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COMMENTS

THE OCCUPY MOVEMENT: THE PUBLIC-PRIVATE “TUG” OF LAND

Anjali Rajasekhar

I. Introduction

“We are the 99%!” This rousing cry forms the bedrock of the Occupy Wall Street movement.¹ The movement seeks to publicize how the wealthiest 1% of society controls a disproportionate share of society’s wealth to the detriment of communities worldwide.² The Occupy Movement officially started on September 17, 2011 in Zuccotti Park, a public space in New York where protestors brought tents, sleeping bags, and other materials to emphasize their enduring message.³

This park is a privately owned public space (hereinafter POPS) where owners, in return for the right to build taller buildings, construct the park, agreeing to keep it accessible to the public 24 hours a day while retaining the right.⁴ A POPS park like Zuccotti Park contrasts sharply with a purely public park where ironically there are specified closing times dictated by the city.⁵ The nature of acceptable public use in a park like Zuccotti Park and the owner’s legal capacity to impose its own rules of conduct are undefined, placing POPS in a legal gray area.⁶

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1. Sandra D. Jordan, *Victimization on Main Street: Occupy Wall Street and the Mortgage Fraud Crisis*, 39 FORDHAM URB. L. J. 485 (2011).
 2. See *Freeman v. Morris*, No. 11-cv-00452-NT, slip op. at 3 (D. Me. Dec. 9, 2011).
 3. See Katie Spencer & David M. Levitt, *Occupy Wall Street Eviction Highlights Manhattan’s Public Spaces*, BUSINESS WEEK (Nov. 25, 2011), <http://www.businessweek.com/news/2011-11-25/occupy-wall-street-eviction-highlights-manhattan-s-public-spaces.html>.
 4. Braden Goyette, *Just How Much Can the State Restrict a Peaceful Protest?* PROPUBLICA (Nov. 15, 2011, 10:00 AM), <http://www.propublica.org/article/explainer-just-how-much-can-the-state-restrict-a-peaceful-protest>.
 5. See Jill Colvin, *Occupy Wall Street Puts Spotlight on Privately Owned Public Spaces*, DNAINFO.COM (last updated October 11, 2011, 10:03 AM), <http://www.dnainfo.com/new-york/20111010/downtown/occupy-wall-street-puts-spotlight-on-privately-owned-public-spaces>.
 6. Jerold S. Kayden, *Occupying Wall Street at the Public-Private Frontier*, THE ARCHITECTS (Oct. 12, 2011) <http://www.archpaper.com/news/articles.asp?id=5691>.

This definitional gap over the owner-proposed rules of conduct led the NY Department of City Planning to proclaim reasonableness as a standard for private owners of POPS parks using city-owned park rules for guidance.⁷ Even with this simple standard, the previously unenforced rules of the park provided the owner little guidance in curbing the movement's growing size and activities.⁸ Moreover, significant questions exist regarding the extent to which regulations in Zucotti Park encroached upon private constitutional rights in POPS.⁹ The First Amendment's specific right to peaceably assemble is not an absolute liberty and warrants reasonable conditions by the government.¹⁰ Even though this right only applies to government action, these principles should be used as a guide to adjudicate matters stemming from the movement.¹¹ The unprecedented attention to POPS highlights the tensions presented by attempting to regulate a hybrid public private space. This article will discuss potential uses for improvements to POPS.

II. Background/Historical Development

a. *The Origins of POPS*

The rewriting of New York City's zoning code in 1961 revamped the entire process of how a city was to be planned and built.¹² A key provision lying at the center of this contentious debate was the creation of the POPS system which was designed to incentivize developers to include amenities of benefit to the public.¹³ For example developers could build publicly accessible spaces such as plazas in front of buildings to make the space inviting.¹⁴ "POPS are intended to provide 'light, air, breathing room and green space' at high-density commercial and residential properties."¹⁵ However, developers attempted to circumvent this provision from the start since they could reap the benefits of a building incentive without completely adhering to the rules.¹⁶ As a result, a rivalry ensued where the Department of City

7. *Id.*

8. *See id.*

9. *See* Nate Berf, *Occupy Wall Street Protest Poses a Public-Private Conundrum*, THE ATLANTIC CITIES (Sept. 29, 2011), <http://www.theatlanticcities.com/politics/2011/09/site-wall-street-protest-public-private-conundrum/219/>.

10. Goyette, *supra* note 4.

11. Kayden, *supra* note 6.

12. *See* Matt Chaban, *Don't Tread on Me: Could Occupy Wall Street Save New York's Neglected Privately Owned Public Spaces?* THE NEW YORK OBSERVER (Oct. 5, 2011, 12:01 AM) (citing New York, NY, Zoning Maps and Resolution (Dec. 15, 1961)), <http://observer.com/2011/10/dont-tread-on-me-could-occupy-wall-street-rescue-new-yorks-neglected-privately-owned-public-spaces/>.

13. *Id.*

14. *Id.*

15. Spencer, *supra* note 3.

16. *See id.* (pointing out that the rules have gone unenforced for so long that developers attempted to dodge them).

Planning would adjust the rules for POPS every time a developer found a way to bypass them by building a substandard space.¹⁷

Two challenges remain today: finding and improving the underutilized POPS that remain substandard and preventing the infringement of building owners.¹⁸ Features of substandard spaces can include: spaces sunken below grade, spaces hidden behind fences thereby inaccessible to the public, or anything aesthetically uninviting.¹⁹ POPS advocates have an issue with owners who “double-dip” by annexing these spaces that contributed to their profits already received from building taller buildings.²⁰ For example, a POPS like a plaza can be turned into a lobby benefiting the owners of the buildings attached to such spaces rather than the public.²¹ Real Capital Analytics calculated “that [POPS] contributed anywhere between \$19 million and \$353 million to the value of each property.”²² Thus, private enforcement of such use could make public attempts to use the space, as it was originally intended, futile because of the already cloudy parameters.²³

b. Limitations of the First Amendment

The hybrid public-private nature of POPS makes the application of the First Amendment difficult since the free speech protection is meant as a limit on government action.²⁴ Presently, there are no rules that specify what private owners of POPS are prevented from doing.²⁵

However, the owner of Zuccotti Park, Brookfield Office Management, communicated concerns to Mayor Michael Bloomberg who then ordered the New York Police to forcefully oust the occupiers us-

17. Chaban, *supra* note 12 (explaining that the substandard space did not amount to a public amenity).

18. *Id.*

19. *Id.* According to a 2007 study, “16% of the spaces are actively used as regional destinations or neighborhood gathering spaces” demonstrating underuse. According to a 2007 study by the New York City Department of City Planning, only 41% of POPS “are of marginal utility.” *Public Space Private Rules: The Legal Netherworld of Occupy Wall Street*, GOOD (Oct. 13, 2011, 12:45 PM), <http://www.good.is/post/public-space-private-rules-the-legal-netherworld-of-occupy-wall-street/>.

20. Chaban, *supra* note 12.

21. *See, e.g., id.*

22. Yolanne Almanzar & Michael Keller, *The \$21 million sidewalk: Putting a price tag on privately owned public spaces*, THE NEW YORK WORLD (April 5, 2012), <http://www.thenewyorkworld.com/2012/04/05/21-million-sidewalk/>.

23. *See* Chaban, *supra* note 12.

24. Kayden, *supra* note 6.

25. *See* Nate Berg, *Occupy Wall Street Protest Poses a Public-Private Conundrum*, THE ATLANTIC CITIES (Sept. 29, 2011), <http://www.theatlanticcities.com/politics/2011/09/site-wall-street-protest-public-private-conundrum/219/>.

ing pepper spray and tear gas.²⁶ This mobilization of forces likely amounts to government action allowing a First Amendment analysis.²⁷

The right to a peaceful assembly is not absolute so the government can impose reasonable time, place and manner restrictions.²⁸ Government actors must implement these restrictions in a content-neutral manner, meaning that the restrictions must apply to similar protests evenhandedly, despite the message or point of view.²⁹ As such, inconvenience must be tolerated by officials but not to the point that conduct becomes disorderly and disruptive.³⁰ This is a standard to which all statutes must conform to keep the delicate balance between expression of constitutional freedoms and maintenance of public health and safety.³¹ In keeping with the right to peaceful assembly, the NYPD allowed the occupiers to stay in Zuccotti Park on the first day of the protest.³²

Public health and safety issues inevitably became problematic with the increasing volume of people and change in weather.³³ The park's unusual ownership status and lack of legal precedents left Brookfield and Mayor Bloomberg with little guidance on how to control the situation.³⁴ Besides ordering the police to clear out the protestors, Brookfield published rules, for the first time, enumerating Zuccotti Park's proper use such as: no tents, tarps and camping and no lying down on benches, sitting areas and walkways.³⁵ These newly stated rules alerted everyone to the longstanding lack of clear rules and the uncertainty of First Amendment rights in POPS.³⁶

26. See Ezra Klein, *Did Bloomberg Do Occupy Wall Street a Favor?*, WASHINGTON POST (Nov. 15, 2011, 8:47 AM), http://www.washingtonpost.com/blogs/ezra-klein/post/did-bloomberg-do-occupy-wall-street-a-favor/2011/08/25/gIQAvQURON_blog.html.

27. Cf. Eyder Peralta, *The Occupy Movement and the First Amendment: 'A Classic Collision'*, NPR (last updated Nov. 15, 2011, 1:28 PM), <http://www.npr.org/blogs/thetwo-way/2011/11/15/142348726/the-occupy-movement-and-the-first-amendment-a-classic-collision>.

28. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

29. *Id.* at 295.

30. See *id.* at 298.

31. See *id.* at 293; Goyette, *supra* note 4.

32. Matt Sledge, *Reawakening the Radical Imagination: The Origins of Occupy Wall Street*, HUFFINGTON POST (last updated Nov. 10, 2011, 6:36 PM), http://www.huffingtonpost.com/2011/11/10/occupy-wall-street-origins_n_1083977.html.

33. Klein, *supra* note 26. Interestingly, this action may have saved the reputation of this movement because if someone had died from weather conditions the movement would have been reduced to a hazardous triviality. *Id.*

34. See Sledge, *supra* note 32.

35. See *Waller v. City of New York*, 933 N.Y.S.2d 541, 544 (N.Y. Sup. Ct. 2011); Spencer, *supra* note 3; Colvin, *supra* note 5.

36. Spencer, *supra* note 3.

c. *Case Study of the Occupy Wall Street Movement*

Waller v. City of New York evaluated the validity of these newly published rules and whether the protestors could show cause to enjoin Brookfield and the government officials from evicting them from Zuccotti Park.³⁷ The court dispensed with a discussion of whether or not the First Amendment applied to Brookfield's actions and assumed its applicability for purposes of evaluating the injunction.³⁸ The protestors argued that Brookfield should not be permitted to enforce rules enacted after the demonstrations because they are unfair and go against the First Amendment.³⁹ The court acknowledged the right to peaceful assembly but asserted that it is not applicable everywhere despite the time of day.⁴⁰ In making such a claim, the protestors failed to carry their burden in proving that Brookfield's rules were not reasonable under the First Amendment.⁴¹ Accordingly, the court concluded that the rules allowed Brookfield to do its job in suitably maintaining the space and guarding against legal liability.⁴²

III. Analysis

a. *The First Amendment Implications of the Occupy Movement*

In *Waller*, the court held that a private "owner has the right to adopt reasonable rules . . . to maintain a clean" and safe public space.⁴³ However, an ambiguity remains with the court circumventing the issue of whether a company's private behavior is government action.⁴⁴ Brookfield's cooperation with Mayor Bloomberg represents private and public interests and allows an easier First Amendment inference.⁴⁵ A First Amendment analysis is also favorable because a platform for political activity is a "time honored use of public space."⁴⁶ Still, the public's desire to use POPS for political activity remains unaddressed.⁴⁷ After the eviction, the city allowed the protestors to return after sanitation workers cleaned the park but banned the protestors from staying overnight.⁴⁸ POPS needed this move towards clearer rules to balance everyone's right to freely use the

37. See *Waller* 933 N.Y.S.2d. at 543.

38. *Id.* at 544.

39. *Id.*

40. *Id.*

41. *Id.* at 544-45.

42. *Id.*

43. *Id.* at 544.

44. See Berg, *supra* note 25.

45. See *id.*

46. Kayden, *supra* note 6 (explaining that the time, place and manner of political activity can be regulated by content-neutral rules as enumerated in the First Amendment analysis).

47. See GOOD, *supra* note 19.

48. *Id.* (highlighting the original intent for POPS to be open 24 hours and freely used).

space.⁴⁹ Though the protestors used the space exactly as it was meant to be used, the movement's enormity undercut the right to use it for other purposes.⁵⁰

b. Emergent Land Use Issues Post-Occupy Wall Street

Brookfield's posting of clear guidelines allowed the owners to enforce them and thereby quell the overwhelming number of occupiers in Zuccotti Park.⁵¹ Since these post-Occupy rules have been tested in court this has generated a wave of similar regulations in POPS which fundamentally curb all acceptable activities to passive uses.⁵² Such activities are ones of quiet enjoyment and stem from an underling fear of activity that can disturb the peace of the space.⁵³ Accordingly, there has been a noticeable shift in the language of the rules from vague to unambiguous, more stringent guidelines.⁵⁴ For example, the new rules will name the prohibited activity and describe its effect, namely, lying on a bench which unreasonably interferes with its use.⁵⁵

Unfortunately, these tougher regulations can curtail public access which contradicts the purpose of POPS to be freely accessible.⁵⁶ The variety of POPS in size, condition, and layout underscore the difficulty in establishing uniform rules for these spaces.⁵⁷ Definitional clarity alone will not strike the delicate balance between the right to protest and the right of the owner to regulate the space.⁵⁸ These competing interests have a fundamental disconnect because public use has historically been separated from private commercial intrusions as in publicly owned spaces.⁵⁹ However, this futility does not end the issue but prompts each private owner to oversee the space as they see fit.⁶⁰ This freedom stems from New York City's rewriting of its zoning code for POPS which never defined the limit such owners could impose on public use.⁶¹ Other modern zoning codes may or may not have well-defined standards but this particular code's lack of one proved to be

49. Kayden, *supra* note 6.

50. Society should consider whether, in satisfying their agendas, they are hindering others from doing the same. *Id.*

51. Colvin, *supra* note 5.

52. Douglas Woodward, *Rules of Conduct*, URBAN OMNIBUS (May 9, 2012), <http://urbanomnibus.net/2012/05/rules-of-conduct/>.

53. *Id.*

54. *See id.*

55. *See id.* (emphasizing that the pre-Occupy rules would simply name the prohibited activity).

56. Colvin, *supra* note 5.

57. Elaine Misonzhnik, *Occupy Wall Street Raises Questions About Privately-Owned Public Spaces*, NATIONAL REAL ESTATE INVESTOR (Oct. 26, 2011, 9:44 AM), http://nreionline.com/city-reviews/new-york/occupy_wall_street_pops_10262011/index.html.

58. Woodward, *supra* note 52.

59. *See id.*

60. *See id.*

61. *Id.*

significant with the Occupy Movement.⁶² The new narrowly tailored rules may perpetuate the divide between these competing rights but alternative solutions have been proposed to mollify the situation.⁶³

The City Council Speaker Christine Quinn and Mayor Bloomberg highlighted the tradition of regulating public parks with nighttime closings and suggested superimposing these rules onto those for POPS.⁶⁴ Since the government is familiar with regulating public spaces it naturally wants this shortcut to clarify the ambiguous nature of POPS.⁶⁵ This is problematic, just like the more stringent guidelines, because the general public park rules cannot adequately cater to the various POPS.⁶⁶ Definitional clarity alone is still not adequate but the standardized public park rules may take the rules for POPS out of context.⁶⁷ An idealistic solution proposed on the other end of the spectrum suggests drafting rules expressing freedoms rather than limitations of a space.⁶⁸ The rule would just mention a space's potential for enjoyment, but only because this assumes that people can sense this potential and automatically know how to conduct themselves.⁶⁹ This is somewhat idealistic since cities regulating POPS now favor an enumeration of rules.⁷⁰ Perhaps the key lies in creating a standard underlying the array of rules for each POPS, rather than just definitional clarity for each prohibition.⁷¹ For example, if drafters agree on a simple definition of what constitutes proper behavior in POPS rather than long and varied descriptions of activities, transparency can be achieved.⁷²

c. Emergent Land Development Issues Post-Occupy Wall Street

Since the use of POPS overall seems to be waning, rehabilitation has become vital for existing POPS.⁷³ Very few new spaces are being built and the most recent additions are suffering from underutilization due to the revised rules.⁷⁴ It would behoove building owners who have these adjacent spaces to take note because having POPS significantly added to the value of their building.⁷⁵ However, these building

62. See Spencer, *supra* note 3.

63. Woodward, *supra* note 52.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See, e.g., *id.*

71. *Id.* (explaining that a unifying theory would make regulation easier to understand for those in charge and the public whereas more definitions would further confuse the public and inhibit access to POPS).

72. *Id.*

73. *Id.*

74. *Id.*

75. See Almanzar, *supra* note 22.

concessions for developers bypass an important issue. Are the property owners or the public getting the better end of this deal?⁷⁶ It is true that these spaces are financed without the public's input, but everyone still has a right to a space that implements public benefit principles.⁷⁷

Private owners' compromised use of these POPS for their own benefit can be countered without diminishing their benefit.⁷⁸ The decision to improve these spaces is beneficial to both the private owner and the public.⁷⁹ Owners can add to the value of their property while the public can enjoy a more beautiful space.⁸⁰ This is true even though owners may gain more clout in regulation by annexing these spaces that are attached to their buildings.⁸¹ Enumerated rules of restriction or freedom aside, design can be an understated method of achieving order and openness in these spaces.⁸² Aesthetically pleasing features or obstructing panels could make it easier for private owners to enforce rules through a more visible message to the public.⁸³ Of course, this would not completely resolve the issue for the right to protest but perhaps rethinking design might induce a willingness by the public to cooperate.⁸⁴

IV. Conclusion

The Occupy Movement highlighted a major gap in POPS regulation and the public-private tensions that come with it. This should hopefully lead to adjudication conclusively defining whether private owners' actions can constitute government action to allow First Amendment scrutiny. Those in charge of drafting zoning laws should conclusively define the parameters of POPS. Once the ambiguous rules are "ironed out," POPS could be highly beneficial for the public by providing space for a more participatory democracy. Underutilization and marginalized POPS would also become less of a problem with more standardized rules. If more POPS are created, people can avail themselves of such spaces to engage in a visible and healthy political debate. However, if the rules are framed to the detriment of the public and to the advantage of owners who have annexed these spaces, the fate of POPS will remain uncertain as it is currently and preclude public use.

76. *Id.*

77. Thomas Balsley, *What to Do With Zuccotti Park? The Designer Behind More POPS Than Anyone Has Some Ideas*, THE NEW YORK OBSERVER (Dec. 20, 2011, 10:29 AM), <http://observer.com/2011/12/207180/>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See, e.g.*, Chaban, *supra* note 12.

82. Balsley, *supra* note 77.

83. *See, e.g., id.*

84. *Id.*