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COUNTY DESIGNATED NON-PUBLIC FORUM FOR RESIDENTS ONLY

(NOTE – The opinion described below was subsequently VACATED BY THE COURT on October 19, 1999 in *Warren v. Fairfax County*, 196 F.3d 186; 1999 U.S. App. LEXIS 25521 (4th Cir. 1999).

As illustrated by the *Warren* decision described herein, “the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” On the contrary, an individual's free speech rights on government property depends upon the type of property involved. As noted in *Warren*, public parks, streets, and sidewalks “have been used historically as locations for free expression.” In contrast, the area at issue in *Warren*, a landscaped island in front of the government center, was not a traditional public forum. As a result, the court in *Warren* found the government could reasonably regulate this particular parcel of government property. In so doing, the government could restrict use of this area to county residents without violating the First Amendment.

RELIGIOUS DISPLAY PERMIT DENIED

In the case of *Warren v. Fairfax County*, No. 98-1059 (4th Cir. 1999), plaintiff Rita Warren claimed a constitutional right to mount religious displays in a landscaped median located in front of the Fairfax County Government Center Complex (the Complex). Defendant Fairfax County (the County), had adopted a regulation which designated the Complex, including the landscaped median, for use by County citizens, employees, and certain nonprofit organizations.

The County refused to issue Warren a permit to erect her displays because she was “not within the class of speakers identified in the County's regulation.” The issue before this court is whether the County's regulation violates Warren's rights under the First Amendment. The facts of the case were as follows:

Warren, who is a devout Christian but is not a member of an organized religion, seeks to spread a message of love, hope, and peace by mounting religious displays at the Complex at certain times of the year. Specifically, she wants to erect a creche and a cross outside the Complex during the Christmas and Easter seasons.

Warren is not a resident of Fairfax County, but is a resident of Fairfax City. Fairfax City, Virginia, is a separate and distinct jurisdiction from Fairfax County, Virginia.

The Complex comprises three buildings in which over 2,500 County employees work, and adjacent grounds. The largest of the buildings is the Government Center building, which is the site of county government offices. A horseshoe-shaped driveway runs in front of the Government Center building. This driveway includes a landscaped median

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area known as the "Center Island." Warren seeks to erect her displays in this Center Island.

The County's Procedural Memorandum # 08-05 (the Memorandum) governs the use of all County common areas at the Complex, including the Center Island. The Memorandum declares that the County's policy is to encourage "use of the common areas of the Government Center Complex by Fairfax County nonprofit organizations and individual citizens of Fairfax County for civic, cultural, educational, religious, recreational, and similar activities." To that end, the Memorandum establishes procedures for obtaining a use permit. Significantly, the Memorandum specifically identifies the following groups as being allowed to use the Complex, including the Center Island: County residents, County employees, and County nonprofit groups. [Defined as "any nonprofit organization which has an office in Fairfax County and/or serves the citizens of Fairfax County."]

Based on this provision, the County has declined to issue Warren a permit to display her creche and cross in the Center Island area. Warren instituted this suit in response to the County's actions. Warren alleged the County, in enforcing the use provision, has violated and will continue to violate her First Amendment rights to free speech and to petition the government. Warren sought a permanent injunction prohibiting the County from enforcing the use provision.

The federal district court granted summary judgment in favor of the County. In so doing, the district found "the use provision did not violate Warren's First Amendment rights" based upon "the standard of constitutional scrutiny applicable to nonpublic fora under established Supreme Court precedents." Warren appealed.

On appeal, Warren argued that "the district court improperly analyzed the County's use provision under the more lenient nonpublic forum standard, as opposed to the more strict, traditional public forum standard." In so doing, Warren maintained that "the use provision violates the First Amendment under the traditional public-forum standard and that the district court therefore erred in dismissing her claims" under the First Amendment.

PROPERTY TYPE DEFINES RIGHTS

As noted by the federal circuit court, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." On the contrary, the court acknowledged that "an individual's right to express herself on government property depends upon the type of property involved." Specifically, the court found the Supreme Court has identified three types of fora: (1) the traditional public forum, (2) the public forum created by government designation, and (3) the nonpublic

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forum.”

As noted by the federal appeals court, “[t]raditional public fora are defined by the objective characteristics of the property, such as whether, by long tradition or by government fiat, the property has been devoted to assembly and debate.”

Traditional public fora include areas such as streets, sidewalks, and parks, areas which have been used historically as locations for free expression. Use of traditional public fora may be regulated only by content neutral time, manner, and place restrictions, or by content-based restrictions which are tailored narrowly to serve a compelling government interest.

Similarly, the court acknowledged that “[d]esignated public fora are areas which the government has purposefully opened to the public for free expression.” In such places, the court found “[g]overnment regulations restricting speech in a designated public forum are scrutinized under the same standards as a traditional public forum.” Accordingly, government regulation of property opened to the public for free speech activities must be limited to content neutral time, manner, and place restrictions which are tailored narrowly to serve a compelling government interest.

On the other hand, the court noted “the Supreme Court has recognized that a designated public forum may be created for a limited purpose such as use by certain groups,” e.g. student groups, or for the discussion of certain subjects, e.g., school board business.

Where the speaker comes within the class or purpose for which a designated public forum is made generally available, the government is bound by the same standards which apply in a traditional public forum.

Where, however, the speaker does not come within the class or purpose of the forum, the nonpublic forum standard applies. [I]n a nonpublic forum or even in a designated public forum the constitutional right of access extends only to entities of similar character to which the government has permitted access... [I]n a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre.

NON-PUBLIC FORUM?

As described by the court, government properties which are not traditional or designated public fora are either nonpublic fora or not fora at all. According to the court, government can legitimately control

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access to a nonpublic forum “based on subject matter and subject identity so long as the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral.” As noted above, in a nonpublic forum the constitutional right of access extends only to entities of similar character to which the government has permitted access.

Applying these principles to the facts of the case, the federal circuit court considered Warren’s contention that “the district court erred in concluding that the Center Island was not a traditional public forum.” The federal court rejected this argument.

In the opinion of the federal circuit court, the Center Island was not a traditional public forum because the objective characteristics of the property did not define its use as a locale historically devoted to assembly, debate and free expression. On the contrary, unlike a public park, the court found the Center was characterized by landscaping and plant materials, not open space conducive to public assembly.

The Center Island is not a street, sidewalk, or a park. Instead, it is a median dividing a u-shaped driveway. As the district court correctly noted, landscaped medians such as the Center Island are designed primarily for aesthetic purposes such as plantings and have not been used historically as a location for public expressive activity. As such, the Center Island is not a traditional public forum... [T]he Supreme Court has rejected the view that traditional public forum status extends beyond its historic confines.

Warren had also contended on appeal that “the County, in its Memorandum, has expressly designated the Center Island as an unlimited public forum.” To support her position that the County had designated the Center Island as a public forum, Warren relied principally on the Memorandum, which provides that it is the County’s “policy . . . to encourage the use of common areas of the Government Center Complex by Fairfax County nonprofit organizations and individual citizens of Fairfax County for civic, cultural, educational, religious, recreational, and similar activities of a nonprofit nature.”

The appeals court rejected Warren’s argument. In so doing, the court noted that “[t]he next section of the Memorandum, ‘Who May Reserve the Facilities of the Government Center Complex,’ expressly opens the Complex for use by county residents, county employees, and any nonprofit organization which has an office in or serves the citizens of the county.” While acknowledging the Memorandum may have indicated “the County’s intent to open the Complex and the Center Island to a broad spectrum of topics,” the appeals court found the Memorandum provided “clear evidence the County did not intend to open this forum to speakers such as Warren, who is neither a county resident nor an employee.”

Moreover, the federal circuit court noted that “[t]he government does not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional

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public forum for public discourse.”

[T]o ascertain whether the Center Island is a designated public forum as to Warren, we must look to the County's policies and practices to determine whether the County intended to designate the Center Island as a public forum. If the government's intent remains unclear, we should then look to the nature of the property and its compatibility with expressive activity to discern the government's intent. However, we will not find that a public forum has been created in the face of clear evidence of contrary intent.

As a result, the court in this particular instance would not find that “the County intended to designate the Center Island as a public forum for speakers such as Warren in the face of a clear indication from the County that it did not intend to do so.” In so doing, the court took particular note of the fact that “Warren falls outside the class to whom the County has opened the Center Island” regardless of whether “the County's Memorandum designates the Complex, including the Center Island, as a limited public forum” or a nonpublic forum.

Regardless of whether the area at issue was considered a limited public forum or nonpublic forum, the court found “the level of scrutiny to be applied to the County's regulation remains the same” Specifically, the court found “the County may exclude Warren from the Center Island so long as the restriction is viewpoint neutral and reasonable in light of the purposes served by the forum.” In this particular instance, the appeals court found undisputed evidence that “the use provision is viewpoint neutral.”

By its express terms, the Memorandum does not seek to restrict or limit the viewpoints of any speaker. Instead, as the district court correctly noted, it simply does not open the Complex to speakers who do not have the requisite connection with the County, regardless of the views that they may hold. Indeed, if Warren was a county resident or employee or represented a nonprofit organization serving the county, she could erect a religious creche in the Center Island.

At this point, then, the use provision need only be reasonable; it need not be the most reasonable or the only reasonable limitation. The reasonableness of the restriction must be assessed in light of the purpose of the forum and all the surrounding circumstances.

Under the circumstances of this case, the federal appeals court found it was “reasonable for the County to conclude that limiting the use of the Center Island to County-related persons and entities will save the County money in maintenance and supervision expenses.”

As the district court noted, the Complex, including the Center Island, was presumably

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built with funds provided by the citizens of the county and their tax dollars support the maintenance of the Center Island. Given that the Center Island is adjacent to a government center which has the purpose of conducting county business and serving county citizens, the Memorandum reasonably opens the Complex and Center Island to those citizens as well as to individuals or organizations who serve the County. [R]estriction may be justified by appeals to common sense and logic.

As a result, the appeals court agreed with the federal district court's conclusion that "Warren has no First Amendment right to speak in the Center Island." In the absence of a First Amendment violation, the appeals court noted that "the provision need only rationally further a legitimate state interest." In this particular instance, the appeals court found the use provision was both reasonable and rationally furthered legitimate interests of the County.

Having the County's regulation of public property in this particular instance was viewpoint neutral and reasonable, the appeals court concluded Warren's claims under the First Amendment "must fail." The federal appeals court, therefore, affirmed the district court's order granting summary judgment in favor of the County.
