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Summer in the City 2020: What Are New York City's Legal Options for Closing or Regulating Open Spaces in Response to COVID-19?

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By Christopher Rizzo. Published in the *New York Law Journal*.

Mayor Bill de Blasio and Gov. Andrew Cuomo can thank Mother Nature for a cold spring. But New York City and other municipalities in the state will face a challenge in late spring and summer in regulating open spaces. Space-starved New Yorkers are not accustomed to restraints on their use of crowded sidewalks and parks (including beaches) and ongoing limits are not likely to be well-received. This article assesses the options for the state and City (or any municipality) to limit uses of outdoor public spaces in response to the COVID-19 pandemic and proposes a concept that is more likely to be sustainable and defensible in court.

Parks Are Currently Open

New York City and the Department of Parks & Recreation deserve great credit for keeping parks open in the face of the pandemic, in contrast to the closures in other cities, states and nations. As this article went to press, city parks (including beaches and marinas) are open but closures apply to playgrounds, sports facilities, dog runs, historic houses, nature centers and most food and amusement concessions. The Department "requires" social distancing in all cases—more on that below. New York state and the Office of Parks, Recreation and Historic Preservation have applied similar rules to state parks. These closures leave parks mostly open and based on anecdotal accounts, far more crowded than usual.

Since declaring a state of emergency on March 7, 2020, Governor Cuomo has issued an unprecedented 30 executive orders that suspend or modify dozens of laws in New York ranging from the vital to the mundane—from suspension of evictions to allowing online notarizations of documents. The most relevant are the following:

- Order No. 202.10 dated March 23, 2020. It states in part: "non-essential gatherings of individuals of any size for any reason (e.g., parties, celebrations or other social events) are cancelled or postponed at this time."

- Order No. 202.17 dated April 15, 2020. It states in part: "any individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance."

The Governor bases his orders on N.Y. Executive Law §29(a). It states: "Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order *temporarily* suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster …." (Emphasis added). The statute limits the Governor's ability to suspend laws in a variety of ways, including limiting the suspensions to 30 days (subject to renewal) and revocation by the state legislature.

These orders have been characterized by the media in a variety of ways such as "Shelter in Place" and "Quarantine." In fact, there is no such language in the orders and New Yorkers remain free to leave their homes. The problem is there are not many places to go, except sidewalks, parks and other open spaces. The crowding is creating a lot of anxiety and summer is not even here yet. Adding to the anxiety is the City's uneven enforcement of the orders to break up gatherings in some locations but allow large crowds to gather in others. Police, including park police, have never had much of a presence in parks until now and it is unclear what the state and City expect them to do.

Constitutional Limits Will Become Increasingly Relevant

Limits on the right to use outdoor spaces alone or in conjunction with friends or family (at least in small groups) would necessarily implicate the rights to privacy, travel, free association, freedom of speech, and due process—among others. See, e.g., *New Alliance Party v. Dinkins*, 743 F. Supp. 1055 (S.D.N.Y. 1990) (rejecting security concerns to overturn limits on protests in parks nearmayor's mansion); *Housing Works v. Safir*, 101 F. Supp. 2d 163 (S.D.N.Y. 2000) (rejecting security concerns to overturn limits on the number of protesters that can gather in front of City Hall or nearby park). Federal courts have traditionally been extremely hostile to numeric or location limits when people are engaging in constitutionally protected activities in public spaces. Admittedly, none of these cases dealt with a public health emergency.

The most relevant precedent may come from the 1905 U.S. Supreme Court decision in *Jacobson v. Massachusetts*, which upheld a state law requiring small pox vaccinations. 197 U.S. 11, 37 (1905) (referring to "high medical authority" that vaccinations would help end an epidemic that imperils the entire population). The court's decision—allowing state intrusion into the private health decisions of citizens—was in large part based on the strong medical consensus that the disease was a severe threat to most (if not all) citizens and that the vaccination would prevent the epidemic from spreading. Once a court finds that a law or policy implicates fundamental rights, it must apply the so-called "strict scrutiny" test. That test requires courts to presume the law is unconstitutional and impose the burden of proof on the government to show a law or policy is necessary to achieve a compelling state interest and narrowly tailored to achieve the intended result. Massachusetts was able to convince the Supreme Court that the pandemic threat was severe and that the vaccination was highly effective.

The three dozen court decisions dealing with challenges to COVID-19-related orders have relied almost entirely on *Jacobson* to allow limits on fundamental rights that weeks ago would have been utterly shocking. See, e.g., *In re Abbott*, 2020 U.S. App. LEXIS 12616 (5th Cir. 2020) (allowing a Texas prohibition on most abortions to stand); *Givens v. Newsom*, 2020 U.S. Dist. LEXIS 81760 (E.D. Cal. 2020) (allowing a ban on large gatherings, even for protest); *Lighthouse Fellowship v. Northam*, 2020 U.S. Dist. LEXIS 80289 (E.D. Va. 2020) (limiting religious worship to 10 persons); *SH3 Health Consulting v. Page*, 2020 U.S. Dist. LEXIS 81433 (E.D. Mo. 2020) (upholding closures of nonessential businesses). It is hard to imagine the Supreme Court allowing any of these limits to persist more than a few months.

Moreover, none of these cases is particularly relevant to how governments can limit where and how people choose to gather on sidewalks, parks and other public spaces, which have traditionally enjoyed the strongest constitutional protections. As stated by one judge in the Southern District of New York in 2007: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." *Nat'l Council of Arab Americans v. City of New York*, 478 F. Supp. 2d 480 (S.D.N.Y. 2007) (denying, in part, motion to dismiss challenging denial of special permit for special event).

Despite the wide berth that courts are presently giving states and cities in responding to the pandemic, limits on personal activities in traditional public spaces will almost certainly cross the line. Orders, policies or laws that prohibit use of public spaces for anything but "essential activities" (as tried in California and a number of other countries)—effectively confining citizens to their homes—would probably not survive strict scrutiny given the decades of court decisions protecting access to public open spaces. Similarly, barring citizens from associating in public spaces with anyone except their own households would be a completely unprecedented intrusion into the lives of citizens. Both limits would necessarily

force the police into the constitutionally suspect situation of having to question residents about their reasons for being outside, the nature of their relationships with their companions, health conditions that might lead them not to wear a face covering, etc. It might lead police to chase down joggers or bikers to issue a summons for intruding on the six-foot social distance zone that is imagined in the executive orders. The situation for the public and police is about to become untenable.

Constitutional challenges to laws and policies can also, of course, be based on how they are applied—meaning that the law might be constitutional on its face but applied in a discriminatory manner. On May 8 the New York Police Department released data on its issuance of summonses for violations of the Governor's "social distancing order." A shocking 304 out of 374 summonses were issued to black or Hispanic New Yorkers—bringing echoes of the banned "stop and frisk" policies of the prior mayoral administration. It is not even clear what the police are enforcing as the Mayor has only referred to the need to break up "large" gatherings. If this trend continues it is easy to see a court barring the police entirely from enforcing social distancing guidelines.

The burden of proof will always be on the state and municipalities to justify restrictions on outdoor activities, socializing, physical fitness or protest. Simply declaring a state of emergency or pandemic will not be enough, particularly as a scientific consensus emerges that outdoor transmission of COVID-19 is unlikely. (The most recent scientific data so far seems to come from researchers at Hong Kong University who published their April 2020 study of outbreaks in China and linked only two cases to outdoor transmission. The study is available online and reported in various news outlets.)

The City Has Better Options for Summer 2020

Ongoing closures of public spaces or limits on how people socialize with friends and loved ones in public are not defensible over the long term. It is therefore imperative that municipalities develop better options for maintaining lower densities in public spaces. This can be achieved with street closures to provide more space for citizens to spread out. For more confined outdoor spaces such as piers, there can be a set maximum occupancy. Additionally, municipalities should set objective criteria for park usage that do not relate to how people choose to socialize (at least in smaller groups). They can temporarily close certain confined facilities, concessions and amusements where distancing is not realistic. In unconfined spaces where distancing is possible, more realistic numeric limits on gatherings can be developed. In New York City, for example, the Department of Parks and Recreation can re-tool its existing permit system for special events. Prior to the COVID-19 crisis, the City required a permit for special events, which are defined as gatherings of 20 or more persons. The City has suspended these permits due to the pandemic. But it could reopen the permit system and require that applicants (e.g., protest organizers) have a plan for social distancing that reflects the space limits of the specific location. Any of these measures would likely be deemed legal so long as they had a rational basis rooted in the best medical information we have about the COVID-19 virus in outdoor settings and the space constraints in particular locations. Moreover these approaches would provide the police with objective rules to enforce and free them from enforcing vague and constitutionally suspect social distance orders.

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