IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BELLA VISTA UNITED, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 04-1014

MEMORANDUM

Padova, J. **April , 2004**

Plaintiffs brought this action to enjoin the enforcement of a number of City of Philadelphia ("City") ordinances restricting the posting of non-permanent signs. Presently before the Court is Plaintiffs' "Motion for a Temporary Restraining Order/Preliminary Injunction," which requests that the Court enjoin the enforcement of three of the challenged provisions pending the final resolution of this litigation on the merits. A hearing on the Motion was held before the Court on March 30, 2004, and the matter has been fully briefed by the parties. For the reasons that follow, the Motion is granted.

I. BACKGROUND

On March 8, 2004, Plaintiffs filed a Verified Complaint seeking injunctive relief from the enforcement of various ordinances located in Title 10 of the Philadelphia Code ("Code"), which regulates the posting of temporary signs on public and private property in the City.

Plaintiff Bella Vista United is an unincorporated community organization "dedicated to improving the lives of people living in, working in, or visiting the Bella Vista section of Philadelphia."

(Compl. ¶ 3.) The association meets bi-monthly and advertises these meetings, as well as community events, by posting flyers throughout Bella Vista. (Id.)

Plaintiff David Cohen is a Philadelphia resident who has served on City Council for over 25 years. (Id. ¶ 4.) Councilman Cohen has posted campaign signs on public property since he first ran for City Council over 30 years ago. (Id.)

Plaintiffs William and Anne Ewing, who live within the City limits, frequently post signs in and around their neighborhood, as well as on their private property, on behalf of political candidates and regarding neighborhood events. (Id. at ¶ 5.) The Ewings intend to continue posting such signs in the future. (Id.)

Plaintiff Walter Fox, a City resident, has participated in neighborhood sales in the past, and intends to continue doing so. (Id. ¶ 6.) To alert people to these sales, Mr. Fox and his neighbors post signs throughout the area notifying neighbors of the time and dates of the sale. (Id.)

Plaintiff Terry Gillen, a City resident, is currently running for state representative. (Id. ¶ 7.) As part of her campaign, Ms. Gillen intends to post campaign posters on public property. (Id.) Ms. Gillen has also requested that her supporters display her campaign signs on their private property. (Id.)

Plaintiff Babette Josephs, a City resident, has served as state representative for the 182nd District of the City since 1985,

and is currently running for reelection. (Id. ¶ 8.) Ms. Josephs intends to ask her supporters to display campaign signs on their private property. (Id.) She has also, on a variety of occasions, posted signs about upcoming events or meetings on public property, including street lights, utility poles and the posts to which parking signs are attached, and will seek to publicize future events in this manner. (Id.)

Plaintiff Pennsylvania Abolitionists United Against the Death Penalty ("PAUADP") is a registered, non-profit, tax-exempt organization founded in 1997. (Id. ¶ 9.) PAUADP works to end capital punishment in Pennsylvania by mobilizing citizens and joining activists together in rallies, vigils, demonstrations, public debates, and discussion forums. (Id.) In order to inform the community of these events, PAUADP regularly posts signs on public property throughout Philadelphia, including on street lights, utility poles and the posts to which parking signs are attached. (Id.) PAUADP intends to continue to post signs as a method of community outreach and advocacy. (Id.)

On March 8, 2004, Plaintiffs also filed the instant Motion seeking preliminary injunctive relief with respect to §§ 10-1202(4), 10-1202(7), and 10-1203 of the Code. Each challenged ordinance regulates the posting of "temporary signs" and/or "political campaign posters." "Temporary signs" are defined in Section 10-1201(7) of the Code as "[a]ny sign except a political

campaign poster, which is constructed of cloth, paper, cardboard or any other material other than glass, wood or metal, intended to be displayed for a short time only, including ground signs, banners, pennants, advertising flags and poster placards." Phila. Code § 10-1201(7). Section 10-1201(8) of the Code defines "political campaign posters" as "[a]ny printed or written matter containing the name, picture, likeness or lever number of any candidate for any office." Phila. Code § 10-1201(7).

Section 10-1202(4) provides: "(a) No political campaign posters shall be affixed in any manner to any type of tree; (b) No political campaign posters shall be allowed to remain posted over thirty (30) days after the primary or regular election to which it refers; (.1) Each candidate and campaign committee that does not remove his/their political or campaign poster from where it was posted as required by section 10-1202(4)(b) above, shall be assessed a fine of one dollar ($1.00) for each such unremoved poster." Phila. Code § 10-1202(4).

Section 10-1202(7), which was added in an amendment to § 10-1202 in December 2003, provides: "Notwithstanding any other provision of this Section, no person shall affix any temporary sign or political campaign poster to public utility poles; streetlights; traffic or parking signs or devices, including the posts to which such signs and devices are attached; or historical markers, without the permission of the owner or of the agency responsible for the

maintenance of such fixture." Phila. Code § 10-1202(7).

Section 10-1203 requires persons to, *inter alia*, obtain a permit, submit a deposit, and pay a fee before posting any "temporary signs" pursuant to the provisions of Title 10 of the Code. Phila. Code § 10-1203.

At the March 30, 2004 preliminary injunction hearing, several of the named Plaintiffs, as well as a number of other persons, testified regarding the First Amendment injuries caused by the City's enforcement of the challenged ordinances. Several City officials testified about the City's policies and practices with respect to enforcement of the challenged ordinances, as well as about the interests underlying the City's enactment of the ordinances. The City also presented testimony by a representative of PECO Energy Company ("PECO") regarding PECO's stance on the posting of temporary signs and political campaign posters on PECO-owned utility poles. In addition, the parties entered an interim agreement on the record regarding the regulation of private property under the challenged ordinances. Pending final resolution of this litigation on the merits, the City agreed not to enforce the challenged ordinances with respect to private property except as follows: (1) a person cannot pay to post signs on private property; and (2) a person cannot post signs on private property that advertise a service or business located on another property. (N.T. 3/30/04 at 138.) The Court retains jurisdiction to enforce

the interim agreement. (Id. at 139.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 65 governs the issuance of preliminary injunctions.[1] A "preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)(quotation omitted). In order to obtain a preliminary injunction, plaintiffs have the burden of demonstrating both (1) that they are reasonably likely to succeed on the merits and (2) that they are likely to suffer irreparable harm without a preliminary injunction. Adams v. Freedom Forge Corp., 204 F.3d 475, 484 (3d Cir. 2000). If these factors are shown, the court may also examine the likelihood of irreparable harm to the non-moving party and whether the issuance of a preliminary injunction would serve the public interest. Id.

[1] Plaintiffs have styled the instant Motion as a "Motion for a Temporary Restraining Order/Preliminary Injunction." While Rule 65 governs both preliminary injunctions and temporary restraining orders, these two forms of injunctive relief have distinguishing features. Temporary restraining orders may be issued *ex parte* and are of very limited duration. See Fed. R. Civ. P. 65(b). By contrast, preliminary injunctions, which remain in effect until completion of the trial on the merits, may be issued only after the opposing party receives notice and after some form of hearing. See id. Given the circumstances of this case, the Court will treat the instant Motion as request for a preliminary injunction. See BABN Technologies Corp. v. Bruno, Civ. A. No. 98-3409, 1998 WL 720171, at *3 (E.D. Pa. Sept. 2, 1998)(treating motion as request for preliminary injunction where both parties submitted comprehensive briefs and participated in hearing).

III. DISCUSSION

A. Likelihood of Success on Merits

As an initial matter, the Court notes that it is undisputed that all three challenged ordinances burden speech protected by the First Amendment. See, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994)(recognizing that signs are a form of expression protected by the Free Speech Clause). The Court also observes that Plaintiffs assert facial challenges to all three of the ordinances. A facial challenge "means a claim that the law 'is invalid *in toto* - and therefore incapable of any valid application.'" Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.5 (1982)(quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974)). It is well-established that in the area of freedom of expression parties have standing to facially challenge ordinances that delegate overly broad discretion to government officials or that contain impermissible content-based restrictions on speech. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988); see also Peachlum v. City of York, 333 F.3d 429, 434-35 (3d Cir. 2003)("The courts have repeatedly shown solicitude for First Amendment claims because of concern that, even in the absence of a fully concrete dispute, unconstitutional statutes or ordinances tend to chill protected expression among those who forbear speaking because of the law's very existence. This concern is particularly

acute with regard to facial challenges to a statute or ordinance."). As determined below, the three challenged ordinances either impermissibly vest unbridled discretion in City officials or draw unconstitutional content-based restrictions on speech. Accordingly, Plaintiffs have standing to bring the instant facial challenge.

1. Section 10-1202(7)

Plaintiffs correctly assert that the permission requirement contained in § 10-1202(7) constitutes a prior restraint on speech. Although not unconstitutional *per se*, "any system of prior restraint . . . bear[s] a heavy presumption against its constitutional validity." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975). A system of prior restraint may neither "delegate overly broad licensing discretion to a governmental official," Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992), nor "fail[ ] to place limits on the time within which the decisionmaker must issue" the permission. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226 (1990). Ordinances vesting public officials with unfettered discretion to permit or prohibit speech create two serious First Amendment risks: "self-censorship by speakers in order to avoid being denied . . . [permission] to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship . . . ." Lakewood, 486 U.S. at 759; see also FW/PBS, Inc., 493 U.S. at 226-27 ("The failure to

confine the time within which the licensor must make a decision 'contains the same vice as a statute delegating excessive administrative discretion.'")(quoting Freedman v. Maryland, 380 U.S. 51, 56-57 (1965)).

On its face, § 10-1202(7) clearly grants undesignated City officials complete discretion to determine which non-permanent signs may be posted on the public fixtures listed in the provision. Moreover, §10-1202(7) fails to place any express limits on the time within which the unnamed City officials must issue their decisions. Accordingly, as written, § 10-1202(7) fails to rebut the "heavy presumption" against its validity under the First Amendment. See Lawson v. City of Kankakee, 81 F. Supp. 2d 930, 934-35 (C.D. Ill. 2000)(finding that ordinance prohibiting placement of signs "upon any private or public property without the consent of its owner or occupants" impermissibly vested unbridled discretion in City officials).

The City does not appear to dispute that §10-1202(7), as written, constitutes an unconstitutional prior restraint on speech. Instead, the City argues that it has cured the unfettered discretion that § 10-1202(7) vests in City officials by adopting a policy of denying permission to *all* persons seeking to post temporary signs and political campaign posters on the public fixtures regulated under the ordinance. According to the Affidavit of Philip R. Goldsmith ("Goldsmith Affidavit"), who presently

serves as Managing Director of the City, "it is the City's policy to prohibit the posting of such temporary signs [i.e., "temporary signs" and "political campaign posters" as defined in § 10-1201] on all City property, including (a) the trees and traffic islands and medians within the public rights of way, (b) public utility poles, ©) street lights, (d) traffic or parking signs or devices, including the posts to which such signs and devices are attached, and (e) historical markers." (Goldsmith Aff. ¶ 8, City Ex. A.) In March 2004, Goldsmith, pursuant to his supervisory powers as Managing Director, issued Directive 57, which directs the Philadelphia Department of Licenses and Inspections ("L&I") to issue a regulation mandating "that no person may affix any temporary sign or political campaign poster on public property, City-owned property, or in any City-controlled right of way." (City Ex. B.) To this end, L&I has drafted a regulation proposing that "[n]o person may affix any temporary sign or political campaign poster on any public utility pole; streetlight; traffic or parking sign or device, including the posts to which such signs and devices are attached; or historical marker." (City Ex. C.)

"It is true that when a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits." Lakewood, 486 U.S. at 770 n.11. Although the City

is currently in the process of promulgating a regulation that purportedly eliminates the unbridled discretion of § 10-1202(7), no such administrative construction of the ordinance is yet in force.[2] (See N.T. 3/30/04 at 184.) Furthermore, the Court finds that the City's claimed policy of completely prohibiting temporary signs and political campaign posters from being posted on the designated public fixtures is neither well-understood nor uniformly applied by City officials. Indeed, at the March 30, 2004 hearing, Managing Director Goldsmith testified that Directive 57 is not an absolute ban, but rather applies only to persons seeking to post temporary signs or political posters on the designated public fixtures without having first obtained a permit. (N.T. 3/30/04 at 175.) By contrast, David Perri, who currently serves as the Deputy Commissioner of L&I, testified that he understood Directive 57 as "emphatically stating that permission will never be granted for any type of sign in the areas in which there is public control." (N.T. 3/30/04 at 194.)

Moreover, as Managing Director Goldsmith's testimony suggests, the City has continued to permit the posting of various non-permanent signs on the designated public fixtures. For example, the City recently permitted "temporary signs" advertising the 2004

[2] The Court takes a position neither on the issue of whether L&I has the authority to promulgate its proposed regulation nor on the issue of whether the proposed L&I regulation would pass constitutional muster.

Philadelphia Flower Show to be posted on public fixtures throughout the City.[3] See DejaVu of Nashville, Inc. v. The Metropolitan Gov't of Nashville and Davidson County, Tenn., 274 F.3d 377, 402 (6th Cir. 2001)("A 'uniformly applied' practice is simply not the same as a 'generally' applied one."). The Court also notes that Directive 57 was issued by Managing Director Goldsmith in "March 2004." Although the Managing Director did not recall the exact date on which he issued Directive 57, his testimony suggested that he did not issue Directive 57 until mid-March, after the filing of this action on March 8, 2004. (See N.T. 3/30/04 at 172). Courts have been skeptical of directives issued by government officials after the commencement of litigation in an apparent attempt to demonstrate a "well-established" practice. See HX Magazine v. City of New York, Civ. A. No. 01-9161, 2002 WL 31059318, at *3 (S.D.N.Y.

[3] The City argues that the posting of large banners, such as those advertising for the Red Cross or for the 2004 Philadelphia Flower Show, are not subject to the City's no-posting policy because these banners are located above the street, made of nylon, designed to enhance the environment, fastened by sturdy metal brackets, and posted by the City itself or its delegate. This argument simply reinforces the confusion among City officials about the actual scope of the City's claimed policy. Indeed, as noted above, the Goldsmith Affidavit states that the City's unqualified policy is "to prohibit the posting of . . . temporary signs on *all* City property." (Goldsmith Aff. ¶ 8, City Ex. A)(emphasis added). Moreover, section 10-1201(7)of the Code defines temporary signs to expressly include "banners" that are "constructed of . . . any . . . material other than glass, wood, or metal . . . ." Furthermore, when pressed by the Court, Managing Director Goldsmith conceded that Directive 57 would not flatly prohibit "someone in the courtroom" from "go[ing] through . . . the same kind of process that Red Cross went through" to post signs on City property. (N.T. 3/30/04 at 175.)

Sept. 13, 2002)(holding that "there is clearly no well-established practice since the purported guidelines were only issued [by the government] this year, after commencement of this lawsuit, in an attempt to withstand constitutional muster"). Even if Managing Director Goldsmith issued Directive 57 before March 8, 2004, the City's no-posting policy, as embodied by that directive, was in effect for, at most, one week before the filing of this action. While the fact that the City's claimed policy was not committed to writing until such a late date does not of itself preclude the finding of a "well-established" practice, cf. Wells v. City and County of Denver, 257 F.3d 1132, 1150 (10th Cir. 2001), the record is devoid of evidence demonstrating that the City uniformly denied permission to post signs on the designated public fixtures prior to the issuance of Directive 57. As the limits which the City claims are implicit in its law have not been "made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice," Lakewood, 486 U.S. at 770, the constitutional defects of § 10-1202(7) remain uncured.[4] The Court

[4] The City notes that many of the "public utility poles" regulated under § 10-1202(7) are owned and maintained by PECO. The City does not otherwise dispute that it owns the public fixtures regulated under § 10-1202(7). Plaintiffs argue that PECO, a private entity, should be treated as a state actor in this case given that it is extensively regulated by Pennsylvania Public Utility Commission, (N.T. 3/30/04 at 181), its utility poles are located on City property, (id.), and it gives the City permission to remove signs posted on its utility poles. The Court need not, however, decide whether PECO should be treated as a state actor in this case, as the evidence in the record reflects that the City

can neither presume that City officials will act in good faith and respect a speaker's First Amendment rights, nor read a requirement into the ordinance that is not fairly and evidently present. Id. Accordingly, the Court concludes that Plaintiffs have demonstrated

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retains the power to determine whether non-permanent signs may be posted on public utility poles. The Goldsmith Affidavit states that "[i]t is the *City's policy* to prohibit the posting of such temporary signs [i.e., "temporary signs" and "political campaign posters" as defined in § 10-1201] on *all City property, including . . . (b) public utility poles*")(emphasis added). When asked whether it was *his* intent, as the City's Managing Director, "to basically not grant permission for any type of sign" pursuant to Directive 57, Goldsmith responded affirmatively. (N.T. 3/30/03 at 171.) Similarly, Deputy Commissioner Perri testified that persons seeking to post signs on any property within the "right-of-way," which includes the sidewalks on either side of a street, (N.T. 3/30/04 at 160), "would have to see[k] [permission from] the [City's] Streets Department since they have the jurisdiction over the right-of-ways." (Id. at 194.) Perri also testified that Directive 57 "emphatically state[s] that permission will never be granted for any type of sign in the *areas in which there is public control*." (Id.) As noted above, PECO's utility poles are located on City property. (Id. at 181.)

On the other hand, Edward McBride, who serves as PECO's Philadelphia County Affairs Manager, testified only that PECO "do[es] not want any signs . . . affixed to [PECO's] poles that [are] not . . . part of the utility business." (N.T. 3/30/04 at 178). McBride also responded in the negative when asked whether "PECO has given permission to some groups to post signs on its poles." (Id. at 180.) When read in light of the record as a whole, Mr. McBride's testimony establishes, at best, that PECO, in addition to the City, has decisionmaking authority with respect to the posting of signs on PECO-owned utility poles. Thus, while the City may not adhere to a uniform and well-established policy of denying permission to all persons seeking to post signs on the designated public fixtures, it is clear from the record that the City is, in whole or in part, vested with the power to determine whether signs may be posted on the public fixtures, including PECO-owned utility poles. Cf. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 153 (3d Cir. 2002)(borough retained control over determination of whether objects could be posted on Verizon-owned telephone poles located on public property).

a clear likelihood of success on the merits with respect to § 10-1202(7).

2. Sections 10-1203 and 10-1202(b)-(b)(.1)

It is undisputed that § 10-1203, on its face, is a content-based regulation on speech,[5] as its permit, fee, and deposit requirements, as well as its 30-day durational limitation, apply only to the posting of "temporary signs," which are defined in § 10-1201(7) as "[a]ny sign *except a political campaign poster*, which is constructed of cloth, paper, cardboard or any other material other than glass, wood or metal, intended to be displayed for a short time only, including ground signs, banners, pennants, advertising flags and poster placards." Phila. Code § 10-1201(7)(emphasis added). Section 10-1203, therefore, exempts signs containing "the name, picture, likeness or lever number of any candidate for any office," Phila. Code § 1201(8), even if intended to be displayed "for a short time only," from the permit, fee, and deposit requirements. It is also undisputed that § 10-1202(4)(b)-(b)(.1), which mandates the assessment of a one-dollar fine for

[5] On its face, § 10-1203 appears to vest unbridled discretion in City officials to determine whether to issue a permit, even where the application, fee, and deposit requirements have been met. Deputy Commissioner Perri testified that L&I uniformly issues permits where the application, fee, and deposit have been met. (N.T. 3/30/04 at 188). The Court need not decide whether the City has a well-established policy that cures the unbridled discretion of § 10-1203 because the Court otherwise finds, as discussed below, that the ordinance impermissibly discriminates based on the content of the regulated signs.

each "political campaign poster" that remains posted more than thirty days after the relevant election, is a content-based restriction of speech as written.

"[The Supreme] Court has held time and time again: 'Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" Forsyth County, 505 U.S. at 135 (quoting Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984)). Content-based regulations, particularly those that discriminate against political speech, are subject to "the most exacting scrutiny." Bartnicki v. Vopper, 200 F.3d 109, 121 (3d Cir. 1999), aff'd, 532 U.S. 514 (2001). To meet the exacting standard of strict scrutiny, the government must prove that the content-based regulation is necessary to serve a compelling governmental interest and is narrowly drawn to achieve that end. Id.

The City contends that the content-based restrictions in § 10-1202(4)(b)-(b)(.1) and § 10-1203 have been rendered obsolete by the City's policy of prohibiting the posting of temporary signs and political campaigns posters on all public property. For the reasons discussed above, however, the Court also declines to consider the City's purported policy in construing these ordinances.[6] The City also maintains that §§ 10-1202(b)-(b)(.1)

[6] In any event, the City's assertion that its policy renders § 10-1203's permit requirement obsolete is belied by the testimony of Deputy Commissioner Perri. Specifically, Perri testified at the

and 10-1203 draws a permissible distinction between political campaign posters and temporary signs because "unlike all other signs, the expiration date [on the posting] of all political campaign signs is uniform." (Perri Aff. ¶ 9, City Ex. H.) In other words, the City can easily ascertain when the thirty day post-election "grace" period authorized by 10-1201(4)(b) expires by reference to the date of the election to which the political campaign poster relates. The City further maintains that the purpose of the fee and deposit requirements of § 10-1203 is "cost recovery and to assist [L&I] in monitoring and enforcing" the durational limitations imposed upon temporary signs by the Code. (Id. ¶ 7.)

The Court finds that the content-based distinctions drawn by § 10-1202(4)(b)-(b)(.1) and § 10-1203 cannot survive strict scrutiny analysis. The City's interests of administrative convenience and cost recovery have never been held to be compelling, and, in any event, §§ 10-1202(4)(b)-(b)(.1) and 10-1203 are not narrowly tailored to achieve those interests. Section 10-

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March 30, 2004 hearing that the permit requirement of § 10-1203 is "separate" from the permission requirement of § 10-1202(7). (N.T. 3/30/04 at 197.) Thus, persons seeking to post temporary signs on public property must not only obtain a "generic permit" from L&I, but also independently secure the permission of the City. (Id. at 192,197.) Deputy Commissioner Perri testified that L&I continues to issue the generic permits for temporary signs notwithstanding the City's alleged policy of denying permission to all persons seeking to post such signs on public property. (Id. at 193-194.)

1203's permit requirement applies to temporary signs that expressly promote an event that is scheduled to take place on a fixed date, even though the City can, as with political campaign posters, easily ascertain when such signs are required to be removed under the Code. In fact, Deputy Commissioner Perri testified that the § 10-1203's permit and fee requirements apply *only* to temporary signs promoting events scheduled for a particular date. (N.T. 3/30/04 at 191.) As the City's asserted interests in administrative convenience and cost recovery would be *better* achieved by imposing the permit, fee, and deposit requirements on temporary signs that promote events unconnected to a specific date, § 1203 is impermissibly underinclusive. See Gilleo, 512 U.S. at 51 ("While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles.")(emphasis in original). Moreover, the City's asserted interests do not justify allowing signs that promote topics or events that are unconnected to a specific date to remain posted indefinitely while requiring political campaign posters and temporary signs promoting events scheduled for a particular date to be removed within 30 days of the advertised event to avoid financial penalty.

The Court also notes that § 1202(4)(b)(.1) mandates the assessment of a fine for "each" unremoved political campaign poster, whereas § 1203(4)©) requires the City to refund deposit

monies if "a substantial number" of the temporary signs have been timely removed. Courts have routinely struck down ordinances granting commercial speech a greater degree of protection than noncommercial political speech.[7] See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981) (striking down billboard ordinance because "[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages"); see also Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (observing that First Amendment has "its fullest and most urgent application precisely to conduct of campaigns for political office"). Accordingly, the Court concludes that Plaintiffs have demonstrated a clear likelihood of success on the merits with respect to § 10-

[7]For example, a person wishing to post 100 temporary signs would have to pay a $25 fee and a $75 deposit pursuant to 10-1203(c)(3). According to 10-1203(4)(c), the $75 deposit will be refunded upon timely removal of a "substantial" number of the 100 signs. Notably, § 10-1203 does not define "substantial," thereby leaving unnamed City officials with unfettered discretion to make the determination. Thus, for instance, if a City official determined that removal of 60 signs was "substantial" enough to justify a refund of the $75 deposit, the permittee will ultimately have paid a total of $25 to post 100 temporary signs. By contrast, if a political candidate who had posted 100 campaign posters, identical in all respects to the temporary signs except for content, removed only 60 of those posters, the candidate would ultimately pay a total of $40 (all in fines, pursuant to 1202(b)(.1)) to post the same number of signs.

1202(4)(b)-(b)(.1) and § 10-1203.

3. Section 10-1202(4)(a)

It is undisputed that § 10-1202(4)(a), which prohibits political campaign posters from being "affixed in any manner to any type of tree," is a content-based restriction on speech as written.[8] The City nevertheless maintains that the content-based distinction drawn in § 10-1202(4)(a) is not fatal because public trees are a nonpublic forum. The Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). Thus, "the extent to which the Government can control access depends on the nature of the relevant forum." Id. The Supreme Court has defined three categories of fora: the traditional public forum; the designated public forum; and the nonpublic forum. Traditional public fora are places, such as public streets and parks, "that by long tradition or by government fiat [have] been devoted to assembly and debate." Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998). In a traditional public forum, the government may enforce content-based restrictions only if they are narrowly drawn to serve

[8]For the reasons discussed above, the Court also declines to consider the City's purported no-posting policy in construing this ordinance.

a compelling interest. Designated public fora include places that the government opens "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[9] Cornelius, 473 U.S. at 802. Although the government need not retain the open nature of a designated public forum, "as long as it does so it is bound by the same standards as apply in a traditional public forum." Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983). Nonpublic fora are places that the government has not opened to public communication either by tradition or by designation. Id. The government may control access to a nonpublic forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806.

The City contends that public trees are a nonpublic forum because the City has not opened public trees for speech activity either by tradition or by designation. In response, Plaintiffs

[9] The Supreme Court has also used the term "limited public forum" to describe fora opened up for public expression of particular kinds or particular groups. See, e.g., Good News Club v. Milford Central Sch., 533 U.S. 98 (2001). It has not been made clear by the Supreme Court whether the limited public fora are a subcategory within a designated public forum or a type of non-public fora of limited open access. However, the Third Circuit has "generally applied to limited public fora the constitutional requirements applicable to designated public fora." Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177, 182 n.2 (3d Cir. 1999)(citing Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth., 148 F.3d 242, 248-55 (3d Cir. 1998)).

argue that the City has designated public trees for speech activity, as evidenced by § 10-1202(5)(b) of the Code. Section 10-1202(5)(b) provides, in pertinent part, that "temporary signs may be permitted on trees which are not situated in parkland provided nails, tacks, staples or other piercing methods are not used." Phila. Code § 10-1202(5)(b).

"The government does not create a designated public forum by inaction or by permitting limiting public discourse, but only by intentionally opening a nontraditional public forum for public discourse." Whiteland Woods, 193 F.3d at 182 n.2 (quoting Forbes, 523 U.S. at 677)). In this case, the City has, by virtue of § 10-1202(5)(b), intentionally and affirmatively opened public trees (other than those situated on "parkland") to the general public for the posting of "temporary signs" addressing, by definition, every conceivable subject other than the candidacy of a person running for political office. As the City has expressly dedicated public trees, with the exception of those situated on parkland, for speech activity, the content-based restriction drawn by § 10-1202(4)(a) is subject to strict scrutiny.

The City maintains that the distinction between political campaign posters and temporary signs in § 10-1202(4)(a) furthers the City's interests in public safety and aesthetics. According to Deputy Commissioner Perri, "political campaign signs have a much greater capacity to proliferate than other signs. For example,

political campaign signs will usually appear in groups of several hundred. By contrast, political issues signs (such as "Bring Home the Troops") rarely appear at all." (Perri Aff. ¶ 10, City Ex. H.) Thus, because the elimination of political campaign posters has a much more dramatic effect on the City's goals of aesthetics and public safety, the City concludes that it is justified in selectively excluding such signs from being posted on public trees. "[W]hile courts certainly have recognized states' and municipalities' interests in aesthetics and safety, no court has ever held that these interests form a compelling justification for a content-based restriction of political speech." McCormack v. Township of Clinton, 872 F. Supp. 1320, 1325 n.2 (D.N.J. 1994)(citations omitted); accord Whitton v. City of Gladstone, Mo., 54 F.3d 1400, 1408 (8th Cir. 1995). Accordingly, the Court concludes that Plaintiffs have shown a clear likelihood of success on the merits with respect to § 10-1202(4)(a), inasmuch as § 10-1202(4)(a) prohibits the posting of political campaign posters on trees not situated in parkland.

B. Irreparable Harm

It is well-established that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Schwartzwelder v. McNeilly, 297 F.3d 228, 241 (3d Cir. 2002)(quoting Elrod v. Burns, 437 U.S. 347, 373 (1976)). Given that this action is a facial challenge to the

ordinances, "the irreparable injury issue and the likelihood of success issue overlap almost entirely." Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 322 (D.N.J. 2003)(quoting Beal v. Stern, 184 F.3d 117, 123 (2d Cir. 1999)); see also ACLU v. Reno, 217 F.3d 162, 180 (3d Cir. 2000) ("Generally, in a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.")(internal quotation omitted), vacated sub nom. on other grounds, Ashcroft v. ACLU, 535 U.S. 564 (2002).[10] However, since "the use of judicial power to arrange relationships prior to a full determination on the merits is a weighty manner," Adams, 204 F.3d at 487, the need remains for Plaintiffs to show a "real or immediate" danger to the

[10] The Court's articulation of the irreparable harm standard is not inconsistent with Hohe v. Casey, 868 F.2d 69 (3d Cir. 1989), a case cited by the City. In Hohe, the Third Circuit held that "[c]onstitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction" where the harm only inhibits First Amendment rights incidentally. Id. at 73; see also G&V Lounge, Inc. v. Michigan Liquor Control Comm., 23 F.3d 1071, 1079 n.4 (6th Cir. 1994)(same interpretation of Hohe). Emphasizing that "it is the direct penalization, as opposed to incidental inhibition, of First Amendment rights which constitutes irreparable injury," id. (internal quotation omitted), the Hohe court found that the mere deduction and collection of fees from the plaintiffs' paychecks did not demonstrate irreparable injury "insofar as th[e] [plaintiffs] may be deprived of money they might use to support their own political, ideological, or other purposes." Id. By contrast, the ordinances challenged in the instant case directly penalize First Amendment rights.

First Amendment rights of those affected by challenged ordinances. Anderson v. Davila, 125 F.3d 148, 164 (3d Cir. 1997).

Plaintiffs easily satisfy the irreparable injury requirement in this case. The record of the preliminary injunction hearing is replete with evidence demonstrating that Plaintiffs, and others similarly situated, will suffer irreparable injury if preliminary injunctive relief is denied with respect to § 10-1202(7). For example, Plaintiff Terry Gillen, who is running for state representative in the April 27, 2004 democratic primary election, testified that she has refrained from posting campaign posters on public fixtures because of the City's recent enactment of § 10-1202(7). (N.T. 3/30/04 at 63.) Gillen further testified that she believes that posting signs on public fixtures is "critical" to her campaign, (id. at 56), and that she would have started posting her political campaign posters several weeks ago but for the permission requirements imposed by § 10-1202(7). (Id. at 63.) Mark Stier, who is also running for state representative, recently received a letter from L&I demanding that, on or before April 9, 2004, he remove any political campaign posters that he had posted on the public fixtures regulated under § 10-1202(7). (Pl Ex. P-8.) The letter further advised Stier that he "may" be billed for the cost of removal of any of his political campaign posters that remain posted after that date. (Id.) Jeff Garis, who serves as Executive Director of Plaintiff PAUADP, testified about the

difficulties he has recently experienced in recruiting volunteers to post signs on various public fixtures due to "an awareness that the [C]ity has put into effect a [new] sign ordinance." (N.T. 3/30/04 at 93.) Garis testified that "people said to [him] they were afraid they would be arrested if they were seen putting up signs and flyers, and some of [PAUADP's] members even said they head rumors about people arrested already under the sign ordinance . . . ." (Id.) These examples, along with numerous others offered by Plaintiffs during the hearing, reveal that the permission requirement of § 10-1202(7) has caused a real and immediate danger of widespread self-censorship.

Plaintiffs also presented evidence demonstrating that the permit, fee, and deposit requirements of § 10-1203 have directly chilled protected speech. One witness, Karyl Weber, testified that she was cited, handcuffed, and arrested by City police officers in March 2003 for posting anti-war rally signs without a permit. (Id. at 115-119.) A local judge subsequently dismissed the charges against her based on selective prosecution. (Id. at 119.) Weber has not since posted signs on City property. (Id.) Likewise, the restrictions imposed on political campaign posters in § 10-1202(4) create a real and immediate danger to the First Amendment rights of political candidates across the City, many of whom are participating in elections this month.

In response, the City argues that Plaintiffs' inability to

post signs on public fixtures does not amount to irreparable injury because adequate alternative channels of communication remain available. The City notes that several of the political candidate witnesses testified to effectively employing a number of different campaigning tactics, such as leaflet distribution, website postings, and targeted mailings. However, the City's arguments are misplaced, as "the availability of other means of communication will not save the City's otherwise unconstitutional ordinance" from the entry of preliminary injunctive relief. Lawson, 81 F. Supp. 2d at 930; see also Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274, 1292 (11th Cir. 2004)(declining to inquire into alternative channels of communication for unconstitutionally content-based ordinance).

The City also argues that Plaintiffs' assertion of immediate, irreparable harm with respect to § 10-1202(4) and 10-1203 is undermined by the fact that these ordinances have not been materially altered in over a decade. In certain circumstances, a plaintiff's "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc., 762 F.2d 1374, 1377 (9th Cir. 1985); see also Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1092 n.27 (3d Cir. 1984)("[T]he district court may legitimately think it suspicious that the party who asks to preserve the status quo through interim relief has allowed the status quo to change through

unexplained delay."). In this case, however, a lack of urgency cannot be implied from any delay by Plaintiffs in seeking a preliminary injunction, especially considering evidence in the record that, until very recently, the City had not regularly and consistently applied the challenged provisions. Indeed, the legislative history of § 10-1202(7) suggests that the ordinance was enacted in part to address the difficulties that the City was experiencing with respect to the enforcement of ordinances such as § 10-1202(4) and § 10-1203. (See Pl Ex. P-3, at 10-11.) Moreover, even if preliminary injunctive relief would alter the status quo, Plaintiffs' clear likelihood of success on the merits with respect to §§ 10-1202(4) and 1203 and the exigent circumstances of this case offset any delay in seeking the instant relief. Cf. Sovereign Order of St. John of Jerusalem-Knights of Malta v. Messineo, 572 F. Supp. 983, 988-89 (E.D. Pa. 1983)(noting that mandatory injunctions which seek to alter the status quo may be granted where "the exigencies of the situation demand such relief and the facts and the law are clearly in favor of the moving party"). Accordingly, the Court concludes that Plaintiffs have sufficiently demonstrated that they, as well as others similarly situated, will suffer irreparable injury if the City is not enjoined from enforcing all three of the challenged ordinances.

C. Harm to Non-Moving Party

The City argues that its interests in public safety and

aesthetics will be significantly harmed if preliminary injunctive relief is awarded. However, "[w]hile [a] preliminary injunction may impinge on significant interests of the City, [a] preliminary injunction leaves the City free to attempt to draft new regulations that are better tailored to serve those interests." Schwartzwelder, 297 F.3d at 242. On the other hand, the First Amendment rights of Plaintiffs and others similarly situated will remain chilled if a preliminary injunction is not entered. Accordingly, the Court concludes that the balance of hardships weighs overwhelmingly in Plaintiffs' favor.[11]

D. Public Interest

"The public interest does not support the City's expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional." Florida Businessmen for Free Enterprise v. City of Hollywood, 648 F.2d 956, 959 (5th Cir. Unit B June 1981). Instead, "permitting the City to attempt, if it

[11] Rule 65(c) provides that no preliminary injunction shall issue "except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c). Plaintiffs have requested that the Court waive the bond requirement in this case. The City has not raised any objection to Plaintiffs' request. "Where the balance of the[ ] equities weighs overwhelmingly in favor of the party seeking the injunction, the district court has the discretion to waive the Rule 65(c) bond requirement." Elliot v. Kiesewetter, 98 F.3d 47, 60 (3d Cir. 1996). As discussed above, the Court finds that the balance of the equities weighs overwhelmingly in favor of Plaintiffs. Accordingly, the Court exercises its discretion to waive the Rule 65(c) bond requirement.

wishes, to frame . . . more tailored regulation[s]" serves legitimate public interests. Schwartzwelder, 297 F.3d at 242. Accordingly, the Court concludes that preliminary injunctive relief is clearly in the public interest.

IV. CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' Motion. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BELLA VISTA UNITED, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 04-1014

O R D E R

AND NOW, this 15th day of April, 2004, upon consideration of Plaintiffs' "Motion for a Temporary Restraining Order And/Or Preliminary Injunction" (Doc. No. 2), the City of Philadelphia's Response thereto (Doc. No. 8), the evidence presented in open court during the March 30, 2004 hearing on the Motion, and all related submissions (Doc. Nos. 3, 6, 11, 13, 15, 16, and 17), for the reasons set forth in the accompanying Memorandum, **IT IS HEREBY ORDERED** that Plaintiffs' Motion is **GRANTED** as follows:

1. Pending final resolution of this action on the merits, the City of Philadelphia ("City"), its officers, agents, servants, employees, attorneys, and those persons in active concert or participation with the City who receive actual notice of this Order, are hereby **ENJOINED** from enforcing § 10-1202(4) of the Philadelphia City Code ("Code"), except with respect to parkland under subsection (a) of said ordinance, against Plaintiffs and others similarly situated.

2. Pending final resolution of this action on the merits, the City, its officers, agents, servants, employees, attorneys, and those persons in active concert or participation with the City who

receive actual notice of this Order, are hereby **ENJOINED** from enforcing § 10-1202(7) of the Code against Plaintiffs and others similarly situated.

3. Pending final resolution of this action on the merits, the City, its officers, agents, servants, employees, attorneys, and those persons in active concert or participation with the City who receive actual notice of this Order, are hereby **ENJOINED** from enforcing § 10-1203 of the Code against Plaintiffs and others similarly situated.

4. This Order does not apply to the extent that the enforcement of § 10-1202(4), § 10-1202(7), and § 10-1203 is addressed by the interim agreement entered into by the parties on the record of the March 30, 2004 hearing.[1]

5. For the reasons set forth in the accompanying Memorandum, the security bond requirement of Federal Rule of Civil Procedure 65(c) is hereby waived.

BY THE COURT:

_____

John R. Padova, J.

[1] Pending final resolution of this litigation on the merits, the City has agreed not to enforce § 10-1202(4), § 10-1202(7), and § 10-1203 with respect to private property except as follows: (1) a person cannot pay to post signs on private property; and (2) a person cannot post signs on private property that advertise a service or business located on another property. (N.T. 3/30/04 at 138.) The Court retains jurisdiction to enforce the interim agreement of the parties. (Id. at 139.)