OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
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MEMORANDUM

Privileged and Confidential

TO: Ginny Gong, Director
Office of Community Use of Public Facilities

Jorge Gonzalez
Senior Assistant CAO

Ronald Clarkson, Police/Community Relations Facilitator
Offices of the County Executive

FROM: Edward B. Lattner EBL
Associate County Attorney

DATE: June 13, 2000

RE: **Lessees' with discriminatory membership policies**

In recent days, each of you have asked separate but related questions regarding the public's use of County land and facilities. Because the answers all involve similar First Amendment analysis, and I believe each of you would benefit from the advice given to the others, I am combining my answers into this singular memorandum.

Questions

1. The Office of Community Use of Public Facilities (CUPF) makes school and other public facilities available for community use. Director Ginny Gong has asked about CUPF's obligation to lease space to a user with a discriminatory message or membership policy. She has also asked whether a user can hold a private meeting in these facilities or whether it must open its meeting to the public despite any discriminatory membership policy the user employs. Finally, she asks about CUPF's responsibility to assure a user's compliance with the Americans with Disabilities Act (ADA).

2. Ronald Clarkson has asked about the First Amendment status of the grassy mall area surrounded by the EOB, the Judicial Center, Maryland Avenue and Jefferson Street. On a recent Saturday, a security guard asked a person who was playing T-Ball with his four year old son to leave that area. The person believes that, as a Rockville resident, he should enjoy free

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access to this public property.

3. Senior Assistant CAO Jorge Gonzalez has asked a general question about use of County facilities for political activities.

Answers

1. Public facilities under CUPF control are designated (or limited) public fora, based upon the County's policy and practice of making these facilities generally available for public use. This means that the County can not refuse access to these facilities based upon a user's discriminatory membership policy because that would constitute illegal content based discrimination — it would be no different than denying the use based upon the speaker's beliefs. But that speaker must keep the forum open to public because (1) state law requires that users of school facilities keep their meetings open to the public, (2) county law requires that CUPF make public facilities available for "community" use and (3) CUPF's building use form prohibits private meetings.

The federal regulations that implement the ADA, as well as the Department of Justice's Technical Assistance Manual, state that where a public entity has a close relationship with a private entity that is subject to Title III of the ADA, Title II requires the public entity ensure that the private entity does not discriminate based upon disability. It would be prudent for CUPF to condition the use of its facilities upon compliance with Title III of the ADA.

2. Security properly excluded Mr. Cotman and his son from the mall area. The short (and easier) answer is that T-Ball is not expressive activity protected by the First Amendment. Furthermore, although not free from doubt, the mall area is neither a traditional public forum nor is it an area that the government has designated for expressive activity.

3. Public facilities are available for political activity in a traditional public forum or if the user complies with CUPF policies in one of its designated public fora.

I. FIRST AMENDMENT AND THE PUBLIC FORUM

Whether the right to speak on government property has been abridged involves three discrete steps.[1] First, is the conduct in question "speech" protected by the First Amendment? If protected "speech" is involved, we must next identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic. Finally, we must assess whether the justifications for the exclusion from the relevant forum

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[1] *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S. Ct. 3439, 3446, 87 L. Ed. 2d 567 (1985); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998).

satisfy the requisite standard.

A. Is the Conduct Protected Speech?

If the proposed use does not involve protected speech under the First Amendment, the analysis is at an end. The Supreme Court has explained that conduct is protected by the First Amendment only if it is "sufficiently imbued with elements of communication."[2] Specifically, the actor must have "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [must be] great that the message would be understood by those who viewed it."[3] Although the First Amendment offers less protection to commercial speech than noncommercial speech, it too is constitutionally protected.[4]

B. Identifying the Various Types of Public Fora

The degree of constitutional protection afforded First Amendment activity on government property depends not only on the type of speech the government seeks to regulate, but also on the character of the public property involved.[5] "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending upon the character of the property at issue," because the First Amendment requires neither equal nor unlimited access to public places.[6] Thus, the Supreme Court has identified several categories of government fora to inform an evaluation of the First Amendment's mandates. The Court distinguishes between these fora based upon the physical characteristics of the property,[7]

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[2]*Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974).

[3]*Spence*, 418 U.S. at 410-411, 94 S. Ct. at 2730.

[4]Under the four-part test for evaluating restrictions on commercial speech set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), (1) the speech cannot be misleading or related to unlawful activity, (2) the regulation must seek to achieve a "substantial interest," (3) the regulation must directly advance and be in proportion to that interest, and (4) the government must carefully design the regulation to achieve that interest, reaching no further than necessary to accomplish the given objective. In *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989), the Court interpreted the last part of the standard as requiring the government to establish a "reasonable fit" between the legislature's ends and the means chosen to accomplish those ends.

[5]*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S. Ct. 948, 954, 74 L. Ed. 2d 794 (1983).

[6]*Perry*, 460 U.S. at 44, 103 S. Ct. at 954.

[7]A forum need not have a physical existence. *See, e.g., Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 1641, 140 L. Ed. 2d 875 (1998) (public access debate); *Rosenberger v. Rector and*

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including its location, the objective[8] use and purposes of the property, and government intent and policy with respect to the property, which may be evidenced by its historic and traditional treatment. None of these factors is dispositive.[9]

1. traditional public fora

Traditional public fora are defined by the objective characteristics of the property,[10] such as whether 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."[11] The typical traditional public forum has the physical characteristics of a public thoroughfare, the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, and by history and tradition has been used for expressive conduct.[12] Traditional public fora are open for expressive activity regardless of the government's intent.[13] Examples of public fora include streets, sidewalks, and parks.[14] In a traditional public forum, the government may exclude

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[7](...continued)
Visitors of the Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (student activities fund). In pinpointing the relevant forum, the courts focus on the "access sought by the speaker." *Cornelius*, 473 U.S. at 801, 105 S. Ct. at 3448. Sometimes the forum is the particular program the speaker wishes access to and not necessarily the physical location where the speech will take place. For example, in *Cornelius*, the government wished to exclude certain groups from participating in a charitable fund-raising drive conducted in the federal workplace. The Supreme Court defined the forum as the fund-raising campaign rather than the government buildings which housed federal workers. In *Perry*, the school district denied a rival union access to the school's internal mail system. The Court defined the forum as the internal mail system rather than the school property.

[8]The term "objective" in this context means, "without reference to the attempted restriction on speech". The restriction on speech cannot be used to justify itself, but must be justified by reference to some non-speech-restrictive aspect of the forum. *See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 691, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) (O'Connor, J., concurring in *ISKCON v. Lee* and concurring in the judgment in *Lee v. ISKCON*, 505 U.S. 830, 112 S. Ct. 2709, 120 L. Ed. 2d 669 (1992)).

[9]*Warren v. Fairfax County*, 196 F.3d 186, 191 (4th Cir. 1999).

[10]*Arkansas Educ. Television Comm'n*, 523 U.S. 666, 118 S. Ct. 1633, 1641, 140 L. Ed. 2d 875 (1998).

[11]*Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939).

[12]*Warren*, 196 F.3d at 191 (4th Cir. 1999).

[13]*Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1641.

[14]But property which has the physical characteristics of a traditional public forum and is generally open to public traffic is not always a public forum. For example, a sidewalk on a military base over which the military has
(continued...)

speakers only through reasonable content-neutral, time/place/manner restrictions, or through content-based restrictions that are narrowly tailored to serve a compelling state interest.[15]

2. nonpublic fora

The second category is nonpublic fora — property which is not by tradition or designation a forum for public communication. Indeed, a nonpublic forum is usually incompatible with expressive activity. "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[16] It is when the government opens facilities not generally available to the public (*i.e.*, facilities that are not a traditional public forum) that legal questions relating to equal access arise. The government creates a nonpublic forum "when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it."[17]

"Access to a nonpublic forum . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' "[18] The restrictions must be reasonable in light of the purpose which the forum at issue serves.[19] The restrictions "need only be reasonable; [they] need not be the most reasonable or the only reasonable limitation."[20] Content-based restrictions are permissible in a non-public forum provided they are consistent with the purposes of the forum, but viewpoint-

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[14](...continued)
retained control is not a traditional public forum. *Compare Greer v. Spock*, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976), *with Flower v. United States*, 407 U.S. 197, 92 S. Ct. 1842, 32 L. Ed. 2d 653 (1972) (per curiam), *cited with approval in Greer*, 424 U.S. at 835, 96 S. Ct. 1211. *See also United States v. Kokinda*, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (four-justice plurality concluded that the sidewalk in front of the Post Office constituted neither a traditional nor a designated public forum).

[15]*Perry*, 460 U.S. at 45, 103 S. Ct. at 954-55.

[16]*Perry*, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983).

[17]*Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1642 (internal quotation omitted).

[18]*Cornelius*, 473 U.S. at 800, 105 S. Ct. at 3447-48 (quoting *Perry*, 460 U.S. at 46, 103 S. Ct. at 955-56).

[19]*Perry*, 460 U.S. at 49.

[20]*ISCON v. Lee*, 505 U.S. 672, 683, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) (internal quotations omitted).

discriminatory restrictions are impermissible.[21] Examples of non-public fora include prisons,[22] military reservations,[23] and a school district's internal mail system.[24]

3. designated public fora

The final category, "designated" or "limited" public fora, is actually a hybrid of the other two. This consists of "public property which the state has opened for use by the public as a place for expressive activity."[25] The government creates a designated public forum when it purposefully makes its property "generally available to a class of speakers"[26] or grants permission "as a matter or course."[27] The government may create a limited public forum "for a limited purpose such as [for] use by certain groups, or for the discussion of certain subjects,"[28] or "for use by certain speakers."[29] The government is not required to open or indefinitely retain the open nature of these fora.

The key to whether the government has designated a certain area as a public forum is its intent.[30] The government does not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse. In order to discern the government's intent, courts look to the policy and practice of the government, the nature of the property, and its compatibility with expressive activity.[31]

But the forum inquiry does not end with the government's statement of intent; we must look not only at what the government says in its policy but at how it applies that policy. To allow

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[21] *Warren*, 196 F.3d at 192-93 (4th Cir. 1999).

[22] *Adderley v. Florida*, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).

[23] *Greer v. Spock*, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976).

[24] *Perry*, 460 U.S. 37, 103 S. Ct. 948.

[25] *Perry*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

[26] *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1642.

[27] *Perry*, 460 U.S. at 47.

[28] *Perry*, 460 U.S. at 46 n. 7, 103 S. Ct. at 955 n. 7.

[29] *Cornelius*, 473 U.S. at 802, 105 S. Ct. at 3449.

[30] *Cornelius*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

[31] *Cornelius*, 473 U.S. 788, 802-03, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567 (1985).

the government's statements of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of First Amendment rights would be determined by the government rather than by the Constitution. Any forum classification must be rooted in the facts of the particular case; forum classification "should be triggered by what a school does, not what it says."[32]

When the government creates a limited public forum for the use of certain speakers or the discussion of certain topics, the First Amendment protections provided to traditional public forums only apply to entities of a character similar to those the government admits to the forum. The government may impose a blanket exclusion of 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.[33] Content-based restrictions are permissible in a limited public forum provided they are consistent with the purposes of the forum, but viewpoint-discriminatory restrictions are impermissible. This inquiry requires consideration of the extent of the restriction on speech and the alternatives for expression that are left open by the use restriction, all with the goal of respecting, if possible, the intended purposes of the forum.[34]

A nonpublic forum may be distinguished from a designated forum by the following: a nonpublic forum is characterized by **selective, permission-only access for individual speakers** while a designated forum is characterized by allowing **general access for an entire class of speakers**.[35] For example, in *Widmar v. Vincent*, a state university created a designated public forum for registered student groups by implementing a policy that expressly made its meeting facilities "generally open" to those groups.[36] Conversely, a school district's internal mail system was not a designated public forum even though selected speakers were able to gain access to it.[37] The Court explained: "In contrast to the general access policy in *Widmar*, school board policy did

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[32]*Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990) (quoting *Board of Educ. v. Mergens*, 496 U.S. 226, 110 S. Ct. 2356, 2369, 110 L. Ed. 2d 191 (1990)); *United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 353 (6th Cir. 1998) (SORTA); *Christ's Bride Ministries v. Southeastern Pa. Transp. Auth.* 148 F.2d 242 251 (3d Cir. 1998).

[33]*Warren*, 196 F.3d at 193-94 (4th Cir. 1999)

[34]*See Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir.1993) (discussing reasonableness standard for nonpublic fora and holding that the "challenged regulation must be assessed 'in light of the purpose of the forum and all the surrounding circumstances,' " (quoting *Cornelius*, 473 U.S. at 809, 105 S. Ct. at 3452-53)).

[35]*Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1642; *Warren*, 196 F.3d at 193 (4th Cir. 1999).

[36]*Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981).

[37]*Perry*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted."[38]

Discerning whether the government permits (in policy and actual practice) general access to public property or limits access to a select few is not the sole criterion in determining the forum it has created; the court will also assess whether the government-imposed restriction on access to public property is truly part of the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. In other words, is the government's justification for excluding certain expressive conduct reasonably related to the forum's purpose?[39] If the forum analysis were limited to a simple determination of whether the government's policy permitted general access or required each speaker to obtain permission to use the property, the government could convert a designated or limited public forum into a nonpublic forum the moment it did "what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content."[40]

Where the prohibited expressive activity would be incompatible with the principal function of the property or forum, the court is reluctant to hold that the government intended to designate a public forum. For example, in *Cornelius* multiple charitable organizations solicited support from federal employees at their work sites "on an ad hoc basis" before 1957. As an increasing number of charities sought access to federal work sites, the multiplicity of solicitations for contributions disrupted the workplace and confused employees who were unfamiliar with many charities seeking contributions. In response, the President established the Combined Federal Campaign ("CFC") "to bring order to the solicitation process and to ensure truly voluntary giving by federal employees," as well as "to minimize the disturbance of federal employees while on duty." The government limited access to the CFC to "appropriate" charitable agencies, as defined in the campaign guidelines and required agencies seeking admission to obtain permission from federal and local Campaign officials. In determining that the government did not create a public forum in establishing the CFC, the Court emphasized that the limitations on access to the CFC were designed to further the government's goal of minimizing disruption to the workplace, thereby suggesting that the government operated the

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[38]*Cornelius*, 473 U.S. 788, 803, 105 S. Ct. 3439, 3449-50; 87 L. Ed. 2d 567 (1985). In *Cornelius* the Court held the Combined Federal Campaign (CFC) charity drive was not a designated public forum because "[t]he Government's consistent policy ha[d] been to limit participation in the CFC to 'appropriate' [i.e., charitable rather than political] voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials." *Id.* at 804, 105 S. Ct. at 3450.

[39]*SORTA*, 163 F.3d 341, 350-51 (6th Cir. 1998); *Christ's Bride Ministries*, 148 F.2d at 249.

[40]*SORTA*, 163 F.3d at 351 (quoting *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir.), *cert. denied*, 119 S. Ct. 68, 142 L. Ed. 2d 53 (1998).

CFC as a nonpublic forum.[41]

C. CUPF Facilities and the Grassy Mall: What Kind a Fora Are They?

1. Grassy mall

The County security officer properly excluded Mr. Cotman and his son from the mall area because T-Ball is not expressive activity protected by the First Amendment. Furthermore the mall area is neither a traditional public forum nor is it an area that the government has designated for expressive activity.

The grassy mall is a nonpublic forum. The walkways which cross the mall provide access to a war memorial and a tree given by the people of Oklahoma in gratitude for County workers who responded to the April 1995 bombing in the federal building. Although the physical characteristics of the property (park-like) suggest that it is a public forum, its objective use, purpose and government intent and policy reveal otherwise. The County has not, by history or tradition, set aside this area for expressive speech. Nor has the County adopted any policy designating the area for First Amendment activities.[42]

2. County policy and practice has designated CUPF facilities as public fora.

By law and practice, the County has designated the public facilities under CUPF control public fora for First Amendment purposes. State law requires that each county board of education encourage the use of public school facilities for community purposes and that any

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[41] *Cornelius*, 473 U.S. at 805-06. More recently, in holding that an election debate aired on public television is not a public forum, the Court explained that the logistical difficulties of including all ballot-qualified candidates in the debate would undermine the educational value and quality of the debates, frustrating public television's mission of scheduling programming that best serves the public interest. *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1643.

[42] The Fourth Circuit examined a similar, but distinguishable, issue in *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999). A noncounty resident challenged the county's refusal to allow her to erect holiday display on an outdoor grassy mall in front of county government center. The court held that the mall was traditional public forum because it "has the physical characteristics of a public thoroughfare like a park or a mall; it has the objective use and purposes of open public access and its use is eminently compatible with expressive activity; and it is part of a class of property which by history and tradition has been open and used for expressive activity." *Id.* at 194. The court concluded that the county's restriction on use of the mall to county residents served no compelling interest and was not narrowly tailored to achieve significant state interest.

meetings held must be open to the public.[43] A slightly modified version of this rule applies in Montgomery County.[44] To this end, County law establishes an Office of Community Use of Public Facilities that "schedules and makes available to the community the use of school facilities and other public facilities . . .."[45]

CUPF scheduling guidelines and its building use agreement form demonstrate that the County has made these public facilities available to the general public for a wide variety of expressive purposes and, thus, have created a designated public forum with little, if any, restrictions. Other courts have found that the government created a designated or limited public forum under similar circumstances.[46] CUPF must make its public facilities available for political expression in a non-discriminatory manner.

D. Although the Government Can Not Refuse Access to a Designated Public Forum Based upon a Speaker's Discriminatory Membership Policy, That Speaker must Keep the Forum Open to Public

Although the government can not refuse access to a designated public forum based upon a speaker's discriminatory membership policy, that speaker must keep the forum open to public because (1) state law requires that meetings in school facilities must be open to the public, (2) county law requires that CUPF make public facilities available for "community" use and (3) CUPF's building use form prohibits private meetings.

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[43]Md. Code Ann., Educ. § 7-108 (Repl. Vol. 1999).

[44]Md. Code Ann., Educ. § 7-108(f) (Repl. Vol. 1999).

[45]Montgomery County Code (MCC) § 2-64M. MCC § 44-3 establishes the Interagency Coordinating Board for Community Use of Public Facilities and § 44-4 sets out the duties of the director of Community Use of Public Facilities.

[46]*Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 811 F. Supp. 1137, 1138 (E.D. Va. 1993), *aff'd in part and rev'd in part on other grounds*, 17 F.3d 703 (4th Cir. 1994) ("The school board, by its policy of renting school facilities to a broad range of community groups has created an open, or public forum.") ; *Country Hills Christian Church v. Unified Sch. Dist. No. 512,* 560 F. Supp. 1207, 1214-15 (D. Kan. 1983) ("Defendants, by and through their Policies Nos. 2000 and 2020, have created a public forum for the exercise of First Amendment rights. The forum is open to 'recognized community groups.' The dedication of school district facilities as a public forum for community groups makes the school buildings virtually the same, in concept, as streets and parks as far as the First Amendment is concerned."); *Gregoire v. Centennal Sch. Dist.,* 907 F.2d 1366 (3d Cir. 1990) 674 F. Supp. 172 (E.D. Pa. 1987) (school district created an open public forum by renting school facilities out to a wide assortment of community groups); *Saratoga Bible Training Inst., Inc. v. Schuylerville Cent. Sch. Dist.*, 18 F. Supp.2d 178 (N.D.N.Y. 1998); *Local Organizing Comm. v. Cook*, 922 F. Supp. 1494 (D. Colo. 1996); *National Socialist White People's Party v. Ringers,* 473 F.2d 1010 (4th Cir. 1973) (school auditorium as public forum); *See also Knights of the KKK v. East Baton Rouge Parish Sch. Bd.,* 578 F.2d 1122 (5th Cir. 1978) (same).

The government can not refuse access to a designated public forum based upon a speaker's discriminatory membership policy because that would constitute illegal content based discrimination. "No case suggests that in maintaining a street, park, or public meeting place, a state espouses the views which may be there expressed. . . . The use of facilities partially dedicated as a public forum for the expression of diverse views does not amount to state espousal of racist views, whether they are merely expressed or whether they are expressed by a group which implements them by racist membership policies."[47]

Some courts, **including our own federal district court**, have concluded that although the government can not refuse access to a designated public forum based upon a speaker's discriminatory membership policy, that speaker must keep the forum open to public.[48] But other courts have found that the speaker's use may temporarily convert an otherwise public forum into a private, nonpublic forum.[49] This would allow the user to hold an essentially private meeting in a public forum.

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[47]*National Socialist White People's Party v. Ringers,* 473 F.2d 1010, 1016 & 1017 (4th Cir. 1973).

[48]*Ringers,* 473 F.2d at 1018 ("a difference may exist where as a result of the discriminatory membership policy, the public building is open for use only on a discriminatory basis. But here, although the [Nazi] Party does not admit Negroes to membership, the proposed . . . meeting was open to the public at large"); *Knights of the KKK v. East Baton Rouge Parish Sch. Bd.*, 578 F.2d 1122 (5th Cir. 1978) (school board could not prohibit Klan from using school facilities for public meetings where there was no state endorsement of the Klan's ideas or practices and the parties had stipulated that the meeting was open to all, with no restriction as to admission of any individuals on a racial basis); *Cason v. City of Jacksonville,* 497 F.2d 949, 954 (5th Cir. 1974) (where district court granted plaintiff, a black woman, an injunction prohibiting the use of the city's Civic Auditorium by the National State's Rights Party because of the Party's discriminatory membership policies, the Fifth Circuit remanded the case for a determination of whether the meeting was purely private or open to the public, writing "[i]f the [district] court finds that the meeting would have in fact been open to nonmembers but limited to the white public at large, we can say without reservation that the district court's injunction would have been entirely proper."); *NAACP v. Thompson,* 648 F. Supp. 195, 209 (D. Md. 1986) ("*Ringers,* supported by *Cason* and *Knights,* would appear to teach that a state may not deny the use of public property to a group with racially discriminatory membership policies if the group's public meetings are open to the public as a whole, but also indicates that a state must deny the use of public property by such a group if the group's public meetings exclude non-whites."). *See also Invisible Empire of the Knights of the KKK, Maryland Chapter v. Mayor, Board of Comm'rs, and Chief of Police of Thurmont*, 700 F. Supp. 281, 287 (D. Md. 1988)

[49]*International Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714, 718 (N.D. Tex. 1978) (City sought, by enforcement of ordinance, to bar religious organization from entering environs of its convention center to solicit funds and proselytize surgeons attending a medical meeting; measuring standard for access due religious organization turned on tenant's usage of rented facility. "For example, a convention of dental supply technicians may well wish to rent the facility for its own purposes and admit only its members. The exclusion's legality (which would probably give us little pause) is measured by quite different standards from situations where the usage creates a public forum."); *Otwell v. Texas*, 850 S.W.2d 815 (Tex. Ct. App. 1993) (group's use of city leased park for private reception converted property into a nonpublic forum); Op. Md. Att'y Gen. No. 95-030 (Aug. 4, 1995) (citing *Otwell*).

Users of public facilities under CUPF control must keep their forum open to the public, although their membership may not be similarly open. We can distinguish the contrary cases cited above on three basis: (1) as noted above, state law requires that meetings in school facilities "shall be open to the public," (2) county law requires that CUPF make public facilities available for "community" use and (3) CUPF's building use form prohibits private meetings in public facilities under its jurisdiction.

II. OTHER LAWS THAT CAN REQUIRE A DISCRIMINATORY USER TO OPEN ITS MEMBERSHIP

That is not to say that others laws will not require a discriminatory user to open up its membership. Title III of the ADA prohibits certain private entities from discriminating based upon disability in places of public accommodation and commercial facilities. And the federal, state and local public accommodations laws may forbid even private groups from using discriminatory membership policies.

A. The ADA

While the express language of Title II of the ADA applies only to programs that a public entity sponsors or promotes, the federal regulations that implement the ADA and the Justice Department's Technical Assistance Manual interpret this provision more broadly, suggesting that in situations like this, where a public entity has a close relationship with a private entity, Title II obligates the public entity to ensure that the private entity complies with Title III.[50]

The federal regulations that implement the ADA provide that a public entity, in providing any service, may not, directly or through contractual, licensing, or other arrangements, aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an organization or person that discriminates on the basis of disability in providing any or service to beneficiaries of the public entity's program.[51] The regulations also provide that a public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.[52]

In its ADA Title II Technical Assistance Manual, the Department of Justice opined that,

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[50]Title II of the ADA requires the government to make its programs, activities and services generally accessible to a qualified individual with a disability. Title III similarly prohibits discrimination based upon disability in non-governmental places of public accommodation and commercial facilities.

[51]28 C.F.R. § 35.130(b)(1)(v).

[52]28 C.F.R. § 35.130(b)(3)(i).

where private and public entities have a close relationship, the public entity is obligated to ensure that the private entity complies with the ADA.

> A privately owned restaurant in a State park operates for the convenience of park users under a concession agreement with a State department of parks. As a public accommodation, the restaurant is subject to title III and must meet those obligations. The State department of parks, a public entity, is subject to title II. The parks department is obligated to ensure by contract that the restaurant is operated in a manner that enables the parks department to meet its title II obligations, even though the restaurant is not directly subject to title II.[53]

While the issue is debatable, it is likely that a court would require both MCPS and CUPF ensure that disabled persons are permitted access to programs that are conducted at public facilities. MCPS and CUPF are responsible for funding any accommodations that are necessary to permit disabled persons to have access to those programs. But this obligation is not unilateral. The private group that uses the public facility is charged with the same level of responsibility as the public entity and must also ensure that it is in compliance with the ADA. There is no prohibition against the public and private entities sharing the cost of compliance. Of course, a public entity may not place a "surcharge" on disabled persons to recover the cost of complying with the ADA. 28 C.F.R. § 35.130 (b)(8)(f).

It would be prudent for CUPF to condition the use of its facilities upon compliance with Title III of the ADA. (I will include this language in my revisions to the building use form.) Although the express provisions of the ADA do not require this, neither do they preclude a public entity from doing so. If CUPF receives a compliant regarding a user's alleged violation of Title III, it should informally investigate the matter and, after giving the user an opportunity to respond, act accordingly. But given that CUPF has neither the expertise nor the facilities to conduct a formal hearing on these types of complex claims, its decision may have to await the outcome of any formal Title III complaint lodged against the user.

B. Public Accommodations Laws

The County's public accommodation law[54] might also serve to prohibit a speaker's discriminatory membership policy. That answer turns on two issues.

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[53]Title II Technical Assistance Manual § II-1.3000 ("Relationship to Title III") illustration no. 1.

[54]MCC § 27-1(c) states that the prohibitions in the Human Relations Commission Article are substantially similar, but not necessarily identical to, prohibitions in federal law (Title II of the 1964 Civil Rights Act, is located in 42 U.S.C. § 2000a) and state law (Md. Ann. Code Art. 49B, § 5 (1986 Repl. Vol., 1988 Cum. Supp.)).

First, whether the speaker (*e.g.*, whether it be the KKK, the Boy Scouts, or a local book club) is a "place of public accommodation" under County law.[55] The reported appellate decisions involving the County's law concern its application to fixed, physical sites, not clubs.[56]

Second, even if the speaker is a "place of public accommodation," it may also be an exempt "private accommodation" under the County law or the government might violate the group members' First Amendment freedom of association rights if they are not permitted to retain their discriminatory membership policy. This issue is pending before the Supreme Court.[57]

ebl
cc: Marc P. Hansen, Chief, General Counsel Division
Robert Schochinski, Assistant County Attorney

00-1741 (CUPF)
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[55] *United States Jaycees v. Massachusetts Comm'n Against Discrimination,* 463 N.E.2d 1157 (Mass. 1984) (Jaycees are not a "place of public accommodation under state public accommodation law); *United States Jaycees v. Richardet,* 666 P.2d 1008 (Ala. 1983) (same); *United States v. Bloomfield,* 434 A.2d 1379 (D.C. 1981) (same); *Kiwanis Int'l v. Ridgewood Kiwanis* Club, 806 F.2d 468 (3rd Cir. 1986) (Kiwanis Club is not a "place of public accommodation" within meaning of New Jersey statute).

[56] *Holiday Universal Club v. Montgomery County,* 67 Md. App. 568, 508 A.2d. 991, *cert. denied,* 307 Md. 260, 515 A.2d 314 (1986) (applied to Rockville Holiday Spa); *Peppin v. Woodside Delicatessen,* 67 Md. App. 39, 506 A.2d 263 (1986) (applied to the Woodside Delicatessen). *But see United States Jaycees v. McClure,* 305 N.W.2d 764, 768 (Minn. 1981) (Jaycees are a "place of public accommodation" under Minnesota public accommodations law); *New York State Club Ass'n v. City of New York,* 69 N.Y.2d 211, 505 N.E.2d 915 (1987), *aff'd on other grounds,* 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (application of NYC Admin. Code § 8-102(9) (1986), which includes "clubs" within its purview, to membership organizations); *Rotary Club of Duarte v. Board of Dirs.*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986), *aff'd on other grounds,* 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) (application of Cal. Civ. Code Ann. § 51 (West 1982), which includes "all business establishments of every kind whatsoever," to Rotary Clubs).

[57] *Boy Scouts of America v. Dale,* 734 A.2d 1196 (N.J. 1999), *cert granted,* 120 S. Ct. 865, 145 L. Ed. 2d 725 (2000).