REGULATING SPEECH IN THE PUBLIC FORA

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The First Amendment to the United States Constitution prohibits the federal government from making a law "abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This prohibition applies to state and municipal regulations through the Fourteenth Amendment. A fundamental principal behind speech protections in the First Amendment is that government may not ban expressive activity on government owned property. The government may, however, exercise certain degrees of control over the public's use of such property for expressive purposes. Therefore, some speech degree of regulation of expressive activity is acceptable. The purpose of these materials is to describe, in a basic form, the law that has arisen over the years to govern the question of how much regulation is acceptable.

Speech regulations adopted by the government with respect to property that it owns are analyzed under a forum-based approach. The degree of control permitted depends upon the nature of the forum in which the expressive activity occurs, and the nature of the restriction on expressive activity. Therefore, before regulating expressive activity on government property, the municipal attorney should, as a first step, define the forum. Courts have defined three types of forums: the traditional public forum; the designated public forum (that may be limited or unlimited); and the non-public forum.

Once the forum is defined, the second step is to apply the appropriate test based on that forum. When analyzing content based regulation of a traditional public forum or unlimited designated public forum, courts apply a strict scrutiny test. With that test, the regulation must serve a compelling interest and be narrowly drawn to achieve that end. When analyzing non-content based regulation of a traditional public forum or unlimited designated public forum, courts apply an intermediate scrutiny test. With that test, the regulations must be content neutral, time, place and manner restrictions that are narrowly tailored to serve a significant government interest and leave open ample alternative avenues for communicating the message. In contrast, when analyzing regulation of a limited designated public forum or a non-public forum courts apply a rationality based test. Under this rationality test, regulations must be viewpoint neutral and rationally related to a legitimate government interest. Viewpoint neutrality, however, does not require that there be no restriction based upon the content of the message. Accordingly, within the non-public and limited designated public forum, government may create reasonable regulations that are content based.

It is important to note that, while most challenges to government regulation brought under the First Amendment address written ordinances, written regulations or written formal policies, many plaintiffs have been successful challenging unwritten or informal policies. In addition, plaintiffs can challenge government regulation of expressive activity under a facial challenge, an as applied challenge, or both. In general, it is the government's burden to justify its regulation of expressive activity on government property.

The first part of the materials below is a refresher of basic First Amendment jurisprudence regarding the regulation of expressive activity on government property. Ultimately, the law in the area is far from "black letter" and usually involves a detailed analysis based on the particular facts of a given situation. An attorney must conduct an analysis with a close eye on the specific facts presented in his or her situation. Similarly, when tasked with the drafting of new regulations of expressive activity on government property, the municipal attorney must carefully examine the facts and circumstances that lead to the desire to regulate and must carefully tailor the regulation to address those issues. In doing so, the municipal attorney would be wise to craft "whereas" clauses

(or similar factual findings by the legislative body) to create a stronger legislative record as to the reasons for the regulation (or its scope) and, thereby, help insulate the regulation from legal challenge.

STEP ONE – DEFINE THE FORUM

I. Traditional Public Forum

The traditional public forum is, not surprisingly, a location that has been traditionally open to the public for expressive activity. These types of public spaces have been used historically for parades, marches and rallies or the dissemination of written materials. These types of forums may NOT be closed to expressive activity, except under the most significant of circumstances.

> "Wherever the title to streets and parks may rest, they have immemorially been held in the 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." *Hague v. C.I.O.*, 307 U.S. 496 (1939).

a. How to determine if the location is a traditional public forum.

Many courts hold that publicly owned streets, sidewalks and parks are traditional public forums without further analysis. However, other courts will review the specific characteristics of a location to determine its status. These courts take an objective view of the location at issue and will analyze its specific physical characteristics and certain factors to define the forum.

i. Objective factors used to determine the existence of a traditional public forum

1. How the location is used today;
2. How the location has been used historically;
3. The government's intent when constructing the location;
4. Whether the location is government owned;
    a. But see
        i. *A.C.L.U. v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003), despite private ownership of the sidewalk, it retained its status as a traditional public forum since it was used as a public thoroughfare for pedestrians;
        ii. *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007), small plot in public park sold to private owner retained its status as traditional public forum;
5. The type of public access at the location;
6. Whether the location is a public thoroughfare;
7. The degree to which the location is separate and/or distinct from other traditional public forums in the specific locale.

ii. Traditional Public Forums

1. Public Parks
    a. *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007), despite portions of a public park being sold to private owners, the park retained is traditional public forum status.
    b. *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007), the City cannot discriminate based on message of speaker in a traditional public forum.

2. Streets, and Sidewalks
    a. *First Unitarian Church of Salt Lake City v. Salt Lake City Corporation*, 308 F.3d 1114 (10th Cir. 2002), a public access easement retained in a deed of sale by the City was sufficient to keep a street sold by the City to a private owner a traditional public forum.
    b. but see
        i. *Hawkins v. City and County of Denver*, 170 F.3d 1281 (10th Cir. 1999), a sidewalk in a performing arts complex is a non-public forum because it is only used by those visiting the complex and not as general city sidewalk.
        ii. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249 (10th Cir. 2005), a former street and sidewalk owned by the government became a non-public forum when sold to a private group who then changed specific characteristics of the forum to alter its status to a non-public forum

II. Designated Public Forum (Limited or Unlimited)

A designated public forum is a place that would otherwise be considered a non-public forum but for the fact that the government intentionally designates it, either expressly or by its actions, as a location for expressive activities. The government can create a "limited" or "unlimited" designated public forum. When a designated public forum is unlimited it operates and will be examined by a court in the same manner as a traditional public forum, with the exception that the government may close the forum at any time. Alternatively, when a designated public forum is limited, the government can limit the expressive activity to a specific category, e.g., a municipal theater that is only for plays and musicals and not for public rallies. In a limited designated public forum, although the government may control the kind of expressive activity it may not discriminate based upon the viewpoint of any speaker whose message is presented within the context of that type of expressive activity.

In your authors' view, the designated public forum is the most important forum to understand and recognize because it is the type of public forum that administrative officials often believe they have the most control over when, in fact, they may not. It is also an important forum to understand because, unlike a traditional public forum, the designated

public forum may not be a place at all, or at least not to the traditional understanding of the term "place." For instance, a student group publication may be a designated public forum. So too might an employee bulletin board or rack of internal mail boxes. When municipalities open up their facilities to the use of other civic organizations, they usually cannot then discriminate based upon the type of organization or the message communicated by that organization.

a. How to determine if the location is a designated public forum

When defining these types of forums, courts look primarily at the intent of the government, either express or implied by its actions, to determine if the location is a designated public forum and then to determine if it is limited or unlimited.

b. Specific Locations

i. Municipal Theaters
   1. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)

ii. School Facilities
   1. *Widmar v. Vincent*, 454 U.S. 263 (1981)

iii. Student Group Publications
   1. *Rosenberger v. Univ. of Virginia*, 515 U.S. 819 (1995)

iv. Other Limited Public Forums
   1. *Goulart v. Meadows*, 345 F.3d 239 (4th Cir. 2003), a community center that was limited to uses of community enrichment and recreational uses and not as a location for home-schooling.
   2. *Cogswell v. City of Seattle*, 347 F.3d 934 (9th Cir. 2003), an election pamphlet that was produced and published by the City for the purpose of informing the public about who was running for office appropriately limited candidates from mentioning their opponents.

III. Non-Public Forum

This type of forum is not by tradition or designation open to expressive activity and is generally a place where the government does not guarantee public access. It includes every location that is neither a traditional public forum nor a designated public forum. It is the preferred type of forum for municipalities whose regulations have been challenged because all rules and regulations within the forum rational basis standard.

a. Specific Non-Public Forum Locations

i. Airport Terminals
   1. *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992)
   2. *Bd. Of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987)

ii. Paycheck Deductions for Designated Charities Through Payroll Deductions

1. *Cornelius v. NAACP*, 473 U.S. 788 (1985)

iii. Handicap Ramp to a Public Health Facility
   1. *McTernan v. City of York*, 486 F.Supp.2d 466 (M.D. Pa. 2007)

iv. Internal Employee Mail System
   1. *Perry Educators Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37 (1983)

v. Military Installations
   1. *Greer v. Spock*, 424 U.S. 828 (1976)

vi. Polling Place
   1. *Marlin v. District of Columbia Board of Elections and Ethics*, 236 F.3d 716 (D.C. Cir. 2001)
   2. *Embry v. Lewis*, 215 F.3d 884 (8th Cir. 2000)

vii. Public Plaza Not Dedicated as a Public Park
   1. *Hotel Employees & Restaurant Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dept. of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002)

viii. Sidewalks
   1. On United States Post Office property
      a. *United States v. Kokinda*, 497 U.S. 720 (1990)
   2. Within a public performing arts complex
      a. *Hawkins v. City and County of Denver*, 170 F.3d 1281 (10th Cir. 1999)

ix. Street Sold to Private Owner
   1. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249 (10th Cir. 2005)

STEP TWO – APPLY THE APPROPRIATE FORUM TEST

I. Traditional Public Forum and Unlimited Designated Public Forum

Courts review regulations within the traditional public forum and the unlimited designated public forum through the same framework. To be valid, government regulations must be content neutral, time, place and manner restrictions that are narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.

a. Content Based or Content Neutral

i. Content Based

A regulation is content based when it is the subject matter in the speaker's message that determines whether the regulation will be enforced. Obviously, this does not apply to content regulation of unprotected forms of speech. Those unprotected forms include, fighting words, deceptive advertising, obscenity and defamation.

1. Examples of content based restrictions

   a. *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007), an ordinance that prohibited the parking of a car in public right of way for

principal purpose of sale or other advertising was invalid as it improperly limited protected commercial speech;

b. *Chicago Police Department v. Mosley*, 408 U.S. 92 (1972), an ordinance that only allowed labor picketing near schools but prohibited all other forms of picketing at the same location was held invalid;

c. Permit fees or costs that could and did fluctuate based upon the speaker's identity:
   i. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)
   ii. *Nationalist Movement v. City of York*, 481 F.3d 178, (3d. Cir. 2007)

d. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984), a prohibition against certain types of bands from playing in a municipal amphitheater because the council associated the band's type of music with drug use was held invalid.

ii. Content Neutral – Time, Place and Manner

A regulation is content neutral when it is not the subject matter of the speaker's message that determines whether the regulation will be enforced and it is based on a non-pretextual rationale, which rationale is divorced from the content of the message attempted to be conveyed.

1. Examples of content neutral time, place and manner restrictions

   a. Ban on the places where speech may occur:
      i. *Citizens v. Peace in Space v. City of Colorado Springs*, 477 F.3d 1212 (10th Cir. 2007), all speech in area around a NATO meeting.
      ii. *Hill v. Colorado*, 530 U.S. 703 (2000), around health clinics.
      iii. *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), buffer zone around health clinics.
         1. *but see*, *Schneck v. Pro-Choice Network of Western New York*, 510 U.S. 357 (1997), a mobile buffer zone around people who go to a clinic is not content neutral since it is directed at a specific content.

   b. Banning non-expressive conduct:
      i. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), sleeping in the park is not expressive conduct.

ii. *Heimbaugh v. San Francisco*, 591 F. Supp. 1573 (N.D. Cal. 1984), general nudity, in and of itself, is not expressive conduct.

c. Permit requirements applied equally to all applicants:
   i. *U.S. v. Adams*, 388 F.3d 708 (9th Cir. 2004)
   ii. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)

b. Narrowly Tailored to Serve a Significant Government Interest

To be "narrowly tailored," the regulation may not burden substantially more speech than is necessary to further the significant government interest. This does mean that the regulation must be the least restrictive means to further that government interest but only that the regulation is not broader than necessary and the asserted interest is supported by more than conclusory statements. It is the government's burden to prove both of these elements.

i. Narrowly Tailored

Courts determine whether a regulation is narrowly tailored under the specific facts and circumstances leading to the regulation. A regulation is narrowly tailored when it serves the significant interest in a direct and effective way. The government must tailor such regulation so that a reviewing court can assure itself that the government has "carefully calculated the costs and benefits associated with the burden on speech imposed" by such regulation. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). At the time of adopting the regulation, the government should note in the "whereas" clauses, or other purpose oriented sections, how it is that the regulation addresses its significant interests.

1. Examples of narrowly tailored regulations

   a. *Citizens v. Peace in Space v. City of Colorado Springs*, 477 F.3d 1212 (10th Cir. 2007), a ban on all speech within a safety zone around a NATO conference based on specific findings of the required distance due to potential blast areas.

   b. *Houston Chronicle Pub. Co. v. City of League City, Tex.*, 488 F.3d 613 (5th Cir. 2007), an ordinance that prohibited street vendors from operating at certain busy intersections was directly related to the public safety purpose of the ordinance.

   c. *Faustin v. City and County of Denver, Colo.*, 423 F.3d 1192 (2005), an unwritten city policy that prohibited the draping of signs from freeway overpasses was directly related to the public purpose of preventing distractions to drivers on the freeway.

ii. Significant Government Interests

The purpose of the regulation must be an important government interest. The government must provide specific support for its asserted interest by more than conclusory statements. *See Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007), where the 6th Circuit found that a conclusory statement by a police chief in support of the regulation, without more, was insufficient support for that regulation.

1. Examples of significant government interests

    a. Controlling the noise level of concerts
        i. Ward v. Rock Against Racism, 491 U.S. 781 (1989)

    b. Maintaining public parks
        i. *Nat'l Council of Arab Americans v. City of New York*, 331 F.Supp. 2d 258 (S.D.N.Y. 2004)

    c. Traffic safety
        i. *Faustin v. City and County of Denver, Colo.*, 423 F.3d 1192 (2005)

    d. Regulating competing uses of public space with permits and applications
        i. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)

c. Leave Open Alternative Avenues of Communication

The regulation must leave open other reasonable means for communicating the idea.

II. Limited Designated Public Forum and Non-Public Forum

In a limited designated public forum, the government may impose restrictions based upon the content of expressive activities, with the understanding that, in this context, the content of speech means the type of expressive activity, e.g., a limitation as to use of a municipal theatre for theatrical productions, but not political rallies. However, once the permitted content has been defined or limited, the government's regulation cannot act so as to discriminate based upon the viewpoint expressed. Using the example of a municipally owned theater, once the government allows members of the community to use it for theatrical productions, it cannot then prevent the production of, what it considers offensive material, such as the musicals "Hair" or "The Best Little Whorehouse in Texas.

The government may restrict the content of speech in a non-public forum so long as the regulation is reasonable and does not amount to the government's effort to suppress expression merely because officials oppose the speaker's view.

a. Viewpoint Neutral

If the government allows someone to present an issue in a limited designated public forum or a non-public forum, then the government must allow an opposing view to be presented in the same manner.

b. Reasonable Regulation

The regulation must only be rationally related to a legitimate government objective.

i. Examples

1. *Lehman v. Shaker Height*s, 418 U.S. 298 (1974), an ordinance that only allowed commercial advertising on a public bus was reasonably related to the government's legitimate purpose of excluding political commentary on public vehicles which are non-public forums.

2. *Doyle v. McFadden*, 182 Fed. Appx. 506 (6th Cir. 2006), the closing of a public building after the council session ended was reasonably related to the legitimate public purposes involved in closing public buildings.

RECENT CASES

Just because you say it, doesn't make it true.

The 6th Circuit strikes an ordinance that prohibited the parking of cars on the public road for the principal purpose of sale because such regulation applied to protected commercial speech and therefore was invalid as a content based restriction that was unsupported by the municipality's stated purposes for the prohibition.

A Village of Glendale, Ohio, ordinance stated:

> It shall be unlawful for any person to stand or park any vehicle, motorized or towed, upon any public or private street, road, or highway within the village or upon any unimproved privately owned area within the village for the purpose of:
>
> (A) Displaying it for sale, except that a homeowner may display a motor vehicle, motorized or towed, for sale only when owned and titled to said homeowner and/or a member of said household, and only when parked upon an improved driveway or apron upon the owner's private property;
>
> (B) Washing, maintaining or repairing such vehicle except repairs necessitated by an emergency;
>
> (C) Any advertising.

The police department in the Village enforced this ordinance against a resident, who parked his car on the street for the principal purpose of selling it. The resident challenged the Village's ordinance based on his right to engage in protected commercial speech. The Ohio Federal District Court upheld the ordinance, not under public forum case law but under the *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), framework. This is an intermediate scrutiny review similar to the traditional public forum analysis where the government must assert "a substantial interest in support of its regulation, [and] demonstrate that the regulation directly and materially advances that interest."

In support of the regulation, the town only produced an affidavit by the police chief stating that the goal of prohibiting the parking of cars for the principal purpose of sale was to "promote . . . traffic safety within the Village. . ." and that such prohibition was necessary to prevent inducing "people to come into the roadway who are not part of normal vehicular or pedestrian traffic . . . and [it] addresses aesthetic objectives of the Village." The 6th Circuit held that these were conclusory statements that did not provide sufficient justification for the prohibition because there was no proof, other than the chief's statement, that people would come into the roadway to look at cars for sale. The Court stated that when regulating the content of speech, the government must provide sufficient proof that the regulation serves a specific purpose beyond just saying that it is so.

The Village argued that there was an obviousness or common sense as to why such regulation would be valid because traffic safety was a significant government interest that required the courts to provide a deferential review. The 6th Circuit held that the "principles of *common sense* or *obviousness*" are insufficient justification for prohibition on protected speech and that it was the Village's "obligation to provide *something* in support of its regulation. . . ."

Pagan v. Fruchey, 492 F.3d 766 (6th Cir. 2007)

Get Out of the Traffic Controlled Intersection

The 5th Circuit upholds an ordinance prohibiting street vendors from soliciting sales in the public roadway or distributing material to a vehicle observing a traffic control light.

The ordinance stated, in part:

> (a) No person who is within a public roadway may solicit or sell or distribute any material to the occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control signal light, It is specifically provided, however, that a person, other than a person 12 years of age or younger, may solicit or sell or distribute material to the occupant of a motor vehicle on a public roadway so long as he or she remains on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself, including the medians and islands.

The City enforced a related ordinance provision against newspaper vendors selling the paper at a busy intersection with a traffic control device. The newspaper challenged the ordinance above as content based and "too narrowly tailored" because it was limited only to intersections with traffic control devices.

The City's stated purpose for the ordinance was public safety. In support of that purpose, the City provided proof that street vendors in other jurisdictions were severely injured at similar intersections to the ones prohibited in the City's ordinance. The 6th Circuit held that the City's purpose served a significant government interest of traffic and public safety and that the ordinance was narrowly tailored because it only applied to the busiest intersections.

Houston Chronicle Pub. Co. v. City of League City, Tex., 488 F.3d 613 (5th Cir. 2007)

At Least Pay the Nominal Fee

3rd Circuit upholds permit fees and certain application requirements for assemblies on public land involving more than 25 persons but strikes provisions requiring reimbursement of certain municipal costs.

The City had ordinances regarding the holding of public meetings on public lands. One ordinance prohibited conducting a "parade, picnic, or other event involving more than twenty-five individuals" on public land without first obtaining a permit and submitting a deposit bond. The permit requirements involved completing an application and tendering a fee. The fee was $50 for residents of the City and $100 for non-residents. The purpose of the fee was to recoup costs associated with processing applications. In addition to the fee, the applicant was required to submit a security deposit to recoup cleaning and policing costs. There was a provision in the ordinance that allowed groups participating in activities protected by the First Amendment where such fees would be financially burdensome to seek a waiver of the fees and other costs.

In addition to the security deposit, a second ordinance required all such applicants to sign an agreement promising to pay for cleanup, policing and restoration costs or to reimburse the City for such costs. In addition, the applicant was required to sign an indemnification that held the City harmless for any injury to a person that occurred in connection with the event and required the applicant to secure sufficient insurance to cover any injuries that occurred at the event. The City based its security deposit and insurance requirements on the applicant's reputation and the unpopularity of the applicant's message.

The Nationalist Movement ("NM") sought a permit and was denied for failing to submit the required fee, or, in the alternative, the waiver. The NM then sought an injunction against enforcement of the ordinance.

The 3rd Circuit held that permit requirements are a "prior restraint" against speech but that the government has a significant interest in "regulating the competing uses of public space." The Court also held that the fee provision was nominal and therefore not a violation of the First Amendment. In addition, the fee and application requirements were not content based because they applied equally across the board and the requirement were narrowly tailored because they were directly related to the City's effort to recoup application processing costs. In addition, the waiver provisions allowed multiple users and speakers access to the public forums. The Court also held that the hold harmless, indemnification requirement, did not violate the First Amendment because it was narrowly drawn.

However, the Court held that the security deposit, the insurance requirements and the reimbursement provisions were unconstitutional because they were content based restrictions that would chill speech. First, the City had too much discretion in setting the security deposit fees and the amount of insurance coverage required and was unlimited in the amount of reimbursement it could seek after the event. The Court stated that these types of provisions are "ripe for abuse" and unlimited discretion in setting fees has always been unconstitutional.

Nationalist Movement v. City of York, 481 F.3d 178 (3d. Cir 2007)