

CAN TOWNS RESTRICT PUBLIC PARK ACCESS TO RESIDENTS AND THEIR GUESTS?

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In an article entitled "County Designated Non-public Forum for Residents Only," the June 1999 NRPA Law Review column examined the case of *Warren v. Fairfax County*, No. 98-1059 4th Cir. 1999). In this case, the federal court noted that an individual's free speech rights on government property depends upon the type of property involved. Moreover, this First Amendment case reiterated the principle that public parks, streets, and sidewalks "have been used historically as locations for free expression." In this particular instance, the panel of federal judges found that a landscaped island in front of the government center was not a traditional public forum. As a result, the appellate panel found the County government could restrict use of this area to county residents without violating the First Amendment.

However, in the case of *Warren v. Fairfax County*, 196 RM 186 (4th Cir. 1999), the full Fourth Circuit Court of Appeals reversed the decision by the appellate panel described in the June 1999 NRPA Law Review. Specifically, the federal circuit court struck down as unconstitutional county restrictions that limited use of a large, grassy mall to "county residents, county employees, and county non-profits." In so doing, federal circuit court determined that "the mall had the "characteristics of a traditional public forum."

Stretching in front of the Fairfax County Government Center Complex is a large grassy mall, approximately thirty yards wide and spanning about 200 yards. Sidewalks circumnavigate the mall and amble along a central landscaped strip. The area of the mall abutting the Government Center Complex features a circular brick promenade complemented by additional landscaping. Surrounding the mall is the street which leads to the Government Center Complex. The entire mall is outdoors, unenclosed, publicly accessible, and in fact open to the public.

Under such circumstances, the County could impose reasonable time, place, or manner restrictions which were "narrowly tailored to achieve compelling state interests." In this particular instance, however, the federal appeals court found that the exclusion of nonresidents was neither reasonable nor narrowly tailored. As a result, the Fourth Circuit held that the residents only policy must be struck down as unconstitutional.

The County has closed this public forum to the entire world of speakers except the class of qualified persons. The same interests could be achieved with much less burden by the simple expedients of charging fees for upkeep and monitoring costs.

In so doing, one of the judges in *Warren* made the following observation about governmental restrictions on non-resident access to public fora:

To limit a forum such as this one to those who live within the jurisdiction is to balkanize our civic dialogue. Were the Freedom Riders to be denied access to public fora in the South because they came from out of state? Is a Vermonter to be denied access to an Ohio public forum if he wishes to bring attention to the problem of acid rain? Is a pro-life Ohioan to be disallowed from protesting pro-choice developments in Virginia? And are Virginians, who are concerned about garbage trucked into their state from New York, to be prohibited from protesting such actions in a New York public forum? "Speech in America cannot be that parochial."

Citing extensively from Warren, the Connecticut state supreme court, in the case of *Leydon v. Town of Greenwich* described herein, also found a "residents only" restriction for access to a public park violated the First Amendment. Limiting Congestion at Greenwich Point In the case of *Leydon v. Town of Greenwich*, No. SC 16356 Conn. 07/26/2001), the issue before the Connecticut state supreme court was "whether a municipality constitutionally may restrict access to a municipal park to its residents and their guests." The facts of the case were as follows:

Greenwich Point is a town owned, 147 acre park facility that includes a beachfront on the Long Island Sound. The park area contains a number of ponds, a marina, a parking lot, open fields, a nature preserve, shelters, walkways and trails, and picnic areas with picnic tables. There also is a library book drop located on the beach.

The only land access to Greenwich Point is over a narrow, broccoli stem shaped piece of land known as Tod's Driftway (driftway), which is owned by the association, a private association of landowners who reside in the residential area adjacent to Greenwich Point. The town holds an easement over a private road on the driftway that provides the only means by which a person seeking to enter Greenwich Point by land may do so...

In 1944, the association became aware of the town's decision to purchase Greenwich Point from the hospital for the purpose of converting it into a beach park. At its meeting of October 1, 1944, the association passed a resolution providing that it was "not opposed to the purchase of the Point by the town as long as the town limited the use of the area to Greenwich residents."

At a town meeting on November 9, 1944, the town approved a policy restricting the use of the Point to "residents, taxpayers, lessees and their bona fide guests of the town." Minutes of the meetings of the town's board of selectmen and the board of estimate and taxation also reflect the adoption of this policy. The town purchased Greenwich Point on January 10, 1945, but did not codify the residency requirement until 1977, when it adopted an ordinance that restricted access to Greenwich Point to town residents and their guests.

It appears that the association itself has never sought to enforce a residents only policy over its private roadway leading to Greenwich Point. Rather, nonresidents seeking admission to Greenwich Point are turned away by an agent of the town at the park's entrance upon their failure to display a permit that, under the ordinance, may be obtained only by town residents.

On August 15, 1994, after crossing the driftway without interference from the town or the association, the plaintiff, a resident of Stamford, attempted to enter Greenwich Point at its main gate. He was refused admission, however, because he did not have a beach pass as required by the ordinance. Thereafter, Leydon applied for a beach pass, but his application was denied in accordance with the provision of the ordinance authorizing the issuance of beach passes to town residents only.

Paintiff Brenden P Leydon subsequently sued the Town claiming the ordinance violated the First Amendment to the United States Constitution. Accordingly, Leydon petitioned the court to issue an order prohibiting "the enforcement of a town ordinance limiting access to Greenwich Point Park (Greenwich Point, a town park with a beachfront on the Long Island Sound, to residents of the Town and their guests."

The trial court rejected Leydon's claims and rendered judgment for the Town. In the opinion of the trial court, Leydon had "failed to provide the court with evidence which would establish that he intended to enter Greenwich Point in order to express himself in any manner." As a result, the trial court found Leydon "was denied access to Greenwich Point by a town employee stationed at the gate because he did not have a beach pass and was not accompanied by a Town resident."

The court is convinced that the Town's subsequent denial of a pass to Leydon had absolutely nothing to do with Leydon's desire to engage in expression. Rather, the Town denied him a pass because it has an ordinance limiting its granting of passes to Town residents... Therefore, if Leydon truly intended to express himself on Greenwich Point, he would have been able to do so, unimpeded, if he were accompanied by a Town resident... [As a result,] the court is not persuaded that the subject ordinance prevented Leydon, or any nonresident, from accessing Greenwich Point for purposes of protected expression.

The appeals court reversed the judgment of the trial court. In the opinion of the appeals court, the challenged ordinance violated a general legal principle whereby "municipal parks are deemed to be held in trust for the benefit of the general public and not solely for the use of residents of the municipality.' The Town petitioned the state supreme court to review this decision.

Public Forum Analysis

The issue before the state supreme court was whether the appeals court was correct in concluding that Leyden was entitled to a court order prohibiting the Town "from limiting the use of Greenwich Point, including its beach area, to inhabitants of the Town."

As cited by the state supreme court, the challenged ordinance involved the following provisions of the Greenwich municipal code:

Section 7-30 provides in relevant part: [R]ecognizing that public parks have been acquired for the use of the inhabitants of the Town only inhabitants of the Town may enter, remain upon or use the Town's parks.

Section 7-36 provides: "Pursuant to the Charter of the Town and recognizing that public beaches, recreation places and facilities have been acquired and constructed by the Town using its own funds for the use of the inhabitants of the Town and are operated and maintained by the Town using its funds for the use of its inhabitants, and further recognizing that said beaches, recreation places and facilities have a limited capacity and are insufficient to accommodate all persons and to avoid excessive congestion, prevent breakdown, collapse and deterioration of said facilities and places, to protect the environment and prevent further ecological destruction, to encourage the acquisition of additional beaches, recreation places and facilities by the Town and to promote health, comfort, convenience and welfare, only inhabitants of the Town may enter, remain upon or use public beaches, recreation places and facilities except for guests of inhabitants of the Town pursuant to this ordinance and other applicable laws, ordinances and regulations promulgated by the Director [of Parks and Recreation]." Section 7-39 provides in relevant part: 'JE]ach family of inhabitants may obtain admittance of not more than eight guests on any one day to any Town owned beach or recreational place, provided such guests are actually visiting with said family's residence and an inhabitant accompanies said guests and remains with them at the facility..... Section 7-56 provides in relevant part: "A. Any person violating any of the provisions of [the] ordinance shall be subject to a fine not to exceed twenty-five (\$25.00) for each offense.

As described by the state supreme court, the First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law abridging the freedom of speech or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In determining whether the challenged ordinance violated the First Amendment, the court noted that "[t]he scope of the government's power to limit speech or other First Amendment activity on public property depends on the type of forum involved":

When a regulation restricts the use of government property as a forum for expression, an initial step in analyzing whether the regulation is

unconstitutional is determining the nature of the government property involved. The nature of the property determines the level of constitutional scrutiny applied to the restrictions on expression.

The United States Supreme Court has delineated three categories of government-owned property for purposes of the First Amendment: the traditional public forum, the designated public forum, and the nonpublic forum.

Further, the state supreme court described "the basic principles of the traditional public forum doctrine" as follows:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. Such locations include streets and parks which 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.

In these quintessential public forums, the government may enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Such close scrutiny is appropriate in these forums because such properties possess long-standing traditions of public usage... Thus, the forum-based approach for First Amendment analysis subjects to the highest scrutiny the regulation of speech on government property traditionally available for public expression.

[T]he right to use a public place for expressive activity may be restricted only for weighty reasons. The liberties protected by the public forum doctrine derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy. Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action.

The government can exclude a speaker from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers... Succinctly put, the First Amendment does not permit government to condition a speaker's access to a public forum on whether the speaker has support in or an indigenous relationship with the local community.

Applying these principles to the facts of the case, the state supreme court concluded that "Greenwich Point is a traditional public forum because it has the characteristics of a public park."

In view of the fact that Greenwich Point contains shelters, ponds, a marina, a parking lot, open fields, a nature preserve, walkways, trails, picnic areas with picnic tables, a library book drop and a beach, it is clear that Greenwich Point qualifies as a park for purposes of First Amendment analysis. The fact that Greenwich Point has a boundary on the Long Island Sound that serves as a beach for swimming, sun bathing and other activities in no way alters its character as a park. As such, it is a traditional public forum...

In addition, we note that photographs were introduced into evidence at trial to show a sand castle exhibition on the beach, along with a sand sculpture depicting a giant hand clawing its way onto a ledge cut into the beach with an adjacent sign stating: "Stamford Law Student Gaining Access to Greenwich Beach." Leydon also introduced into evidence copies of pamphlets distributed on the beach seeking to mobilize support and contributions for the Town's legal effort, in conjunction with the association, to defeat Leydon's lawsuit. Finally, testimony adduced at trial indicated that candidates for public office have campaigned at Greenwich Point, and that both the Democratic and Republican parties and the National Association for the Advancement of Colored People have hosted gatherings there...

We note that, as a general matter, under the forum-based approach adopted by the United States Supreme Court, courts do not conduct a particularized inquiry into the manner in which the specific public property at issue historically has been used. The inquiry, rather, is whether, in light of the objective characteristics of that property, it is a street, sidewalk or park in the traditional or conventional sense of those terms. If so, the property is a public forum for purposes of First Amendment analysis...

No particularized inquiry into the precise nature of a specific street, sidewalk or park is necessary; all public streets, sidewalks and parks are held in the public trust and are properly considered traditional public fora. Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums.

Moreover, in this particular case, the state supreme court found that the Town had "failed to explain why the ordinance's virtual ban on nonresidents is a reasonable time, place or manner restriction on the use of the park by such nonresidents." In so doing, the court found further that the Town had not shown 'a compelling interest in restricting

nonresident access to the park," nor was there indication that the ordinance was "narrowly tailored" to accomplish a compelling state interest.

The ordinance bars all nonresidents who are unaccompanied by a town resident from Greenwich Point, a public beach park. Thus, any nonresident who is unable to find a town resident to accompany him or her to Greenwich Point cannot engage in any activity there, including expressive and associational activity. Moreover, it is reasonable to presume that, for many reasons, most nonresidents who might wish to gain admission to Greenwich Point will be unable to find a town resident willing to serve as a host. Even if a nonresident can find a town resident to accompany him or her to Greenwich Point, the mere fact that he or she is required to do so places more than an incidental burden on the nonresident's expressive and associational rights. It, therefore, is inarguable that the ordinance significantly limits the ability of nonresidents to engage in constitutionally protected activities at Greenwich Point.

The state supreme court, therefore, concluded that the ordinance violated the First Amendment.

[1]n a public forum, by definition, all parties have a constitutional right of access. Furthermore, the ordinance bars a large class of nonresidents, namely, all nonresidents who cannot find a resident host, from engaging in a multitude of expressive and associational activities at Greenwich Point.

Because the Town's restriction on the use of Greenwich Point by nonresidents cannot be justified on the ground that it is narrowly tailored to meet a compelling need, the ordinance is facially overbroad. The ordinance, therefore, cannot withstand scrutiny under the First Amendment, either as applied to Leydon or as applied to other nonresidents who might wish to enter Greenwich Point.

Accordingly, the state supreme court held that the Town could not lawfully "bar Leydon from Greenwich Point due solely to the fact that he is a nonresident because the park is a public forum."