

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

DONALD BENDER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	FILE NO.
CITY OF ATLANTA,	)	
	)	
Defendant.	)	
	)	

**VERIFIED COMPLAINT**

COMES NOW Donald Bender (Bender), Plaintiff, and brings this Complaint seeking an order barring enforcement of the anti-graffiti ordinance, Atlanta Code 106-801, et. seq. and public art ordinance, Atlanta Code 16-28.025 and Atlanta Code § 16-28A.007(q)., *to the extent that they criminalize expressive art that has been commissioned by the property owner but has not been subjected to government vetting of its content and artistic merit.* Under Atlanta’s scheme, Plaintiff must obtain approval from no less than three city departments and the City Council itself – at each juncture somehow meeting vague and uncabined standards for approval. Bender seeks an order declaring these ordinances unconstitutional, enjoining their enforcement, and nominal damages. Bender alleges violations of his rights to free speech, petition, due process, equal protection, and privileges and immunities.

## **JURISDICTION AND VENUE**

1.

This action arises under the authority vested in this Court by virtue of 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343 and 1367 and the First and Fourteenth Amendments of the United States Constitution. Pendent jurisdiction is had over state claims. Venue rests with this Court.

## **PARTIES**

2.

Plaintiff Donald Bender is a homeowner and owner of a number of commercial locations throughout the City of Atlanta. He has sponsored, commissioned and/or placed a number of artistic murals on locations he owns.

3.

Defendant, the City of Atlanta, is subject to the jurisdiction and venue of this Court. Service of process may be effected on the Mayor of the City of Atlanta, Shirley Franklin, 55 Trinity Avenue, Atlanta, Georgia 30303. At all times relevant hereto the City of Atlanta acted within the scope of its authority as a municipality chartered under the laws of the State of Georgia.

## **FACTUAL ALLEGATIONS**

### **The Anti-Graffiti Ordinance**

4.

In 2003, the City of Atlanta in 2003 adopted a substitute anti-graffiti ordinance, Ordinance 03-0-1360, codified as Section 106-801, et. seq. The Atlanta Police Department and the Bureau of Neighborhood Conservation have enforced the ordinance since this time. Atlanta Code § 106-806.

5.

The Anti-Graffiti Ordinance prohibits any person owning or otherwise being in control of any real property within the City of Atlanta to “maintain, permit, or allow” any expression defined as “graffiti” to be placed upon any structure located on such property when the graffiti is “visible from the street or other public or private property.” Atlanta Code § 106-802(b).

6.

A property owner who does not remove the graffiti within 30 days of receiving written notice from the City shall be issued a summons to appear in municipal court. The property owner who is adjudged in violation of the Ordinance shall be guilty of a misdemeanor and shall be subject to a fine of up to \$1,000 and/or imprisonment for up to 6 months. Atlanta Code §§ 106-804, 805.

7.

Businesses and private property owners who have authorized the placement

of visual expressive speech/art that might otherwise be defined as “graffiti” on their property must apply for a sign permit pursuant to Atlanta Code § 16-28, et. seq. See Atlanta Code § 106-807. Unless a sign permit is secured, artwork and murals authorized by property owners must be removed under threat of criminal penalty.

8.

The Atlanta City Council determines whether a business or private property owner may display owner-authorized graffiti. Atlanta Code § 16-28.025. The graffiti art will not be granted a permit unless it is approved by three city departments and the Atlanta City Council itself. Atlanta Code § 16-28A.007(q).

9.

An applicant must first meet the following “preliminary certifications” before the City Council even considers the granting of a permit: (1) the Director of the Bureau of Traffic and Transportation or his/her designee must certify that the “artistic expression” will not constitute a traffic hazard or undue and dangerous distraction to motorists or pedestrians; (2) the Executive Director of the Urban Design Commission or his/her designee must certify “that the work does not contain and is not intended to convey a commercial message primarily” (provided that the name of the sponsor may be displayed in a two square foot area); and (3) the Director of the Bureau of Cultural Affairs or his/her designee must “certify that the work is not inconsistent with the City of Atlanta’s public arts program.” Atlanta Code § 16-28A.007(q).

10.

Even if one obtains the approval of these three administrative departments of

the City, the City Council has further discretion to grant or deny the permit. Among the various factors the Council can consider whether the work “negatively affects the public interest” in (1) “aesthetics;” (2) “additional sign clutter;” and (3) “public safety.” “In making this finding the council shall consider the required certifications; the spatial relationships of the proposed art to the building or premises upon which it is located as well as the surrounding area; vehicular and pedestrian traffic safety; the existence of nearby signs; and the size, dimensions and other physical characteristics of the proposed work.” Atlanta Code § 16-28A.007(q).

Plaintiff-Donald Bender

12.

Plaintiff Bender owns a home and numerous commercial locations throughout the City of Atlanta.

13.

Bender has sponsored, commissioned and/or placed a number of artistic murals on the exterior of locations he owns. Some owner-authorized murals received permits through the process set out in the proceeding paragraphs, while others were not permitted by the City.

14.

In 1979, Bender was instrumental in the placement of the *Seminole Peace Mural*.

15.

In 1996, Bender was involved in the placement of the *World Wall of Peace* in

the Little Five Points area of the City of Atlanta. The Urban Design Commission raised concerns about the content of the artistic mural, and requested changes as a requirement for permitting that mural.

16.

In 1997 or 1998, Bender was a sponsor of an *Arts Diversity Mural* at Seven Stages Theater in the City of Atlanta.

17.

Bender also has artistic murals on a number of other properties that he has authorized and approved, however he does not believe each work should be subject to review and authorization through the City of Atlanta's permit process.

18.

Most recently, in 2004, Bender was a sponsor of the *Australian Aboriginal Art Wall* in the East Atlanta area of the City of Atlanta. The sponsors complied with the permit requirements set out herein for this display. The mural received an award from the City. While the sponsors obtained a permit, Bender does not believe he should be required to comply with this process and subject all works to approval of the City of Atlanta.

19.

Bender's properties also have occasionally fallen victim to unauthorized graffiti. Bender has endeavored to remove such unauthorized graffiti as soon as possible, but has received warning citations from the City even for graffiti that he had already removed.

20.

Bender believes that while unauthorized graffiti should be removed, he has the right to approve and display art work on his own property without being subjected to criminal sanction for failing to abide by the City of Atlanta's permit requirements which subject each art work to multiple layers of governmental judgments of artistic worth and content.

21.

Bender intends to place other artistic murals on his properties in the future and seeks to do so without being subject to criminal sanction for failing to abide by the City of Atlanta's permit requirements which subject each art work to multiple layers of governmental judgments of artistic worth, merit and content.

### **CLAIMS FOR RELIEF**

22.

Plaintiff re-alleges all the within and foregoing allegations for each and every claim for relief.

23.

The Anti-Graffiti and Public Art Ordinances are impermissible restrictions on free speech and artistic expression in violation of the First and Fourteenth Amendments of the United States Constitution.

24.

The Anti-Graffiti and Public Art Ordinances are impermissible restrictions of Plaintiff's Constitutional rights by a subdivision of the States and thus violates the

Privileges and Immunities clause of the Fourteenth Amendment.

25.

The Anti-Graffiti and Public Art Ordinances obstruct Plaintiff's freedom of speech and artistic expression and therefore constitute a deprivation of liberty without due process of law in violation of the Due Process clause of the Fourteenth Amendment. They are vague, overbroad and give unbridled discretion to the various departments to provide or refuse preliminary certifications and to the City Council to approve or disapprove a permit.

26.

The Anti-Graffiti and Public Art Ordinances allow constitutionally protected graffiti art to be displayed by permit holders but denies expression of this protected form of speech for those who do not hold a permit. Freedom of speech is a fundamental right and so strict scrutiny must be applied to survive Equal Protection review. Because Defendant's "interest" in controlling the display of graffiti art is not necessary to further any compelling state interest, the Anti-Graffiti and Public Art Ordinances as applied to authorizing property owners violate the Equal Protection clause of the Fourteenth Amendment.

27.

In passing and enforcing the Anti-Graffiti and Public Art Ordinances, Defendant has under color of law subjected Plaintiff to a deprivation of his rights secured by the United States Constitution and thus is liable under 42 U.S.C. § 1983.

28.

The Anti-Graffiti Ordinance and the Public Art Ordinance, to the extent that they criminalize expressive speech that has been authorized by the property owner, violate Plaintiff's rights to freedom of life, liberty and property; protection to person and property and equal protection; and freedom of speech under Georgia Constitution, Art. I, Sec. I, paras. I, II. and V.

## **PRAYERS FOR RELIEF**

Wherefore, on the basis of the foregoing, Plaintiff prays that this Court:

(1) Issue an order that Defendant's actions, policies, and procedures, embodied in the anti-graffiti ordinance, Atlanta Code 106-801, et. seq. and public art ordinance, Atlanta Code 16-28.025 to the extent that they criminalize expressive speech that has been authorized by the property owner, are an unconstitutional violation of Plaintiff's rights as secured under the free speech clause of the First Amendment of the United States Constitution, the privileges and immunities, due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, and Article I, § 1 paragraphs 1 (life, liberty, and property), 2 (protection to persons and property; equal protection), and 5 (freedom of speech) of the Georgia Constitution;

(2) Enjoin Defendant, its officers, agents, successors, employees, attorneys, and those acting in concert with, from enforcing the anti-graffiti ordinance, Atlanta Code 106-801, et. seq. and public art ordinance, Atlanta Code 16-28.025, to the extent that they criminalize expressive speech that has been authorized by the property owner;

(3) Grant to Plaintiff nominal damages against Defendant in an amount reasonable and commensurate with the losses imposed upon him by Defendant's unlawful acts;

(4) Grant reasonable attorneys fees and expenses as permitted by law; and

(5) Grant such other and further relief as may be necessary or proper.

DATED: This the \_\_\_\_ day of September, 2004.

Respectfully submitted,

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