August 14, 2009

Richard A. Storm, P.E.
County Engineer/Assistant Director Metro Public Works & Assets
Metro Development Center
444 S. Fifth St., Ste. 400
Louisville, KY 40202

Re: Request for Permit to Temporarily Place a Work of Art (*The Chicken*) on the Public Right-of-Way

Dear Mr. Storm,

I am counsel to People for the Ethical Treatment of Animals (PETA), and this letter concerns PETA's request for a permit to temporarily place a work of art (*The Chicken*) in various possible locations on the public right-of-way as part of a free speech, educational display.

In a letter dated August 5, 2009, you informed Thomas Deans of PETA that the review of PETA's

> permit application and others recently submitted, has made us aware that current Metro regulations pertaining to placement/installation of non-Metro owned art and other temporary structures on the public right-of-way do not fully address the many issues raised during review of these applications. With that in mind, Louisville Metro is putting a forty-five day (45-day) Moratorium on issuance of permits that are for installation of non-permanent structures in the right-of-way. This Moratorium will give us an opportunity to conduct research and to develop regulations that address requests of this nature.

The letter does not identify a particular governmental provision or ordinance that implements the alleged moratorium. There also appears to have been no public announcement or hearing prior to, or after, the alleged adoption of the moratorium disclosing the existence and details of the moratorium, including its scope and the beginning and ending dates. In fact, our research has not identified any evidence in the Louisville Metro public record that a moratorium has actually been promulgated or even proposed in a committee meeting. I contacted you on August 12 to request a copy of the resolution or regulation pertaining to the moratorium and, so far, have received no response.

Because there is no evidence that a moratorium was enacted, the city's justification for denying PETA's permit falls under its own weight.

PETA FOUNDATION

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PETA FOUNDATION IS AN OPERATING NAME OF THE FOUNDATION TO SUPPORT ANIMAL PROTECTION

Even if the city were to enact a moratorium pursuant to some statutory or regulatory scheme, the moratorium is an unlawful prior restraint on protected speech in violation of the U.S. Constitution.

Municipal "streets and parks have immemorially been held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[1] There can be no question that *The Chicken* is included within this type of expressive conduct in a quintessential public forum.[2]

A prior restraint stops protected speech before it starts.[3] It is presumed to be unconstitutional, and, in the case that a prior restraint exists, government officials have a heavy burden to demonstrate that the restraint is valid.[4] A prior restraint will withstand a First Amendment challenge only if its restrictions are reasonable and viewpoint-neutral; regulations that impose arbitrary restrictions based upon subjective or non-existing standards are invalid as a matter of law,[5] and the prior restraint analysis applies to moratoria banning the issuance of licenses to engage in expressive conduct.[6] Otherwise, it would be far "too easy for an abusive government to circumvent constitutional protections of individual rights" by suspending, rather than denying, the issuance of licenses affecting protected expression.[7]

In this case, the city's denial of PETA's application in the guise of a moratorium does not withstand even the mildest scrutiny. There is no evidence that the decision to declare a moratorium was reasonable (i.e., that it was based on

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[1] *Kunz v. New York*, 340 U.S. 290 (1951).

[2] *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston*, 515 U.S. 557 (1995) (noting that "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll" are all protected expressive conduct).

[3] *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

[4] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

[5] *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (stating that "the many decisions of this Court over the last 30 years [hold] that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definitive standards to guide the licensing authority, is unconstitutional"); *Amandola v. Town of Babylon*, 251 F.3d 339 (2nd Cir. 2001) ("where a municipality requires a permit for expressive activity the 'scheme' for issuance of the permit 'must set objective standards governing the grant or denial of [the permit] in order to ensure that the officials not have the 'power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers'").

[6] *ASF, Inc. v. City of Seattle*, 408 F. Supp.2d 1102 (W.D. Wash. 2005) (holding that moratorium on issuing adult entertainment licenses was an unconstitutional prior restraint on free expression); *ASF, Inc. v. City of Bothell*, (W.D. Wash. 2007) 2007 WL 4418630 (same; collecting cases). *Howard and Emro Corp. v. City of Jacksonville*, 109 F.Supp.2d 1360 (M.D. Fla. 2000) (holding that moratorium was unconstitutional prior restraint); *D'Ambra v. City of Providence*, 21 F. Supp.2d 106 (D.R.I. 1998) (city's licensing moratorium violated First Amendment and was improper time, place, and manner restriction).

[7] *Cf. Saints and Sinners v. City of Providence*, 172 F.Supp.2d 348 (D.R.I. 2001) (stating that actions of government amounting to a licensing moratorium "reek of a government decision-maker using its unbridled power to silence unpopular speech").

objective, definitive criteria for determining the need, timing, and scope of the moratorium). We would think that it needs no further elaboration that giving unbridled discretion to a government agency to suspend protected speech at a moment's notice—whenever and for how long it may choose—flies in the face of the First Amendment.[8]

At best, the city's *ad hoc* decision regarding the timing, duration, and scope of the moratorium was arbitrary; at worst, it was a pretext for suppressing PETA's animal protection message. Under either scenario, the city's unfettered exercise of discretion is precisely the type of conduct prohibited by the First Amendment.

It also bears mention that the city "enacted" the supposed moratorium admittedly during the pendency of and (at least partially) *in response to* PETA's application. The city previously granted permits in response to the same application process followed here by PETA, and it is undisputed that PETA complied with all the requirements pursuant to which these previous permits were issued in its own application for *The Chicken*. Therefore, the city's justification for denying PETA's application on the grounds that the application process raises "many issues" merely begs the question: If these issues posed no impediment to granting permits in the past, why do they currently pose an insurmountable obstacle to processing PETA's application?

Even if the city were to have a valid interest in enacting new regulations, the city has offered no explanation for why it cannot process PETA's application in the meantime. The Draconian measure of completely suspending the permitting process is not in reasonable proportion to the purported interests to be served. Nothing suggests that the city's interests in studying and drafting new regulations cannot be served while maintaining the *status quo* of the existing permitting scheme.

Finally, freedom of speech falls within the liberty interests protected by the Due Process clause of the Fourteenth Amendment.[9] Due process requires that before government officials restrict protected speech, there must be an opportunity for a fair adversary hearing.[10] In this case, no such opportunity was afforded to PETA.

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[8]The First Amendment is made applicable to the States through the Fourteenth Amendment. *See, e.g., Forsyth County v. Nationalist Movement,* 505 U.S. 123 (1992) (holding that a permit scheme may not "delegate overly broad licensing discretion to a government official"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (holding that a licensing scheme that gives government officials are given unbridled discretion over decisions limiting expressive activity, constitutions an unlawful prior restraint).

[9]*See Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

[10]*Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) ("When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action.").

For all these reasons, the city's action violates the First Amendment and the Due Process clause of the U.S. Constitution and causes irreparable harm to PETA.[11] To avoid further injury to PETA's constitutionally guaranteed rights, we request that the city promptly confirm that PETA's application is granted pursuant to the permitting procedures that existed at the time the application was filed. The city's failure to do so will require PETA to seek alternative means of protecting its rights.

Very truly yours,

Martina Bernstein
Litigation Counsel

cc: Thomas A. Deans

[11] *See, e.g., Bill Salter Advertising, Inc. v. City of Brewtown, Alabama*, 486 F. Supp.2d 1314 (S.D. Ala. 2007) (holding that moratorium on the issuance of licenses that deprived plaintiff of free speech rights constituted irreparable harm).