as a state actor, through the operation of the Fourteenth Amendment.

### **COUNT ONE**

***Monell Claim - Official Policy to Suppress Protected Speech and Assembly***  
**(42 U.S.C. § 1983 - Violation of First Amendment - Viewpoint Discrimination)**  
**Fort Myers City Code, Sec. 2-273 and Sec. 58-156**  
**By ALL PLAINTIFFS Against CITY OF FORT MYERS**

44. Plaintiffs reallege and incorporate each jurisdictional and factual allegation of Paragraphs 1-43, as if set forth at length herein.

45. At all times relevant hereto, the City Council of defendant City of Fort Myers (“Council”) was the final policymaker for the City of Fort Myers, for the purpose of adopting ordinances and other policies regulating constitutionally-protected speech, expressive conduct, and assembly within the boundaries of the City.

46. The Council enacted Ordinance No. 3019, codified as Code Sec. 2-271 to Sec. 2-273 referenced as the “Special Events Advisory Board” Ordinance, precluding OFM’s demonstration event without first obtaining a permit, to be reviewed and recommended by the Special Advisory Board members defined in Sec. 2-271 and 2-272. This ordinance is unconstitutional on its face as an impermissible prior restraint, containing terms which provide for targeted regulation of core political speech while allowing unbridled discretion in the Board to provide exemption of permit requirements for commercial speech.

47. The Council enacted Ordinance 1991, §12-219, now codified as City Code Sec. 58-156 referenced as the “Park Regulations” Ordinance, precluding OFM’s demonstration event after park closing hours, defined as 10:30 p.m. to 6:30 a.m. This ordinance is unconstitutional on its face as an impermissible prior restraint, containing terms which provide for targeted regulation of core political speech while allowing the Recreation Manager to make accommodations by extending park hours for sporting, cultural or civil events.

48. As a content-based regulatory scheme, Code 2-273 is subject to strict scrutiny, mandating that the defendant City establish that its regulatory scheme is (1) **narrowly-tailored**, and (2) serving a **compelling state interest**. The broad prohibitions against politically-centered speech and conduct, the application of the permit schemes to small groups such as OFM, the provision that allows for recommendation of a waiver or reduction of permitting fees, or even a City cash sponsorship, for preferred commercial speech, the failure to provide for spontaneous speech events, the failure to have fee exemptions for indigent applicants, the lack of an appeals process, and other factors preclude a finding that the ordinance scheme is narrowly-tailored. The content-based ordinance cannot be fairly said to serve any compelling state interest.

49. As a content-based prohibition, Code 58-156 is subject to strict scrutiny, mandating that the defendant City establish that it be (1) **narrowly-tailored**, and (2) serving a **compelling state interest**. The broad prohibitions against politically-centered speech and conduct, while allowing for the accommodation for preferred non-political speech, preclude a finding that the ordinance scheme is narrowly-tailored. The content-based ordinance cannot be said to serve any compelling state interest.

50. The use of Code 58-156 by Defendant has chilled the First Amendment-protected activities of the plaintiffs, has and may continue to cause the citation of members of the plaintiffs, as well as others similarly situated who wish to exercise their rights of free speech, assembly and association.

51. The adoption by the Fort Myers City Council of the aforementioned ordinances, and the present and future implementation of the ordinances, constitute the proximate causation of the deprivation of the First Amendment rights of the Plaintiffs and other demonstrators for the ongoing events in Centennial Park, and other imminently-scheduled events within the City of Fort Myers. The Plaintiffs seek redress for these violations of the First Amendment through the operation of 42 U.S.C. § 1983.

## **COUNT TWO**

***Monell Claim - Official Policy to Suppress Protected Speech and Assembly***  
**(42 U.S.C. § 1983 - Violation of First Amendment - Overbreath)**  
**Fort Myers City Code, Sec. 2-273, 58-156 and 86-153**  
**By ALL PLAINTIFFS Against CITY OF FORT MYERS**

52. Plaintiffs reallege and incorporate each jurisdictional and factual allegation of Paragraphs 1-43, as if set forth at length herein.

53. At all times relevant hereto, the City Council of defendant City of Fort Myers (“Council”) was the final policymaker for the City of Fort Myers, for the purpose of adopting ordinances and other policies regulating constitutionally-protected speech, expressive conduct, and assembly within the boundaries of the City.

54. The Council enacted Ordinance No. 3019, codified as Code Sec. 2-271 to Sec. 2-273 referenced as the “Special Events Advisory Board” Ordinance, precluding OFM’s demonstration event without first obtaining a permit, to be reviewed and recommended by the Special Advisory Board members defined in Sec. 2-271 and 2-272. This ordinance is unconstitutional on its face as an impermissible prior restraint, containing terms which provide for targeted regulation of core political speech while allowing unbridled discretion in the Board to provide exemption of permit requirements for commercial speech.

55. As a content-based regulatory scheme, Code 2-273 is subject to strict scrutiny, mandating that the defendant City establish that its regulatory scheme is (1) **narrowly-tailored**, and (2) serving a

**compelling state interest.** The broad prohibitions against politically-centered speech and conduct, the application of the permit schemes to small groups such as OFM, the provision that allows for recommendation of a waiver or reduction of permitting fees, or even a City cash sponsorship, for preferred commercial speech, the failure to provide for spontaneous speech events, the failure to have fee exemptions for indigent applicants, the lack of an appeals process, and other factors preclude a finding that the ordinance scheme is narrowly-tailored. The content-based ordinance cannot be fairly said to serve any compelling state interest.

55. The Council enacted Ordinance 1991, §§17-117–17-118, now codified as Sec. 86-153, referenced as the “Parades and Processions” Ordinance, precluding OFM’s rallies and marches without first seeking issuance a permit, to be reviewed and by the Chief of Police of the FMPD, or his designee. This ordinance is unconstitutional on its face as an impermissible prior restraint, containing terms which provide for targeted regulation of core political speech while allowing unbridled discretion in the Chief of Police to show preference of non-political speech.

56. As a content-based regulatory scheme, Code 86-153 is subject to strict scrutiny, mandating that the defendant City establish that its regulatory scheme is (1) **narrowly-tailored**, and (2) serving a **compelling state interest**. The unbridled discretion vested in the Chief of Police, or a designee, without guidelines for issuing a permit, time limitations on review, guidelines for the imposition of restrictions or requirements, the failure to provide for spontaneous speech, and other factors preclude a finding that the ordinance scheme is narrowly-tailored. The content-based ordinance cannot be said to serve any compelling state interest.

57. The Council enacted Ordinance 1991, §12-219, now codified as City Code Sec. 58-156 referenced as the “Park Regulations” Ordinance, precluding OFM’s demonstration event after park closing hours, defined as 10:30 p.m. to 6:30 a.m. This ordinance is unconstitutional on its face as an impermissible prior restraint, vesting unbridled discretion in the Recreation Manager to make accommodations by extending park hours for sporting, cultural or civil events.

58. As a content-based prohibition, Code 58-156 is subject to strict scrutiny, mandating that the defendant City establish that it be (1) **narrowly-tailored**, and (2) serving a **compelling state interest**. The provision vesting unbridled discretion in the Recreation Manager to make accommodations for certain groups, but not for political speech, preclude a finding that the ordinance scheme is narrowly-tailored. The content-based ordinance cannot be said to serve any compelling state interest.

60. The adoption by the Fort Myers City Council of these Codes, and the present and future implementation of the ordinances by Defendant, constitute the proximate causation of the deprivation of the First Amendment rights of the Plaintiffs and other demonstrators for the ongoing events in Centennial Park, and in other public parks, streets or sidewalks in the City. The Plaintiffs seek redress for these violations of the First Amendment through the operation of 42 U.S.C. § 1983.

### **COUNT THREE**

***Monell Claim - Official Policy to Suppress Protected Speech and Assembly***  
**(42 USC § 1983 – Violation of Fourteenth Amendment - Vagueness)**  
**Fort Myers City Code, Sec. 58-153 and Sec. 58-154**  
**By ALL PLAINTIFFS Against CITY OF FORT MYERS**

61. Plaintiffs reallege and incorporate each jurisdictional and factual allegation of Paragraphs 1-43, as if set forth at length herein.

62. At all times relevant hereto, the City Council of defendant City of Fort Myers (“Council”) was the final policymaker for the City of Fort Myers, for the purpose of adopting ordinances and other policies regulating constitutionally-protected speech, expressive conduct, and assembly within the boundaries of the City.

63. The Council enacted Ordinance 1991, §§12-216–12-217, now codified as City Code Sec. 58-153 and 58-154, referenced as the “Park Regulations” Ordinance, subjecting OFM to a regulatory scheme that is impermissibly vague, is unconstitutional on its face. First, this ordinance fails to provide the kind of notice that enables ordinary citizens to understand what precise conduct it

prohibits; second, it authorizes arbitrary and discriminatory enforcement through its lack of precision.

64. The use of this code by Defendant has chilled the First Amendment-protected activities of the plaintiffs, has and will continue to cause the issuance citations to the plaintiffs, and others similarly situated who wish to exercise their rights of free speech, assembly and association.

#### **COUNT FOUR**

***Monell Claim - Official Policy to Suppress Protected Speech and Assembly***  
**(42 USC § 1983 – Violation of Fourteenth Amendment - Liberty Interest)**  
**Fort Myers City Code, Sec. Sec. 58-154 and Sec. 86-153**  
**By ALL PLAINTIFFS Against CITY OF FORT MYERS**

65. Plaintiffs reallege and incorporate each jurisdictional and factual allegation of Paragraphs 1-43, as if set forth at length herein.

66. At all times relevant hereto, the City Council of defendant City of Fort Myers (“Council”) was the final policymaker for the City of Fort Myers, for the purpose of adopting ordinances and other policies regulating constitutionally-protected speech, expressive conduct, and assembly within the boundaries of the City.

67. The Council enacted Ordinance 1991, §§12-216–12-217, now codified as City Code 58-154, referenced as the “Park Regulations” Ordinance, subjecting OFM to a regulatory scheme that prohibits “protracted lounging” in City parks is unconstitutional on its face, as a prohibition that has a substantial impact on conduct protected by the Due Process Clause of the Fourteenth Amendment, as members of OFM have a significant liberty interest in lounging on public benches and public places according to their inclination.

68. The Council enacted Ordinance 1991, §§17-117–17-118, now codified as Sec. 86-153, referenced as the “Parades and Processions” Ordinance, subjecting OFM to a regulatory scheme that is unconstitutional on its face, as a prohibition that has a substantial impact on conduct

protected by the Due Process Clause of the Fourteenth Amendment, as members of OFM have a significant liberty interest in “meeting” with others in “open air” within City limits.

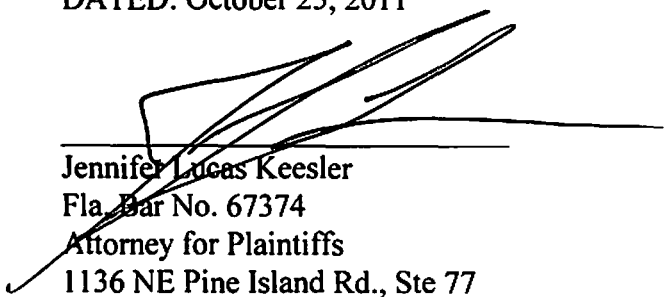
69. The use of these codes by Defendant has chilled the First Amendment-protected activities of the plaintiffs, has and will continue to cause the issuance citations to the plaintiffs, and others similarly situated who wish to exercise their rights of free speech, assembly and association.

### **PRAYER FOR RELIEF - ALL COUNTS**

WHEREFORE, Plaintiffs seek judgment against defendant City of Fort Myers for the following relief:

1. A preliminary and permanent injunction, enjoining defendant City of Fort Myers, its officers, employees and agents, from enforcing the Fort Myers City Ordinances challenged in this complaint;
2. A declaration that defendant City of Fort Myers’s challenged Ordinances violate Plaintiffs’ rights to free speech, assembly and association, under the First Amendment;
3. Compensatory Damages;
4. Costs of suit pursuant to 42 U.S.C. § 1920 and 42 U.S.C. § 1988;
5. Attorneys’ Fees pursuant to 42 U.S.C. § 1988;
6. Such other relief as this Court deems just and proper.

DATED: October 25, 2011



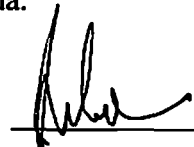
Jennifer Lucas Keesler  
Fla. Bar No. 67374  
Attorney for Plaintiffs  
1136 NE Pine Island Rd., Ste 77  
Cape Coral, FL 33909  
239.240.5057  
[jennifer@keeslerlaw.com](mailto:jennifer@keeslerlaw.com)

VERIFICATION

I, JUSTIN VALO, declare:

1. I am a volunteer organizer for Occupy Fort Myers. I submitted a declaration in support of the Emergency Motion for Preliminary Injunction, and in support of the facts set forth in this Verified Complaint.
2. I have read the Verified Complaint in this action and am familiar with the factual matters set forth in the pleading. I verify that these facts are true and correct.
3. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on October 25, 2011 in Fort Myers, Florida.

  
\_\_\_\_\_  
JUSTIN VALO

# **Exhibit 1**

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION**

CASE NO:

**OCCUPY FORT MYERS, CINDY  
BANYAI, STEPHANIE DARST,  
CHRISTOPHER FAULKNER, F. FRANK  
GUBASTA, ZACHARY KUHN, HILARY  
MAINS, MATT MCDOWELL, MICHELLE  
MEYER, LUIS OSPINA, RYAN POGUE,  
FRANK PRATT, MARLENE ROBINSON,  
and JUSTIN VALO,**

**Plaintiffs,**

v.

**CITY OF FORT MYERS,**

**Defendant.**

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**DECLARATION OF JUSTIN VALO**

Justin Valo, being of full age, hereby declares the following under penalty of perjury:

1. I have personal knowledge of the facts set forth in this declaration.
2. I am a resident of Fort Myers, Lee County, Florida.
3. Occupy Fort Myers ("OFM") is a group of mostly local citizens who have come together to discuss common grievances, and hold general assemblies. OFM is an unincorporated association of individuals concerned about the direction of our country who have spontaneously gathered together in an attempt to bring visibility to the insidious influence of money into the people's political process. OFM seeks to bring awareness to the citizens' concerns through an around-the-clock, peaceful protest. A core part of OFM's message is in our 24-hour

“occupation,” which is a symbolic expression of our frustration with the current U.S. political and economic climate. OFM seeks to cooperate with local police departments and city officials. OFM is neither a corporation nor a not-for-profit organization. OFM is not formally affiliated with any national organization or corporation. OFM does not endorse any political candidate or group. OFM has no funds, no bank account, and does not participate in fundraising. I participate in the ongoing OFM demonstration activities and I assist in the organization of the group’s activities.

4. I had heard about the Occupy Wall Street movement in Zuccotti Park in New York City beginning in September, 2011, and when I saw that a group of individuals were seeking to come together in Fort Myers in an effort to bring local visibility to Occupy Wall Street, I was excited to participate.

5. Occupy Fort Myers had their first General Assembly on October 8, 2011. I attended the General Assembly and, afterwards, was happy to participate and assist in organizational activities. At the first General Assembly, OFM came to a consensus that we would hold our first rally and march on October 15, 2011. The OFM General Assembly agreed to begin “occupying” Centennial Park on First Street in Fort Myers in a show of solidarity with Occupy Wall Street and to bring local visibility to the citizens’ concerns.

6. Individual participants agreed to take on certain responsibilities on behalf of OFM in an effort to ensure our right and ability to peacefully demonstrate on October 15. A loosely organized OFM “Legal Working Team,” of which I am a participant, agreed to work with the City of Fort Myers and/or the Fort Myers Police Department for approval for our planned demonstrations. Mark Hetrick, who was serving as part of the Legal Working Team informed the General Assembly on or about October 11, 2011 that the Fort Myers Police Department (“FMPD”) said OFM could rally and march downtown on Oct. 15th, provided that we submit to certain restrictions, such as

agreeing not to use a megaphone or walk in the street. An FMPD contact said that the police would not interfere with any overnight “occupation,” including allowing the erection of tents, as long as there was no alcohol brought into the park. The FMPD advised OFM to contact the City of Fort Myers Recreation Division to obtain a permit for the overnight occupation.

7. On October 11, 2011, the Legal Working Team began speaking with employees of the Recreation Division in an attempt to obtain a permit for OFM’s First Amendment-protected activity.

8. On October 15, 2011, OFM held a noon rally at Centennial Park, and then conducted an approximately one mile long march from Centennial Park to the Bank of America branch on First Street, and then back to Centennial Park. Approximately 500 people showed up to support the Occupy Fort Myers movement. The march and rally remained peaceful and respectful. There were private birthday parties occurring under the pavilion in Centennial Park after our return from our march. OFM agreed to congregate away from the pavilion so that we would not disturb the private event.

9. OFM began “occupying” Centennial Park on the evening of October 15<sup>th</sup>. The General Assembly agreed that the occupiers would respect the City and park by making sure that they maintained quiet after park closing hours and by thoroughly cleaning up after themselves. The occupiers had no confrontations with members of the public, the City or FMPD from Oct. 15<sup>th</sup> through Oct. 20<sup>th</sup>.

10. On October 14, 2011, the Legal Working Team received an email from Peggy Kay, Recreation Administrative Manager. Ms. Kay attached Chapter 58, Art. IV, Div. 2, Sections 58-151 to 58-157 in response to our inquiry about using Centennial Park for our peaceful demonstration. We were then directed to a 34-page Special Events Handbook. The Handbook had, within it, a

special events permit application and required a deposit of \$50. OFM completed the permit application on October 18, 2011, and submitted it to the Recreation Division. OFM informed the Recreation Division, along with Officer Sanchez of the FMPD, through email communication that Occupy Fort Myers sought to cooperate with the City. On October 19, 2011, at 10:19 a.m., we heard from Kelly MacDonald, Sr. Program Coordinator in the Recreation Division through email, who informed us that, before the Special Event Committee could even review our permit application, OFM would need to obtain a \$1 million liability insurance policy and bring the Liability Insurance certificate to the Recreation Administrative Office. Ms. MacDonald informed OFM that the City was prepared to enforce Ordinance Sec. 58-153(3), which states that “[n]o unauthorized person in a park shall . . . set up tents, shacks, or any other temporary shelter for the purpose of overnight camping,” if OFM did not comply with the liability insurance by 3:00 p.m. on the same day. We immediately contacted Ms. MacDonald that same day by email and phone to let her know that OFM could not possibly comply with the 3:00 p.m. deadline to obtain an insurance policy. We also informed Ms. MacDonald that OFM had no idea how to obtain or who to contact to obtain such a policy. The City gave us the names of three insurance companies—Lot and Gailor, K&K Insurance, and CSI. Ms. MacDonald agreed to allow OFM an additional day to attempt to obtain insurance and comply with City regulations.

11. On Oct. 19, 2011, OFM informed the City of Fort Myers Recreation Division and Police Department, through email, that the insurance companies designated by the City of Fort Myers would not provide the requested liability insurance policy to OFM. Lot and Gailor Insurance Agency said they would not insure OFM because we were not a legal entity. K&K Insurance said that their underwriter would not insure “these types of events.” CSI never even returned our call. OFM informed Ms. MacDonald, Mr. Saeed Kazemi, the Public Works Director, and Officer Sanchez of

the FMPD, through email, that OFM sought understanding and cooperation with the City, that we would like to obtain a permit, but we could not satisfy the City's requirements. OFM asked that the City not attempt to dismantle OFM.

12. OFM reviewed both the City of Fort Myers ordinances and the Special Events pamphlet, and saw no provision for seeking a waiver of the liability insurance requirement or a means to seek an appeal of the Recreation Division's refusal to accommodate OFM's request for a permit.

13. It is my understanding that the City's Ordinance Sec. 2-273(1)(d) allows the Special Events Advisory Board, the entity to which OFM submitted our permit application, to request that the City Council approve a waiver or reduction of fees for special events. Among the problems with the ordinance code is it does not outline specific procedures for obtaining a permit for First Amendment activity, does not outline any specific procedures to seek a waiver or appeal of permit denial, and contains no exception for spontaneous speech. Additionally, the code gives the Special Events Advisory Board too much discretion in what factors the Board can consider in granting or denying a permit; the ordinances are unduly vague, so that someone would not know what is allowed and what is prohibited (how would we know what constitutes "loud and boisterous" behavior, for instance?); and the ordinances allow for exceptions and accommodations to be made for "athletic sporting events, or cultural or civic activities," but not for political speech, thus showing a clear preference for non-political viewpoints.

14. On October 19, 2011, the Legal Working Team informed OFM during General Assembly that OFM's permit application would be denied, and the City of Fort Myer's Ordinance Sec. 58-153 would be enforced against OFM. After receiving this news, the General Assembly agreed to seek legal advice from an attorney. Even if an insurer would agree to insure OFM, OFM

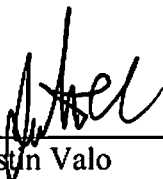
has absolutely no funds with which to pay for a liability insurance policy and, it is my understanding, that the City of Fort Myers would require OFM to apply for another permit and obtain a re-issuance or new insurance policy every ten days. It is my further understanding that the City of Fort Myers does not allow an indigency exemption from the monetary permitting regulations. The City's requirement that OFM obtain a liability insurance policy has the effect of being a complete prohibition on OFM's core symbolic speech.

15. On October 20, 2011, members of OFM and their legal counsel spent most of the day attempting to negotiate, in good faith, with City employees in an attempt to obtain a legal permit for our symbolic demonstration. Despite everyone's best efforts, the City would not issue OFM a permit. On the evening of October 20, at approximately 10:45 p.m., members of the FMPD showed up at Centennial Park and issued citations of over \$100 each to any individual who had erected a tent in the park or who was planning on remaining in the park after 10:30 p.m. Since the issuance of citations on Oct. 20<sup>th</sup>, I have had to field numerous telephone calls and emails from demonstrators and members of the public who are concerned about the threat of harassment and intimidation due to the enforcement of these ordinances. OFM held a second downtown march and rally on October 22. Since the City began issuing citations, approximately 100 people attended the OFM events.

16. The City of Fort Myers' unconstitutional ordinance scheme has hindered the free speech of OFM and all of the individuals who associate with the group, or who may have wanted to associate with the group, but are now fearful to demonstrate in solidarity with OFM due to threats of monetary sanctions or, even, arrest, if they were to participate. OFM's message has been curtailed, and we have suffered constitutional violations as well as monetary damages due to the cost of citations, costs of materials for signs that had to be removed, and because of loss of supplies while rushing to disassemble the encampment area. Also, OFM suffered, and continues to suffer, the loss of valuable media attention that arose from our overnight symbolic expression.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22 day of October, 2011.

  
\_\_\_\_\_  
Justin Valo

# **Exhibit 2**

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION**

CASE NO:

**OCCUPY FORT MYERS, CINDY  
BANYAI, STEPHANIE DARST,  
CHRISTOPHER FAULKNER, F. FRANK  
GUBASTA, ZACHARY KUHN, HILARY  
MAINS, MATT MCDOWELL, MICHELLE  
MEYER, LUIS OSPINA, RYAN POGUE,  
FRANK PRATT, MARLENE ROBINSON,  
and JUSTIN VALO,**

**Plaintiffs,**

**v.**

**CITY OF FORT MYERS,**

**Defendant.**

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**DECLARATION OF CHRISTOPHER FAULKNER**

CHRISTOPHER FAULKNER, being of full age, hereby declares the following under penalty of perjury:

1. I have personal knowledge of the facts set forth in this declaration.
2. I am a resident of Lehigh Acres, Lee County, Florida.
3. On October 15, 2011, I began organizing and participating in demonstrations at Centennial Park, 200 West First Street, Fort Myers, Florida. My participation includes attending marches, gatherings, rallies, general assemblies, and other Occupy events. I have spent numerous hours the past week in Centennial Park sitting at the Occupy Fort Myers "Information Booth," and speaking to members of the public about our message.
4. I am participating in the Occupy events because I believe that monetary influence has led

to corruption in the U.S. policies and elections. I strongly believe in and support the Occupy ideology.

5. To stand in solidarity with Occupy Wall Street, I planned to and have been symbolically “occupy” Fort Myers by camping overnight in Centennial Park on Thursday, October 20, 2011. The Occupy Fort Myers “encampment” is an area of approximately 10-12 tents erected in the southwest quadrant of Centennial Park. At the “entrance way” of the encampment area, there is an information booth where members of the general public can stop by to engage in a discussion of our ideas or to ask questions about our views on social justice and economic equality. Behind the information booth, but in front of the tent area are handmade signs temporarily erected to communicate our core beliefs to members of the general public.

6. Around 11:00 p.m. on the evening of Oct. 20, 2011, I was given two citations by a Fort Myers Police Department law enforcement officer, both in the amount of \$135.00 for remaining in the park after closing hours and for unlawful construction of a tent on City property. I was advised by the FMPD that I would be issued a citation every night if I intended to symbolically “occupy” the park. Since the original 2 citations were issued, I’ve received 6 more for a total of 8 citations.

7. It is my understanding that the Fort Myers Police are enforcing the City of Fort Myers ordinances because we were unable to obtain a permit for our symbolic speech. It is my further understanding that the Recreation Division has authority to recommend the issuance of permits and to waive certain provisions, but they would not waive those provisions for Occupy Fort Myers.

8. I wish to continue to respectfully and peacefully “occupy” a public area of Fort Myers, but I fear I will suffer further monetary damages and I also fear that, in the future, I could suffer arrest due to the City policies and codes. The monetary loss and threat of arrest intimidates me as I am a single father with a young child. I fear that continued government intrusion will continue to

inhibit the exercise of my First Amendment rights.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23 day of October, 2011.



Christopher Faulkner

# **Exhibit 3**

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION**

CASE NO:

**OCCUPY FORT MYERS, CINDY  
BANYAI, STEPHANIE DARST,  
CHRISTOPHER FAULKNER, F. FRANK  
GUBASTA, ZACHARY KUHN, HILARY  
MAINS, MATT MCDOWELL, MICHELLE  
MEYER, LUIS OSPINA, RYAN POGUE,  
FRANK PRATT, MARLENE ROBINSON,  
and JUSTIN VALO,**

**Plaintiffs,**

v.

**CITY OF FORT MYERS,**

**Defendant.**

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**DECLARATION OF MATT MCDOWELL**

MATT MCDOWELL, being of full age, hereby declares the following under penalty of perjury:

1. I have personal knowledge of the facts set forth in this declaration.
2. I am a resident of Naples, Collier County, Florida.
3. I have actively participated with Occupy Fort Myers since its inception. My participation includes attending rallies, organizational meeting, general assemblies, marches and other Occupy events. I have engaged in dialogue regarding the nature and reform of our system of government with other members of Occupy Fort Myers, as well as with member of the general public on public streets,

in public parks and in other public spaces in the City of Fort Myers. I also serve as a citizen journalist.

4. I have been participating in Occupy events because I strongly believe in supporting the rights of average people in participating in the policy, economic and social debate of this Country.

5. In an attempt to bring visibility to my concerns about the right of the average person to be heard in the political process, I planned to symbolically “occupy” Fort Myers by camping overnight in Centennial Park on Friday, October 21, 2011.

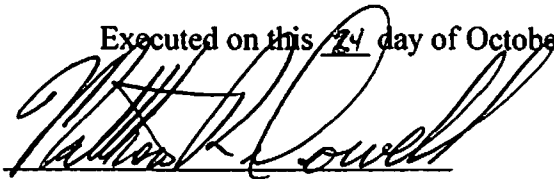
6. Around 6:15 p.m. on the morning of October 21, 2011, I was advised by Capt. Viola of the Fort Myers Police Department that the public park was rented until noon by Humana Insurance Co., a private corporation, for an Alzheimer’s Awareness event. Capt. Viola further informed me that Humana representatives approached FMPD and requested that the “occupiers” and our tents be removed from the park, but we could return at noon. I was given a citation by a Fort Myers Police Department law enforcement officer in the amount of \$135.00 for remaining in the park after closing hours even though, at the same time of day I was in the park expressing my political views, Humana representatives were in the park, also, setting up for their Alzheimer’s event.

7. It is my understanding that the Fort Meyers Police Department would not issue citations if the City of Fort Myers Recreation Division would accommodate our event by allowing for us to participate in our expressive conduct after park closing hours. It is my further understanding that the City of Fort Myers ordinances require the Recreation Manager to accommodate athletic, cultural and civic events that occur after hours, but the City has refused to accommodate OFM.

8. I desire to symbolically “occupy” a public space in Fort Myers, but the City’s enforcement of their policies has chilled my exercise of free speech because I am afraid of additional citations, or even arrest. I am concerned that the City’s ordinances and policies will continue to inhibit the exercise of my First Amendment rights.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24 day of October, 2011.

A handwritten signature in black ink, appearing to read "Matt McDowell", is written over a horizontal line.

Matt McDowell

# **Exhibit 4**

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION**

CASE NO:

**OCCUPY FORT MYERS, CINDY  
BANYAI, STEPHANIE DARST,  
CHRISTOPHER FAULKNER, F. FRANK  
GUBASTA, ZACHARY KUHN, HILARY  
MAINS, MATT MCDOWELL, MICHELLE  
MEYER, LUIS OSPINA, RYAN POGUE,  
FRANK PRATT, MARLENE ROBINSON,  
and JUSTIN VALO,**

**Plaintiffs,**

**v.**

**CITY OF FORT MYERS,**

**Defendant.**

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**DECLARATION OF LUIS OSPINA**

LUIS OSPINA, being of full age, hereby declares the following under penalty of perjury:

1. I have personal knowledge of the facts set forth in this declaration.
2. I am a resident of Lehigh Acres, Lee County, Florida.
3. On October 15, 2011, I began organizing and participating in demonstrations at Centennial Park, 200 West First Street, Fort Myers, Florida. My participation includes attending rallies, marches, general assemblies and other Occupy events. I have made and held signs displaying our message to members of the general public.
4. I choose to participate in the Occupy events because I am tired of the suppression of the masses, and the loss of personal fulfillment which has occurred because of the desire of those who

have money to attain more material wealth, and the need of those who do not have money to sustain their day-to-day lives.

5. To bring local visibility to my concerns, I planned to symbolically “occupy” Fort Myers by camping overnight in Centennial Park on Thursday, October 20, 2011.

6. Around 11:00 p.m. on the evening of Oct. 20, 2011, I was given a citation by a Fort Myers Police Department law enforcement officer in the amount of \$135.00 for remaining in the park after closing hours. I was advised by the Fort Myers Police Department that I would be issued a citation every night if I intended to symbolically “occupy” the park.

7. It is my understanding that the City of Fort Myers may accommodate sporting or cultural events after park closing hours, but our symbolic speech is not being accommodated by the City.

8. I desire to continue my peaceful “occupation” of a public area of Fort Myers, but because I am underemployed, the cost of the citation is an economic hardship for me. I am also concerned that more citations, or even arrests, may soon follow. I fear further intimidation or harassment from City employees will continue to inhibit the exercise of my First Amendment rights.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23 day of October, 2011.

  
Luis Ospina

# **Exhibit 5**





# **Exhibit 6**

**Fort Myers, Florida, Code of Ordinances >> Subpart A - ADMINISTRATIVE CODE >> Chapter 2 - ADMINISTRATION >> ARTICLE III. - BOARDS, COMMITTEES, COMMISSIONS >> DIVISION 9. - SPECIAL EVENTS ADVISORY BOARD >>**

**DIVISION 9. - SPECIAL EVENTS ADVISORY BOARD**

Sec. 2-271. - Purpose; creation; membership; terms; vacancies; qualifications; nonvoting meeting attendees.

Sec. 2-272. - Oath; officers; records; meetings; quorum; attendance; minutes; compensation.

Sec. 2-273. - Powers and duties.

Secs. 2-274—2-290. - Reserved.

**Sec. 2-271. - Purpose; creation; membership; terms; vacancies; qualifications; nonvoting meeting attendees.**

- (a) Pursuant to Charter section 83, there is hereby created a board of seven members and two alternate members to serve in the absence of a member to be known as the Special Events Advisory Board. The members of such board shall be appointed in the manner and for the duties hereinafter provided. Each council member shall nominate one member and the mayor shall nominate one member and the two alternate members. Each nominee shall be presented to the city council for consideration of appointment. After consideration of each nominee, the city council will make such appointments to the board as it deems appropriate. Nominees that are not appointed by the city council shall be replaced with a new nomination from the person holding the position of the elected official who made the original nomination. The city council will make the final decision on all appointments. The appointment of all members shall be by the city council. The members serve at the pleasure of the city council. Except for ex officio members, no member shall hold any other public office or position for the city.
- (b) The members of the board shall serve for a term of three years. Any member may be reappointed from term to term upon nomination by the person holding the position of the elected official making the original nomination and appointment by the city council as provided in subsection (a) of this section.
- (c) Appointments to fill vacancies shall be for the remainder of the unexpired term and made in the manner as the original appointment as provided in subsection (a) of this section.
- (d) The board shall consist of members with experience or interest in the following fields of expertise: public relations, community relations, marketing, special event coordination, special event promotion, tourism, fundraising, sponsorship, economic development, educational or sports education, community development, or the entertainment or media industries. The members of this board shall be residents, own property or operate a business within the city limits.
- (e) A representative from the police department, recreation division, fire department, public works department and parks division shall attend each meeting of the special events advisory board to provide their expertise and suggestions to the board members and shall be nonvoting attendees.

(Code 1991, § 2-130.51; Ord. No. 3019, § 1, 9-17-2001; Ord. No. 3439, § 17, 1-22-2008)

**Sec. 2-272. - Oath; officers; records; meetings; quorum; attendance; minutes; compensation.**

- (a) After nomination and appointment, the members of the special events advisory board shall be sworn in by the city clerk to perform the duties of the office. The board shall meet and select a chair and vice-chair from among its members. The term of the chair and vice-chair will be for one year, at which time the chair and the vice-chair must be elected or reelected by the members. The chair and vice-chair may serve for two consecutive years, at which time a new chair and vice-chair must be elected.
- (b) The special events advisory board shall prescribe rules for its meetings and shall keep records of its motions, resolutions, transactions, findings and recommendations, which records shall be filed with the city clerk and be public records.
- (c) The public relations liason shall be responsible for presenting proposals to the board and keeping the minutes of the board meetings, recording the names of the members appointed, all members attending

- and all members absent, and the vote of each of the members upon decisions, resolutions, and recommendations, and the minutes shall be public records and shall be filed with the city clerk.
- (d) All meetings shall be held at the call of the chair and at other such times as may be determined by a majority of the board. Notice of the date, time, place and agenda for all meetings, both regular and special, shall be provided to the city clerk's office in a timely manner to be included in the notice of public meetings to comply with the Sunshine Law. All meetings shall be open to the public. At least one meeting will be held each month.
  - (e) A quorum of the board shall consist of a majority of the appointed members, but no less than four members, and an affirmative vote of the majority of the quorum present shall be necessary to pass any motion.
  - (f) If any member fails, without cause, to attend at least 75 percent of all meetings held during any calendar year from the date of appointment by the city council, the member's seat shall be declared vacant by the chair and such vacancy shall be reported in writing to the city clerk. Such a vacancy shall be filled as provided in this division.
  - (g) All members shall serve without compensation.  
(Code 1991, § 2-130.52; Ord. No. 3019, § 1, 9-17-2001)

### **Sec. 2-273. - Powers and duties.**

The special events advisory board shall:

- (1) Act in an advisory capacity to the city council in matters relating to special events proposed by event managers, which are:
  - a. Open to the public;
  - b. Held within the city limits in spaces which are overseen by the city;
  - c. Expected to attract more than 1,000 people; and
  - d. Requesting the city council approve a waiver or a reduction of fees or a cash sponsorship;
- (2) Endeavor to facilitate quality cultural and artistic events that enhance the quality of life for the citizens of the city, and provide exposure and positive social and economic impacts for the city, by either recommending or withholding recommendation of funding to the city council for a special event that meets the four criteria described in subsection (1) of this section, based on a competitive process;
- (3) Recommend to the city council special events that should receive city sponsorship by a reduction or waiver in the fees charged for the use of public property and/or the cost of services to be provided by the city, based on a weighted scale of merit;
- (4) Recommend regulations for the conduct of special events that will increase interest therein to the citizens, residents and visitors of the city generally, insofar as the same are not in conflict with the city Code and state statutes;
- (5) Have such other advisory duties granted by the city council consistent with successful special events held within the city.

(Code 1991, § 2-130.53; Ord. No. 3019, § 1, 9-17-2001; Ord. No. 3439, § 18, 1-22-2008)

### **Secs. 2-274—2-290. - Reserved.**

**Fort Myers, Florida, Code of Ordinances >> Subpart A - ADMINISTRATIVE CODE >> Chapter 58 - PARKS AND RECREATION >> ARTICLE IV. - PARKS AND OTHER RECREATION FACILITIES >> DIVISION 2. - REGULATIONS >>**

**DIVISION 2. - REGULATIONS**

Sec. 58-151. - Malicious mischief; disorderly conduct.

Sec. 58-152. - Sanitation.

Sec. 58-153. - Recreational activity restrictions.

Sec. 58-154. - Prohibited behavior.

Sec. 58-155. - Merchandising.

Sec. 58-156. - Park operating policy.

Sec. 58-157. - Violations; penalties.

**Sec. 58-151. - Malicious mischief; disorderly conduct.**

No unauthorized person in a park shall:

- (1) Willfully mark, deface, spray paint, or disfigure any buildings, benches, railings, signs, art objects, statues, notices or placards, whether temporary or permanent facilities, on park property.
- (2) Climb any tree or walk, stand or sit upon monuments, vases, fountains, railings, fences or upon any other property not designated to be customarily used for such purposes. Throwing rocks in a careless or malicious manner and tree climbing are prohibited.
- (3) Ride or operate any wheeled conveyance without yielding the right-of-way to pedestrians in all areas of a park. Bicycles and roller skates shall be permitted in areas or on sidewalks designated for each.

(Code 1963, § 24-28(2); Code 1991, § 12-214)

*Cross reference— Miscellaneous offenses and crime prevention programs, ch. 50.*

**Sec. 58-152. - Sanitation.**

- (a) Park patrons shall cooperate in maintaining restrooms and washrooms in a neat and sanitary condition. No unauthorized person over the age of six years shall use the restrooms and washrooms designed for the opposite sex, unless medical necessity dictates otherwise.
- (b) No unauthorized person in a park shall dump, deposit or leave any bottles, broken glass, ashes, paper, boxes, cans, dirt, rubbish, waste, garbage or refuse or other trash. No such refuse or trash shall be placed in any water in or contiguous to any park, or left anywhere on the grounds thereof, but shall be placed in the proper receptacles where these are provided; however, where receptacles are not so provided, all such rubbish or waste shall be carried away from the park by the person responsible for its presence, and properly disposed of elsewhere. No unauthorized person shall examine, empty, remove, disturb or eat from the contents of any trash receptacle on public property.

(Code 1963, § 24-28(3); Code 1991, § 12-215)

**Sec. 58-153. - Recreational activity restrictions.**

No unauthorized person in a park shall:

- (1) Swim, dive, bathe or wade in any waters, lakes, ponds or waterways in the city limits, except at such places as are provided and designated therefor by signage, and in compliance with such regulations as are herein set forth or may be hereafter adopted. No swimming shall be allowed in any public waters or ponds, unless a "swimming permitted" sign is posted thereon. Diving head first is prohibited in the city limits due to the risk of catastrophic injury, except in athletic diving events or in private swimming pools. No person shall frequent any waters or places customarily designated for the purpose of swimming or bathing, or congregate there when such activity is

prohibited by the recreation manager, upon a finding that such use of the water would be dangerous or otherwise inadvisable.

- (2) Frequent any ponds or public swimming pools for the purpose of swimming, or congregate there, except during such hours that are designated for that facility by the recreation manager.
- (3) Set up tents, shacks, or any other temporary shelters for the purpose of overnight camping. No person shall live in a park beyond closing hours in any movable structure or special vehicle to be used or that could be used for such camping purpose, such as a tent, house-trailer, camp-trailer, camp-wagon or the like.

(Code 1963, § 24-28(4); Code 1991, § 12-216)

#### **Sec. 58-154. - Prohibited behavior.**

No unauthorized person in a park shall do any of the following:

- (1) *Intoxicating beverages.*
  - a. Possess or drink alcoholic beverages at any time in the park, except:
    1. At public events or public celebrations, including, but not limited to, festivals, food fairs, Riverfest, Taste of the Town and public holiday activities which have been properly permitted by the recreation manager;
    2. At certain specifically designated recreation centers where meals or lunches are served under concession privileges, where the sale of alcoholic beverages by such concessionaire is permitted by the city; or
    3. Where alcohol is consumed at an approved city event.
  - b. Enter or be under the influence of intoxicating liquor or illegal drugs.
- (2) *Domestic animals.* Permit the entry of a dog or other domestic animal into areas other than automobile parking concourses and walks immediately adjacent thereto, and in such other areas as may be clearly marked by "domestic animals permitted" signs. Nothing herein shall be construed as permitting the running of dogs at large.
- (3) *Alms or contributions.* Solicit, beg or panhandle for alms or contributions for any purpose, whether public or private, except when done for permitted events, or when done by bona fide and properly licensed public charities with city permission.
- (4) *Fires.* Build or attempt to build a fire, except in such areas for cookouts, barbecues, and other fires permitted by regulations as may be designated by the recreation manager. No person shall drop, throw or otherwise scatter lighted matches, burning cigarettes or cigars, tobacco paper or other inflammable material within any park area or on any highway, road, or street abutting or contiguous thereto, except in proper receptacles.
- (5) *Closed areas.* Enter an area posted as "closed to the public," nor shall any person use or abet the use of any area in violation of posted notices.
- (6) *Loitering and boisterousness.* Sleep or protractedly lounge on the seats, benches, or other areas, or engage in loud, boisterous, threatening, abusive, insulting or indecent language, or engage in any disorderly conduct or behavior tending to a breach of the public peace.

(Code 1963, § 24-28(5); Code 1991, § 12-217)

#### **Sec. 58-155. - Merchandising.**

No person in a park shall expose or offer for sale any article or thing, nor station or place any stand, cart, or vehicle for the transportation, sale or display of any such article or thing, except such restrictions shall not apply to any properly licensed concessionaire or when done with the consent of the city as part of an approved public event or public activity.

(Code 1963, § 24-28(6); Code 1991, § 12-218)

#### **Sec. 58-156. - Park operating policy.**

- (a) *Hours.* Except for unusual and unforeseen emergencies, parks shall be open to the public every day of the year during designated hours. The opening and closing hours shall be posted for public information. Normal park hours are 6:00 a.m. to 10:30 p.m. unless posted otherwise by the recreation manager. Such hours shall be deemed extended by the recreation manager as necessary to accommodate athletic sports events, or cultural or civic activities.
- (b) *Closed areas.* Any section or part of any park may be declared closed to the public by the recreation

manager at any time and for any interval of time, either temporarily or at regular and stated intervals (daily or otherwise) and either entirely or merely to certain uses, as the recreation manager shall find reasonably necessary.

(Code 1963, § 24-28(7); Code 1991, § 12-219)

**Sec. 58-157. - Violations; penalties.**

A violation of this division will subject the violator to a fine of not less than \$25.00 and not more than \$250.00. Such violators may be issued appropriate citations by city police officers.

(Code 1963, § 24-28(8); Code 1991, § 12-213)

**Fort Myers, Florida, Code of Ordinances >> Subpart A - ADMINISTRATIVE CODE >> Chapter 86 -  
TRAFFIC AND VEHICLES >> ARTICLE IV. - PARADES AND PROCESSIONS >>**

**ARTICLE IV. - PARADES AND PROCESSIONS**

**[86]**

Sec. 86-152. - Purpose and intent.

Sec. 86-153. - Permit required; fees.

Sec. 86-154. - Permit denial.

Secs. 86-155—86-181. - Reserved.

**Sec. 86-152. - Purpose and intent.**

It is not the purpose or the intent of this article to curtail, deny or abridge any of the civil liberties accorded by the state or the United States Constitution, but only to give city officials notice, in advance, of such activities in order to afford proper policing, if needed, and to ensure the safety and convenience of the general public in the use of public thoroughfares to prevent violence and disturbance of the peace, and to guard against fraud or illegal activities and otherwise safeguard the public welfare in the interest of all.

(Code 1963, § 32-2; Code 1991, § 17-116)

**Sec. 86-153. - Permit required; fees.**

- (a) No parade or procession upon any street of the city, and no open-air public meeting upon any public property shall be permitted unless a special permit shall first be obtained. Any person desiring a permit under this section shall make written application to the chief of police or some duly authorized member of the police department. Permits issued under this section shall be printed or written, duly signed by the chief of police or some duly authorized member of the police department after approval, and shall specify the day, hour, place and purpose of such parade, procession or open-air public meeting.
- (b) The fee for such permit shall be \$5.00 if the activity permitted requires no extra policing or will cause no extra cost or expense to the city. If such activity will require additional policing or supervision, or otherwise incur additional cost and expense to the city, there shall be charged such fee as will defray such additional cost to be determined by the chief of police.

(Code 1963, § 32-2; Code 1991, § 17-117)

**Sec. 86-154. - Permit denial.**

If the chief of police knows or has reasonable grounds to believe that to permit any parade, procession or open-air meeting under this article may or will result in violence, fighting, disturbance of the peace, or injuries to persons or damage to property, he may refuse to approve issuance of a permit hereunder by endorsing on the application or indicating in writing to the city clerk his reason for his refusal and such permit shall not be issued.

(Code 1963, § 32-2; Code 1991, § 17-118)

**Secs. 86-155—86-181. - Reserved.**

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**FOOTNOTE(S):**

<sup>(86)</sup> **Cross reference—** Streets, sidewalks and other public places, ch. 78. (Back)

<sup>(86)</sup> **State Law reference—** Authority to regulate parades, processions, etc., F.S. § 316.008(1)(c).  
(Back)