



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

OCCUPY DELAWARE, an unincorporated)
association,)

Plaintiff,)

v.)

C.A. No. 7027-VCG

CITY OF WILMINGTON,)

Defendant.

VERIFIED SUPPLEMENTAL COMPLAINT

Occupy Delaware, by and through undersigned counsel, alleges, upon knowledge as to its own actions and otherwise upon information and belief (including counsel's reasonable investigation), as follows:

SUMMARY OF THE ACTION

1. Plaintiff Occupy Delaware files this supplemental and amended complaint to stop Defendant City of Wilmington from violating the agreement it made to settle the first phase of this action, and to vindicate Plaintiff's and its members rights under the First and Fourteenth Amendments of the United States Constitution and Article I, § 5 of the Delaware Constitution.

2. On November 10, 2011, in order to settle the motion for a temporary restraining order that Plaintiff filed at the initiation of this action, Defendant agreed that Occupy

Delaware could occupy Peter Spencer Plaza south of the fenced in gravesite area located on the plaza, with tents, signs and other structures, seven days a week around the clock “for as long as they wish to use it.” The only “out” defendant retained in the agreement was the right to ask this Court to excuse it from complying “if, due to a physical change in the plaza that is in no way attributable to actions by the city or its agents, it becomes unreasonable for the occupation to continue at Peter Spencer Plaza.” (A copy of the settlement agreement is Exhibit A hereto.)

3. There has not been a physical change in the plaza, and Defendant has not asked this Court to find that a physical change has made it unreasonable for Occupy Delaware and its members to continue the operation. Instead, on April 23, 2012 Defendant accused Occupy Delaware of an “improper seizure of public space” and directed it to remove its encampment by May 1, 2012. (Copies of a simultaneously issued press release and letter from Defendant’s new counsel are attached hereto as Exhibits C and D, respectively.)

4. Defendant appears to have a case of buyer’s remorse. Its actions violate its agreement, are not justified by any facts, and were taken in contravention of its prior practice for dealing with issues related to Plaintiff’s use of the plaza. On the few occasions in the past when it had concerns about specifics of the occupation, Defendant’s law department contacted Occupy Delaware’s counsel and the issue was resolved quickly and amicably.

THE PARTIES

5. Plaintiff Occupy Delaware is an unincorporated non-profit association that seeks to bring attention to the imbalance in our financial and economic system, to ensure that elected leaders are as concerned about and responsive to citizens of our country without means or with moderate means as they are to those with the most and to eliminate the excessive, unwarranted influence of money and corporations in political decision making. It communicates with its members and the public through <http://www.facebook.com/occupyde>, <http://occupyde.org>, and <http://twitter.com/#!/occupyde>. It was organized in October 2011. It is, in some sense, a modern day Bonus Army, seeking to persuade the public by occupying a public space.

6. Plaintiff brings this action to vindicate its own rights and the rights of its members.

7. Defendant City of Wilmington is an incorporated municipality in the State of Delaware.

FACTS

POST-FILING ACTIONS BY THE PARTIES

8. Plaintiff's original complaint and motion for temporary restraining order were filed on November 9, 2011. Following a telephonic hearing on the motion the next day, this Court issued a temporary order permitting Plaintiff to maintain its occupation of Peter Spencer Plaza for twenty-four hours. The Court directed Defendant to file a brief by noon of the next day and scheduled an in-person hearing.

9. Apparently recognizing the validity of Plaintiff's legal position, Defendant decided not to oppose Plaintiff's continued occupation of the plaza. Instead, it proposed a

settlement limiting the area for the encampment. Plaintiff accepted Defendant's offer, and the settlement was memorialized in a written agreement filed with this Court.

10. The settlement agreement states, in part:

The City of Wilmington and Occupy Delaware agree this tenth day of November, 2011, that Occupy Delaware and its members may use Peter Spencer Plaza for their occupation without being required to pay a fee, for as long as they wish to use it, that they may remain on the plaza seven days a week around the clock, and that they may place tables, tents, signs and other items on the plaza, but that tents will not be placed north of the tree line that runs perpendicular to French Street just south of the fenced in monument/grave site area. Occupy Delaware agrees not to block pedestrian traffic by putting fixed items north of the tree line.

....

This agreement also has no bearing on the rights, or lack thereof, of Occupy Delaware to use property in Wilmington otherwise than for an occupation. The City of Wilmington may ask the Court to excuse it from complying with this agreement if, due to a physical change in the plaza that is in no way attributable to actions by the city or its agents, it becomes unreasonable for the occupation to continue at Peter Spencer Plaza.

11. On April 23, 2012 Defendant issued a news release headlined "Mayor Baker Directs Occupy Delaware to Cease Occupation of Spencer Plaza." It quotes the mayor as saying "the indefinite seizure of public property is not protected speech. I am therefore asking that Occupy Delaware discontinue the occupation of the Plaza." Likewise, Defendant's counsel has written that "a seizure of public property" is not constitutionally protected conduct. But Occupy Delaware and its members did not seize anything. They accepted Defendant's offer to resolve a TRO motion by granting them the right for a 24 x 7 encampment on the plaza "for as long as they wish to use it." Plaintiff now has a contractual right to continue that use, in addition to its rights under the Delaware and

United States Constitutions.

12. Defendant combined its announcement that Occupy Delaware had to end its encampment with a litany of complaints that had not been discussed with Plaintiff's counsel, although Defendant knows how to contact counsel and had done so in the past on the few occasions when it was aware of issues it wanted to resolve.

13. On three occasions between November 16, 2011 and March 8, 2012, Defendant's law department expressed specific concerns to counsel for Occupy Delaware about something on the plaza (i.e., there was an old sofa next to the sidewalk that should be removed). Counsel discussed the matter with Occupy Delaware and then told the law department how the matter had been or was being resolved (i.e., the sofa had been removed). The law department appears to have found those responses satisfactory, since it did not question counsel's responses.

14. On one other occasion defendant's law department had a concern about the nature and size of an event planned for the plaza. Counsel promptly provided the law department with information about the event and received no objection from the law department.

15. That's it. That is the sum of Defendant's complaints before it announced there had been "physical changes in the plaza" that entitle it to eject Occupy Delaware.

16. Perhaps because it recognizes the weakness of that legal position, Defendant will now argue that the tents need to comply with the Wilmington building code. But it agreed in the settlement agreement that Occupy Delaware could place tents on the plaza. It can't argue now that tents are impermissible because they do not meet housing code

requirements.

17. Likewise, Defendant intends to argue that Occupy Delaware's signs violate Wilmington's sign code. But it agreed in the settlement agreement that Occupy Delaware may place signs on the plaza. If there is something wrong with those signs (other than their content), Defendant can ask Occupy Delaware to correct the problem and it will.

Defendant's unhappiness with the signs provides no basis for finding physical changes in the plaza that entitle Defendant to eject Occupy Delaware.

18. In response to Defendant's April 23, 2012 letter and with the arrival of warmer weather, Occupy Delaware has reduced its footprint on plaza and removed items it does not need at the current time.

19. Occupy Delaware has made no secret of the fact that it has been willing to work in good faith with the Defendant to decrease its current footprint on the plaza, as long as it retained the right to expand the footprint (within the area covered by the settlement agreement) as needed in the future. Defendant was unwilling to cooperate on that. Thus, without consulting with Defendant, Occupy Delaware removed its supply tent from the plaza, moved the tent that is used for meetings, moved planters to where they had been before they were moved to accommodate placement of the meeting tent, removed its winterization, removed straw about which Defendant had complained, reinstalled locks that had been removed from the portable restrooms in connection with servicing, had trash removed, and took other actions that reduce its footprint on the plaza. Now, contrary to Defendant's statement in the news that the occupation "is preventing the general public

from the use and enjoyment of the plaza,” the plaza is clean and the contiguous area of the encampment covers less than 30% of the portion of the plaza that the settlement agreement authorizes Occupy Delaware to use. The other 70% and the area around the gravesite memorial remain available for any member of the public who wishes to use it.

Photographs showing the plaza on May 1, 2012 are attached hereto as Exhibit B.

20. In response to Defendant’s representation that it intends to start a renovation of the plaza in late summer or early fall, Occupy Delaware has offered to move to another location, such as the plaza next to the Louis L. Redding City/County Building, for the construction period. Defendant has not accepted that offer.

21. By agreement between the parties, Occupy Delaware’s encampment is located south of the fenced in enclosure that contains the burial site of Peter Spencer. Perhaps the most disturbing aspect of Defendant’s recent actions has been the accusation by its mayor that the occupation is “a desecration of the final resting place of one of our most historic and revered citizens.” Nothing could be farther from the truth.

22. A more accurate view is that expressed by Rev. Dr. Thomas C. Davis, Wilmington resident and retired pastor of the Hanover Street Presbyterian Church in Wilmington:

In his recent notice to Occupy Delaware that their members must vacate their encampment at Peter Spencer Plaza on or before May 1st, Mayor Jim Baker declared that the Occupiers desecrated that sacred burial ground, in part by the company they keep, indigent folk, drug users and such. I cannot speak for Peter Spencer, nor for the black citizens of my home town who rightfully revere him as the founder of the first independent black church in America. I suspect, however, that Peter Spencer, a follower of Jesus, who was criticized for keeping company with no-count tax collectors and sinners,

would sympathize with the Occupiers, and would declare that his memory has been consecrated, not desecrated by the tent community which they have created near his grave.Yes, it seems to me that Spencer would be at home with the Occupiers. They are not perfect people, but they share his spirit.

PLAINTIFF'S APPLICATIONS FOR PERMITS

23. On October 26, 2011, Occupy Delaware decided to convey its message to the general public in Delaware by conducting an occupation in H. Fletcher Brown Park, a state park located adjacent to Market Street in downtown Wilmington, between the Hercules Building and South Park Drive, across from the Brandywine River. That location in downtown Wilmington, would have enabled plaintiff to present its message to a large number of people through, *inter alia*, setting up tents and occupying the park on a twenty-four hour basis.

24. On October 28, 2011 Occupy Delaware submitted an application for a permit from the City of Wilmington to use H. Fletcher Brown Park for these purposes. After several days delay, Occupy Delaware was advised by a representative of the City of Wilmington that H. Fletcher Brown Park was a Delaware State Park, and that a permit application would have to be submitted to a Delaware Department of Natural Resources and Environmental Control ("DNREC") office.

25. DNREC issued a permit for daytime use of H. Fletcher Brown Park during the weekend of November 5-6, 2011. It declined to permit Occupy Delaware to use that park during the work week because it is regularly used twice a day by 100 children attending a nearby day care center for outdoor play, and both the state and the daycare center operator

considered the intended occupation and the day care center use, which had been occurring for many years, to be incompatible. Occupy Delaware did not challenge that conclusion.

26. For an alternative to H. Fletcher Brown Park, DNREC issued Occupy Delaware a permit for overnight, seven day use of an area in Brandywine Park, underneath the I-95 overpass. Recognizing its obligations under the First and Fourteenth Amendments and Article I, § 5 of the Delaware Constitution not to condition free speech and the right to assemble on financial wherewithal, DNREC waived its permit fee and other financial requirements.

27. The location proposed by DNREC, a mile from downtown in an area where there is no through traffic, is incompatible with Occupy Delaware's intention of expressing its concerns to the public through an encampment that will be seen by many members of the public. Therefore, it declined DNREC's proposed permit.

28. Instead, on Sunday, November 6, 2011, it decided to occupy Peter Spencer Plaza and Freedom Plaza in downtown Wilmington. Peter Spencer Plaza is located on French Street across from the Carvel State Office Building and the City/County Building. Freedom Plaza is located between the Carvel Building and the City/County Building.

29. On Sunday afternoon, November 6, 2011, Occupy Delaware moved to Peter Spencer Plaza.

CITY OF WILMINGTON RESPONSES TO OCCUPY DELAWARE

30. Defendant responded to Occupy Delaware's decision by directing Occupy Delaware to submit permit applications for the two plazas to the city administration and

Wilmington Renaissance Corporation, an agent of the City of Wilmington. Occupy Delaware was told by defendant's counsel that a permit for Spencer Plaza had to be approved only by defendant, and that a permit for Freedom Plaza had to be approved by defendant, New Castle County and the state. Defendant's counsel stated that defendant would interface with the state and county regarding the permit for Freedom Plaza.

31. On Sunday evening, a Wilmington police officer told the Occupy Delaware members who were at Spencer Plaza that they could stay, but could not lie down or erect any structures.

32. Also on Sunday evening, defendant's counsel stated that if Occupy Delaware applied for permits by 9:30 a.m. on Monday, November 7, 2011, Occupy Delaware and its members could stay on the plazas at least until a decision on the permit applications was made. Occupy Delaware complied with that deadline.

33. Several hours after the permit requests were submitted, Wilmington Renaissance Corporation responded with an email stating that a permit request for use of Spencer Plaza has been approved conditionally for a period of seven days, but that the use of tents or other structures would not be permitted in Spencer Plaza. The email further stated that there was a fee of \$200 for the seven-day period, and that if was not paid by 4:30 p.m. "the permit will be revoked."

34. Plaintiff and its members do not have the resources to pay the fee, either for this one week permit or for any extensions of a permit. It did not pay the \$200.

35. Following the 4:30 deadline, counsel spoke, and were unable to reach any

agreement about the use of Spencer Plaza. Occupy Delaware's ACLU attorney asked that defendant defer taking action for one day so Occupy Delaware would have an opportunity to file suit. Defendant refused to wait.

36. At 5 p.m. Wilmington police told Occupy Delaware that it had to move off Peter Spencer Plaza within one hour. Occupy Delaware did so.

37. Defendant issued a press release justifying the \$200 charge for using Peter Spencer Plaza with a statement that "The City's overtime costs for police coverage related to Occupy Delaware are now approaching approximately \$25,000." How the city administration managed to spend \$25,000 on overtime police costs for a few days of peaceful demonstration by a small group is difficult to comprehend. Moreover, the statement is pretextual. Shortly before the press release was issued, counsel for the city wrote that "Occupy DE does not need a permit to utilize the public sidewalk in front of the plaza, so long as the sidewalk is not substantially blocked and no tables are set up on the sidewalk." Requiring the Occupy Delaware members to sleep in chairs on the sidewalk next to Peter Spencer Plaza, rather than on the ground in the plaza, has no effect on police costs.

38. Wilmington police have permitted members of Occupy Delaware to sleep in the area, but have told them they may not use sleeping bags because of PATRIOT Act concerns. Similarly, counsel for defendant mentioned unspecified "public safety/security issues as it relates to the Federal Building that is directly adjacent to the plaza" as a reason for barring Occupy Delaware from erecting tents on the plaza.

39. In response to that statement, counsel for Occupy Delaware contacted the United States Marshall's Office and spoke to the person in charge of security for the Federal Building. She expressed no concern. To the contrary, she said the plaza was city property and it would be up to the city whether tents were placed there.

**THE CODE PROVISIONS INVOKED BY DEFENDANT MAY NOT BE
EMPLOYED TO PREVENT OCCUPY DELAWARE'S USE OF SPENCER
PLAZA**

Tents

40. The Wilmington City Code does not authorize the city administration to bar Occupy Delaware and its members from erecting tents and other temporary shelter on Peter Spencer Plaza. When asked for the City Code provision that authorizes defendant to bar tents from Peter Spencer Plaza, counsel for defendant cited only two provisions, Wilmington City Code, §§42- 213, 241.

41. Section 42-213 states:

No person shall place, build, erect, construct or maintain, or cause or permit to be placed, built, erected, constructed or maintained, any encroachment beyond the true building line of the streets, highways, lanes and alleys of the city, except as provided by this article.

42. Section 42-241(a) states:

No person shall place, erect, build, construct or maintain, or cause or permit to be placed, erected, built, constructed or maintained, any booth, stand, stall, cabinet, tent or place for the purpose of displaying or selling any goods, wares or merchandise, or for any purpose whatsoever, which extends beyond the true building line of any street, highway, lane or alley of the city, or shall in any manner place, display or sell any goods, wares or merchandise upon any portion of any street, highway, lane or alley of the city between the true building lines thereof.

43. Those provisions only prohibit the erection of tents and other structures “beyond the true building line of any street, highway, lane or alley of the city.” “True building line” is defined to mean “the boundary line of the public street or highway established by the department of public works of the city.” *Id.* §42-211 Thus, the Code only bars tents that extend into the roadway. It does not apply to tents that will be erected on a plaza, inside the sidewalk, so the Wilmington City Code does not authorize the city administration to bar people from erecting tents there.

Night Time Use

44. Apart from whether or not defendant may bar tents in Peter Spencer Plaza, it has no City Code authority to prevent Occupy Delaware’s members from using Spencer Plaza at night. The code provision the city has relied on, § 38-60, states:

It shall be unlawful for any person to be upon any park property owned by the city, whether maintained by the city, or by the county, or by the state, on any day of the week, from dusk of one day to dawn of the following day unless otherwise authorized by the department of parks and recreation. Any person lawfully may be upon any such park at any time between dawn and dusk of the same day, unless otherwise provided by the said department.

45. That provision does not prevent all night time use of Peter Spencer Plaza, as defendant appears to believe. The language only addresses being on park property “from dusk of one day to dawn of the following day.” In other words, it only prohibits staying through the night. Thus, if the provision were otherwise applicable and enforceable, Occupy Delaware’s members could comply by leaving for a few minutes during the night.

46. Moreover, the code provision does not apply to a “plaza.” It is titled “Park hours,” and its language says it applies to “park property.” The City Code recognizes that a “park” and a “plaza” are different, *see, e.g.*, § 2-150.7(3), so even if defendant were entitled to apply § 38-60 against Occupy Delaware’s use of a park, it would not apply to its use of the plaza.

47. The language of the code provision is also deficient in the First Amendment context for two reasons. First, it gives the city administration discretion to waive the provision, without establishing standards for exercise of that discretion. The provision has no articulated standards; the department of parks and recreation is not required to rely on any objective factors; and it need not provide any explanation for its decision. Nothing in the law or its application prevents the city official from encouraging some views and discouraging others through arbitrary application of the power to allow nighttime use of public space. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

48. Second, the provision is too vague to be invoked to limit First Amendment rights. Read literally, the words mean one can’t stay on park property from nightfall until the next morning. But the administration apparently reads it to mean one can’t stay there for even one minute during the night. If those two interpretations are plausible, the provision is void for vagueness.

Permit Fee

49. Finally, the City Code provision on which defendants have relied to charge a \$200 fee, Wilmington City Code § 38-76, may not be invoked to limit free speech and the right of assembly because it is overbroad. It states:

The department of parks and recreation shall impose and collect a partially refundable park usage and clean up fee in the amount of \$100.00 from individuals and groups for a permit to utilize city parks and facilities prior to the issuance of such park permit. Twenty-five dollars of the initial fee shall be refundable if the individual and or group removes all trash and debris associated with the permitted usage of the park, the facility, or both.

If the park and/or facility is left with trash and debris associated with the permitted usage of the park and/or facility then the \$25.00 refundable fee shall be deemed forfeited by the individual and or group. If the event in the park is shut down for any violation, then the refundable portion of the usage and clean up fee shall be forfeited.

50. Section 38-76 does not state that a permit must be obtained before a city facility or park may be used. But if it is interpreted to mean that, which is defendant's position with regard to Occupy Delaware, the requirement applies to all "individuals and groups [who] utilize city parks and facilities." If a permit is required by § 38-76, no one can use a city without first paying the fee. If one person wants to utilize a city park by sitting on a bench to eat lunch or to make a speech to people on the next bench, defendant charge them \$100. That is a burden the First Amendment and Article 1, § 5 of the Delaware Constitution preclude.

51. A law is overbroad under the First Amendment if it reaches a substantial number of impermissible applications relative to the law's legitimate sweep. Clearly, §38-76 is overbroad under that standard and therefore unenforceable. Any law imposing an overbroad restriction on speech will be struck down. It is no defense for defendant to say that some city official might exercise discretion not to charge the fee in some instances. The provision lacks constitutionally acceptable standards constraining that discretion.

52. Plaintiff does not have an adequate remedy at law.

COUNT I

53. Plaintiff incorporates herein by reference paragraphs 1 through 52 hereof as if set forth at length.

54. Defendant's directive to Occupy Delaware to end its encampment on the Plaza, in that absence of a finding by this Court that it is unreasonable for the occupation to continue because of a physical change in the plaza that is in no way attributable to actions by the city or its agents, is an anticipatory breach of the settlement agreement.

55. Any action by Defendant to enforce that directive otherwise than by an application to this Court for a determination that it is unreasonable for the occupation to continue because of a physical change in the plaza that is in no way attributable to actions by the city or its agents will be a breach of the settlement agreement.

56. Any action by Defendant preventing Occupy Delaware from continuing its occupation of the plaza will be a violation of the rights of Occupy Delaware and its members, and a violation of Defendant's obligations, under the First and Fourteenth Amendments of the United States Constitution and Article I, § 5 of the Delaware Constitution.

COUNT II

57. Plaintiff incorporates herein by reference paragraphs 1 through 56 hereof as if set forth at length.

58. Defendant's refusal to permit Occupy Delaware to use Peter Spencer Plaza without paying a \$200 fee, and its refusal to permit Occupy Delaware and its members to

use the plaza at night or to erect tents on the plaza, has deprived them, and unless enjoined will continue to deprive them, of the right to use open public space for public meetings, assemblies, demonstrations and speech, without any basis in the Wilmington City Code for that denial.

59. If plaintiff is not permitted to use Peter Spencer Plaza as it has sought to do, Occupy Delaware and its members will suffer irreparable harm.

COUNT III

60. Plaintiff incorporates herein by reference paragraphs 1 through 59 hereof as if set forth at length.

61. If the Wilmington City Code provisions on which defendant has relied may be interpreted to allow defendant to impose the fee requirement, it will allow defendant to deny constitutionally-guaranteed rights of free speech and assembly to persons who are unable to pay an arbitrary fee.

61. If so interpreted the Code provisions would enable the city to arbitrarily, capriciously, and discriminatorily impose a requirement that discourages or deny people and groups from exercising constitutional rights of political protest in the state's public parks, streets and squares.

62. If the Code provisions may be so interpreted, they are constitutionally flawed because they do not provide an indigency exception, and therefore would condition the exercise of the right to free expression and free association in traditional public forums on the ability of applicants to pay fees and costs plaintiff and its members are unable to pay.

63. If the Code provisions may be interpreted to permit defendant to prohibit Occupy Delaware and its members from remaining in Peter Spencer Plaza at night after sunset, they are overbroad because they would give Defendants the power to prohibit Occupy Delaware, its members and any other persons and organizations having grievances from exercising their rights of free speech and assembly after sunset in every state park and all other lands under defendant's jurisdiction.

64. If the Code provisions may be interpreted to permit defendant to prohibit Occupy Delaware, its members and any other persons and organizations having grievances from exercising their rights of free speech and assembly at night without parks department authorization, they are unconstitutionally vague because they would give defendant complete discretion to limit exercise of the rights of free speech and assembly without providing any standards or guidance, leaving the requirement open to use for improper viewpoint discrimination.

COUNT IV

65. Plaintiff incorporates herein by reference paragraphs 1 through 64 hereof as if set forth at length.

66. Plaintiff's and its members' proposed activity constitutes political speech and association in a public forum and therefore is expressive activity entitled to the highest degree of protection under the First Amendment and Article I, § 5 of the Delaware Constitution.

67. Defendant's actions barring Occupy Delaware and its members from using the Peter

Spencer Plaza without paying a fee they cannot afford and barring them from using the plaza at night and from erecting tents on the plaza, violate Occupy Delaware's and its members' First Amendment, Fourteenth Amendment and Article I, § 5 rights in the following ways:

- a. They constitute an impermissible prior restraint on speech.
- b. They constitute a content-based regulation of speech.
- c. They embody the exercise of excessive and unfettered arbitrary discretion, ungoverned by objective standards, by the officers, employees or agents of the city.
- d. They constitute an arbitrary and standardless tax or financial burden on plaintiffs' speech, and impose arbitrary requirements on Occupy Delaware's and its members' attempt to exercise their expressive rights.
- e. They are unconstitutionally vague.
- f. They are unconstitutionally overbroad.
- g. They discriminate against Occupy Delaware and its members in that they chill or eviscerate their constitutional rights on the basis of their financial status, and their inability to pay the fees and costs imposed by the state on expressive activity in public forums.

68. As a proximate result of the Defendants' actions, the Plaintiffs have been deprived of their rights under the First Amendment, Fourteenth Amendment and Article I, § 5 rights and will suffer immediate and irreparable harm unless this Court rules that defendant must permit Occupy Delaware and its members to conduct their occupation in

Peter Spencer Plaza without paying a permit fee, to remain in the plaza at night and to erect tents in the plaza.

69. Defendant has acted under color of state law at all times material hereto.

70. Plaintiff and its members are entitled to relief pursuant to 42 U.S.C. § 1983 and Delaware state law for the deprivation of their freedom of speech, expression and association as guaranteed by the United States and Delaware Constitutions, including a declaration that they are entitled to remain in Peter Spencer Plaza for the duration of their occupation, and damages for any deprivation of those rights they have suffered.

71. Plaintiff and its members are also entitled to a declaration that the Code provisions are void as overbroad and vague, in violation of the United States and Delaware Constitutions.

WHEREFORE, the Occupy Delaware demands judgment as follows:

A. That Defendant be temporarily restrained and preliminarily and permanently enjoined from preventing plaintiff and its members from using Peter Spencer Plaza in the manner in which it has stated it intends to use it;

B. A declaration that Occupy Delaware is entitled to issuance of a permit without paying the fee defendant seeks to charge, if defendant is found to have the authority to charge a fee;

C. That Defendant be ordered to issue the permit without charging a fee, if the Wilmington City Code authorizes a fee to be charged;

D. A declaration that the Wilmington City Code provisions relied on by

defendant are unconstitutional both facially and as applied in against Occupy Delaware;

E. A declaration that Occupy Delaware and its members have not lost the right to use Peter Spencer Plaza, south of the tree line that runs perpendicular to French Street just south of the fenced in monument/grave site area, for their occupation for as long as they wish to use it, seven days a week around the clock, including the right to place tables, tents, signs and other items on the plaza.

F. Enjoining and, if necessary, temporarily restraining, Defendant from taking any action other than an application to this Court, to terminate or modify Occupy Delaware's right to use Peter Spencer Plaza for its occupation.

G. Awarding plaintiff damages for any loss or injury caused by defendant's actions;

H. That plaintiff recover the costs of this action, including reasonable attorneys' fees, from defendants, pursuant to 42 U.S.C. § 1988;

I. Any other relief that this Court deems just and appropriate.

s/ Richard H. Morse
Richard H. Morse (No. 531)
American Civil Liberties Union Foundation of Delaware
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Wilmington, Delaware 19801
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rmorse@aclu-de.org
Attorney for Plaintiff

DATED: May 7, 2012



EXHIBIT A

AGREEMENT BETWEEN OCCUPY DELAWARE AND CITY OF WILMINGTON

The City of Wilmington and Occupy Delaware agree this tenth day of November, 2011, that Occupy Delaware and its members may use Peter Spencer Plaza for their occupation without being required to pay a fee, for as long as they wish to use it, that they may remain on the plaza seven days a week around the clock, and that they may place tables, tents, signs and other items on the plaza, but that tents will not be placed north of the tree line that runs perpendicular to French Street just south of the fenced in monument/grave site area. Occupy Delaware agrees not to block pedestrian traffic by putting fixed items north of the tree line.

Occupy Delaware will not establish another encampment in downtown Wilmington unless the number of people occupying Peter Spencer Plaza grows to the point where it becomes unreasonably crowded. In that case, the parties will discuss what to do about using other sites for an occupation. This agreement will not limit the decisions or arguments either party may make regarding use of a second City of Wilmington site for an occupation.

This agreement also has no bearing on the rights, or lack thereof, of Occupy Delaware to use property in Wilmington otherwise than for an occupation. The City of Wilmington may ask the Court to excuse it from complying with this agreement if, due to a physical change in the plaza that is in no way attributable to actions by the city or its agents, it becomes unreasonable for the occupation to continue at Peter Spencer Plaza.

Occupy Delaware by William Fasano, its designee to sign this agreement

William Fasano

City of Wilmington by Romania Tassoni-Silardo, Esq.

Romania Tassoni-Silardo
Attorney for City of Wilmington

EXHIBIT B

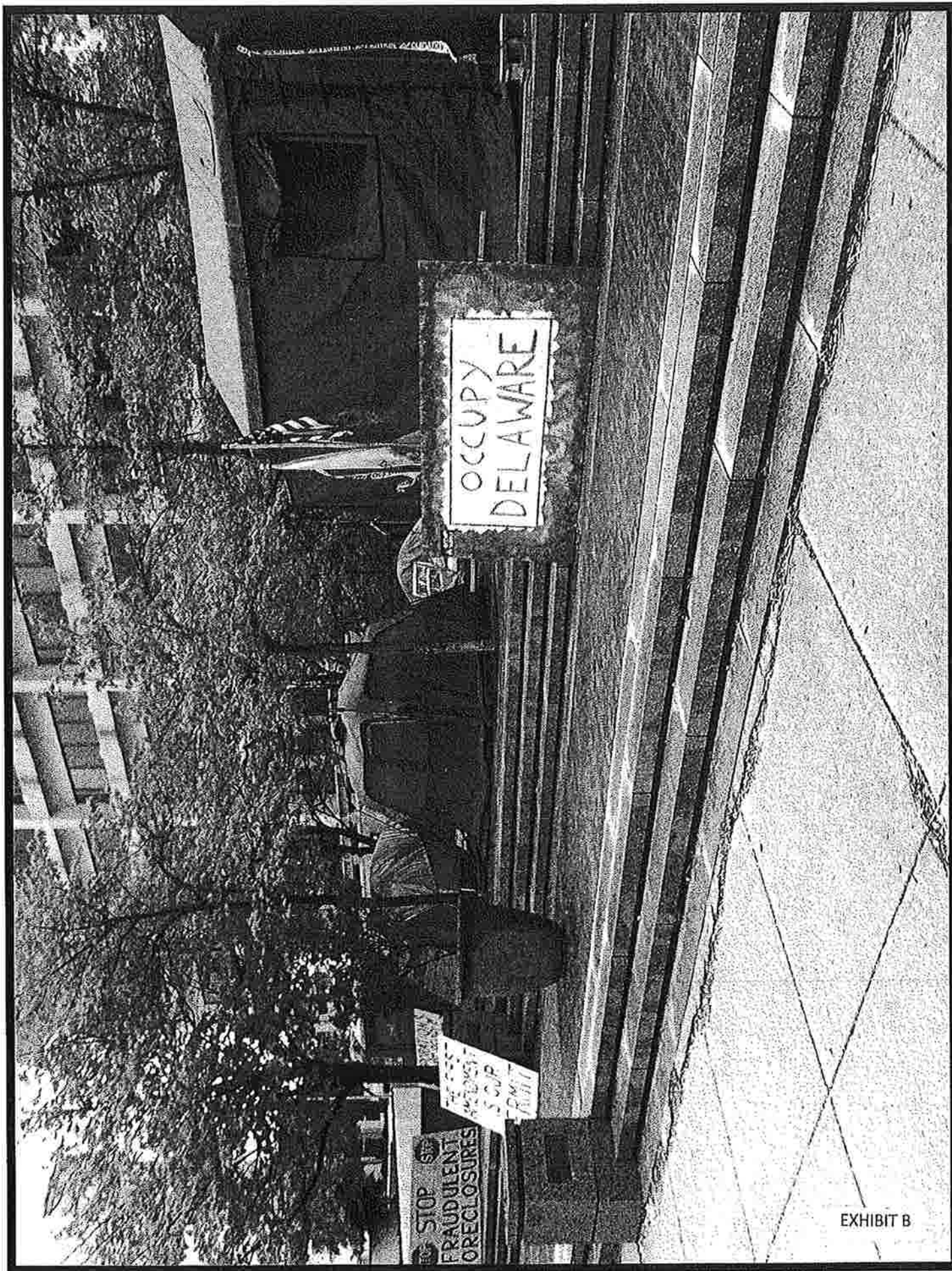


EXHIBIT B



EXHIBIT C

City of Wilmington Delaware

Mayor Baker Directs Occupy Delaware to Cease Occupation of Spencer Plaza

Posted on 04/23/2012 3:03 pm

Wilmington Mayor James M. Baker today directed members of Occupy Delaware to discontinue their occupation of Spencer Plaza, which is located on the 800 Block of French Street directly across from the Louis L. Redding City/County Building. The Mayor has requested that the group dismantle their campground by May 1. Occupy Delaware has occupied Spencer Plaza—the sacred burial ground of celebrated African American religious leader Peter Spencer, his wife and six other individuals—since November of 2011.

The City of Wilmington originally agreed to allow Occupy Delaware to use Spencer Plaza to express its First Amendment right to engage in protected speech. According to Mayor Baker, however, in the time since the agreement was reached, individuals at the site have engaged in criminal misconduct, including destruction of public property, safety and sanitation violations and, most recently, illegal drug activity and public intoxication.

The Mayor said the group's 'occupation' is preventing the general public from the use and enjoyment of the plaza. "The City does not intend to preclude Occupy Delaware from the legitimate exercise of its First Amendment rights," said the Mayor. "But the indefinite seizure of public property is not protected speech. I am therefore asking that Occupy Delaware discontinue the occupation of the Plaza by no later than May 1."

"The Occupy Delaware encampment in Spencer Plaza has become more than just a public nuisance with its unsightly and disorderly appearance—it also represents a danger to the people camping there as well as to the public," Mayor Baker continued. "Most disturbing is the lack of respect some have shown for our laws and for what many Wilmingtonians consider to be a sacred gravesite. Occupy Delaware's 'occupation' has become a desecration of the final resting place of one of our most historic and revered citizens—the African American church leader Peter Spencer who founded the first independent black Christian Church in the United States, which is the A. U. M. P. Church in Wilmington."

Mayor Baker said he hopes that Occupy Delaware will be respectful of Wilmington's cultural heritage and sensitive to the desires of the total Wilmington community by voluntarily removing the tents and related structures from Spencer Plaza, on or before May 1. The Mayor said he also hopes that Occupy Delaware will immediately bring an end to the violations of law that have occurred at the site.

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EXHIBIT C

EXHIBIT D

C. Malcolm Cochran, IV
Director
302- 651-7506
Cochran@rlf.com

April 23, 2012

VIA HAND DELIVERY

Richard H. Morse, Esquire
American Civil Liberties Union of Delaware
100 West 10th Street, Suite 603
Wilmington, DE 19801

Re: Occupy Delaware Camp at Spencer Plaza

Dear Richard:

This firm represents the City of Wilmington ("City") in the referenced matter.

Introduction

As you are aware, on November 10, 2011, the City agreed (the "Agreement") to allow individuals associated with the movement called "Occupy Delaware" ("OD") to use Peter Spencer Plaza ("the Plaza"), a public space located in the 800 block of French Street, by setting up tents, signs and other items. OD's stated purpose was the exercise the First Amendment right to free speech. This purpose was the basis of the Agreement.

In the more than five months since the Agreement was reached, however, there have been recurrent, unlawful conditions and criminal conduct at the site. The unlawful conduct recently has grown more serious, with reports of illegal drug use. There also have been ongoing health and safety issues. The City previously has called these matters to OD's attention, but as evidenced by last week's news report (which associated alleged drug traffickers with the site) the problems appear to be worsening.

Federal courts recently have held that a seizure of public property through the establishment of an indefinite encampment is not constitutionally protected conduct, and thus outside the essential purpose of the Agreement. OD's encampment also has almost completely foreclosed other public use of the Plaza: Its numerous large, unsafe temporary structures (placed

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EXHIBIT D

in close formation), large and insecure wooden billboards, multiple wooden pallets, piles of straw, trash and other combustibles, storage facilities, porta potties, and other installments (apparently intended to be permanent) constitute physical changes in the plaza "in no way attributable to actions by the city or its agents" that make it "unreasonable for the occupation to continue"

Neither the First Amendment nor the Agreement require the City to tolerate violations of City code, unsafe conditions, or other violations of law. OD has breached the Agreement for the use of the Plaza. While the City will permit the lawful exercise of First Amendment rights (subject to reasonable time, place and manner requirements) on the Plaza, OD's "occupation" is neither lawful, nor reasonable.

The City hereby requests that OD remove its encampment and cease its "occupation" of the Plaza by May 1, 2012. Should you wish to engage in dialogue regarding more reasonable ways in which OD may use the Plaza, please feel free to contact us.

Background

On several occasions since OD began its occupation, the City has made OD aware of issues arising at the camp, including complaints from the public, and requested that OD address the matters. The specific issues have included (among others): tying tent ropes, flags and signs to public trees and structures; placing an old sofa on the Plaza along the sidewalk; creating trip hazards in areas where the general public walks; pulling up loose pavers from the Plaza; creating a fire hazard by placing large amounts of combustible material on the Plaza while using open flame sterno; public urination; an individual vomiting onto the adjacent property owner's parking lot; foul odors from garbage containers and the portable bathrooms; and accumulated trash and debris throughout the Plaza. *See* e-mails from R. Tassone to R. Morse dated 11/16/11, 11/18/11, 12/2/11, 12/20/11 and 3/8/12; e-mail from G. McDaniel to R. Tassone dated 2/16/12; e-mail from R. Grogan to R. Tassone dated 3/7/12; GA meeting notes dated 11/20/11 and "Urgent Needs Update" dated 11/21/11 referencing the need for sterno to heat food despite the Fire Marshal's prohibition of open flames; photos dated 11/17/11, 12/2/11, 1/5/12, 1/27/12, 1/30/12 and 3/2/12).¹ OD is aware that these activities violate the Wilmington City Code. *See* Occupy Delaware's Guidelines for Effective Occupation; e-mails from R. Tassone to R. Morse dated 11/16/11 and 12/20/11.²

¹ "GA" refers to the weekly meetings held by OD which it calls "General Assemblies."

² Documents and photographs referenced herein are enclosed.

Richard H. Morse, Esquire

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The same and similar conduct has continued notwithstanding that the City has brought these matters to OD's attention and asked that they stop. For instance, OD members continue to allow containers to overflow with trash, or to place trash and debris directly on the Plaza; its members apparently moved three (3) large planters without the City's permission in order to erect a "command tent;" OD members have apparently placed flags and signs in the planters and in the tree guards; pavers are still being removed from the Plaza; persons apparently associated with OD continue to urinate on the ground and even in the recycling bin rather than use the portable bathrooms; liquids from the portable bathrooms have spilled onto the Plaza, and the portable bathrooms continue to smell. Despite the milder temperatures, OD has not removed the straw, wood pallets, bamboo poles and tarps it used to "winterize" its camp. As such, OD continues to maintain a fire hazard on the Plaza. OD members have been seen smoking cigarettes at the camp, increasing the probability of a fire. See e-mail from S. Hurschman to R. Tassone dated 3/27/12; photos dated 3/21/12 and 4/10/12.

In addition to the Wilmington City Code violations cited above, there has apparently been criminal activity at the site since it was established. On November 15, 2011, a member of OD approached a Wilmington police officer to request assistance with a disorderly person at the site. The individual was a transient who had moved into the camp. At the time, the complainant did not want the individual arrested or removed from the camp. However, in the early morning hours of November 16, 2011, several members of the camp approached another officer and requested that the individual be removed from the Plaza because he was causing a disturbance. See Initial Crime Report dated 11/15/11 and e-mail from Sgt. Misetic to Insp. Finerty dated 11/16/11; e-mail from R. Tassone to R. Morse dated 11/18/12. On January 24, 2012, a member of OD called the Wilmington Police Department to report a theft and damage to his property. According to the police report, an individual who resided at Connections and who had stayed at the camp cut the exterior of the complainant's tents and stole clothing, tools and cash. See Initial Crime Report dated 1/24/12. Similar incidents have occurred at the camp site, but were not reported to the police. See GA meeting notes dated 2/4/12 (indicating "[t]here has been a spate of tent slashing and stealing"); GA meeting notes dated 2/29/12 (wherein one member of OD who did not agree with one of the signs placed on the Plaza and attempted to remove it was "put in fear of physical abuse by the person who put it there"); GA meeting notes dated 3/21/12 (referencing a "sticky eviction yesterday, with attendant threats" and the need for security at the camp).

Reports of Drug Activity

While the above cited matters are concerning to the City and represent breaches of the Agreement, we have recently been made aware of recurrent drug and alcohol use, apparently by individuals occupying the OD tents. On March 9, 2012 at approximately 6:30 a.m., an individual from the camp was taken from the Plaza to the emergency room as a result of an apparent

Richard H. Morse, Esquire

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overdose. *See* Detail Call for Service Report dated 3/9/12. On April 2, 2012, members of OD called the Wilmington Police Department regarding the disorderly conduct of another person (reportedly associated with OD) who was "kicked out" and not permitted at the camp because of her "excessive drinking." *See* Initial Crime Report dated 4/2/12. While officers were at the camp in response to that report, individuals who appear to have been members of OD complained to the officers about "excessive" drug and alcohol usage at the site. The officers were advised that illegal drug use by others at the site was occurring in the portable bathrooms as evidenced by drug paraphernalia "usually" found in the stalls. During the group's March 24, 2012 general assembly, they discussed the "illicit use" of the facilities. *See* GA meeting notes dated 3/24/12. Although the notes attribute the illegal behavior to "non-occupiers," this assertion is apparently contradicted by individuals who appear to occupy the tents. Nonetheless, whether the drug use occurring at the camp is directly attributable to members of OD or to non-members seizing upon the opportunity presented by the OD encampment on the Plaza, the conduct causes grave concern and cannot be tolerated.

Other complaints have been made to the City regarding possible drug and alcohol use which are bolstered by the reported incidents referenced above. On March 9, 2012, the City received a complaint from an attorney whose office overlooks the Plaza. He stated that he saw a group of individuals apparently "rolling joints outside [his] window." *See* e-mail from G. McDaniel to R. Tassone dated 3/9/12. Also, an employee of the City of Wilmington Law Department was approached by someone who appeared to be associated with OD, whom she described as "drunk or high." This incident occurred sometime in late March.

Within weeks of OD establishing its camp site, no one was seen at the camp with any regularity, at least not on weekdays. *See* e-mail from R. Tassone to R. Morse dated 11/18/11; GA meeting notes dated 12/20/11 (recommending that OD stop "publicizing our weaknesses on the Facebook page so that people know there's no one here."). Some of the tents were being used as storage facilities, some tents were simply being used as windbreaks or to establish a "perimeter" for the camp and some tents had collapsed and were left lying on the ground. *See* GA meeting notes dated 11/30/11; photos. It has only been within the past six weeks, approximately, that a few individuals have been seen at the camp. It appears the few tents which are now being "occupied" are being lived in by individuals who otherwise reside in various temporary housing shelters. *See* Initial Crime Report dated 4/2/12 (where the individuals present at the camp gave their address as 110 North Poplar Street, the Sunday Breakfast Mission); GA meeting notes dated 2/4/12 (referencing outreach efforts to the homeless to "develop loyalty" and stating that "as long as they make some commitment to OccDE we can get Occupy Supply to send up gloves and hats.").

While the City agreed to allow OD to use the Plaza for its "occupation" in order to express its First Amendment rights, the condition of the Plaza and the criminal activity taking

Richard H. Morse, Esquire

April 23, 2012

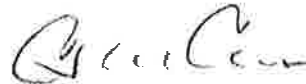
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place there, both of which are directly attributable to OD's use of the space, are contrary to the Agreement. OD's use of the Plaza poses a threat to public health and safety, including the safety of OD members themselves.³ OD's indefinite and improper seizure of public space, to the exclusion of other members of the public, infringes the rights of the public in general and is neither protected speech, nor symbolic conduct. As a result, the City hereby declares OD in breach of the Agreement, and requests that OD remove all tents and materials from the Plaza, and discontinue its use as a camping ground.

I would also like to take this opportunity to advise OD that prior to its occupation of the space, the City had planned an extensive renovation of the Plaza, including the open space on King Street and the steps leading to the Plaza on French Street. The renovation was contingent upon the successful financing of the project which has now been accomplished. OD's encampment cannot remain on the Plaza during the renovation. Demolition of the Plaza is currently scheduled to commence in late summer or early fall.

Again, the City requests that OD "de-occupy" the Plaza by May 1, 2012. Should you wish to discuss a manner of using the Plaza that addresses the above described issues, we would be willing to engage in dialogue.

Sincerely,



C. Malcolm Cochran, IV

³ Although OD has stated that it will implement measures to address public safety issues at the camp site, it has not been successful. See e-mail from R. Morse to R. Tassone dated 11/21/11 (stating that OD will address the issue of homeless individuals staying on the Plaza and secure the empty tents); GA meeting notes dated 4/4/12 (stating that OD has purchased locks for the portable restrooms to stop the "illicit" activity; however, as of the date of this letter, the facilities remained unsecured.).