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TO: Isiah Leggett
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VIA: Leon Rodriguez
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FROM: Nowelle A. Ghahhari
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RE: Public Use of Ellsworth Drive

QUESTION

Do Ellsworth Drive,and its adjoining sidewalks and walkways, and other public use areas (collectively, " Ellsworth Drive") constitute public fora such that PFA Silver Spring, LC, is limited in implementing restrictions on the First Amendment rights of users of Ellsworth Drive?

ANSWER

Ellsworth Drive constitutes a public forum. Thus, PFA Silver Spring, LC may only implement reasonable time, place and manner restrictions on protected speech which are content-neutral, narrowly tailored to serving a significant purpose, and which allow for reasonable alternative avenues of expression, or content-based restrictions which are narrowly tailored to serving a compelling purpose.

BACKGROUND

In April of 1998, Montgomery County entered into a General Development Agreement with PFA Silver Spring LC (the "Developer"), a Maryland limited liability company, for the Redevelopment of Downtown Silver Spring as part of the County's Silver Spring Retail Redevelopment Urban Renewal Project. The project was to entail the creation of mixed use space, consisting of retail, entertainment, restaurant, office, hotel and public use space. Central to the Agreement was the lease to the Developer of several parcels of property in downtown Silver Spring owned by the County, including the portion of Ellsworth Drive extending between Fenton Place and Georgia Avenue. The County retained an easement over specific portions of the leased properties for vehicular and pedestrian use.

In September of 2002, pursuant to the terms of the Development Agreement, the County entered into a lease with the Developer and recorded a Declaration of Easements in the Land Records. The Declaration of Easements provided that the County reserved "Public Use Easements" over several of the leased parcels, including Interior Ellsworth Drive, the Gateway Plaza, the Silver Spring Plaza, an area referred to as the "Breezeway Easement Area," and all adjacent streets and ways. The easements defined the areas as "Public Use Space," pursuant to Section 59-A-2.1 of the Zoning Ordinance of Montgomery County, which provides that public use space is "[s]pace required by the sector plan and other space devoted to such uses as space for public enjoyment." The County retained a "perpetual non-exclusive easement and right of passage and use, free of charge," for pedestrian and vehicular ingress and egress on, over and across the public use spaces.

In addition to the Public Space Easements, the County also retained the right to close Interior Ellsworth Drive, Gateway Plaza, and Silver Spring Plaza four times per year for public festivals. The Developer retained the right to close any one or all three of those spaces to public *vehicular*, but not *pedestrian*, traffic from time to time, as well as the right to "impose and enforce such reasonable rules and regulations as [the Developer] deems necessary to maintain order and to promote the safety, security and economic success of the Downtown Silver Spring Project."

In June of 2007 it came to the County's attention that the Developer was requiring anyone wishing to take photographs on Interior Ellsworth Drive to register with its security office. Timothy Firestine, Chief Administrative Officer for Montgomery County, subsequently requested a legal opinion as to whether the Developer has the ability to so restrict photography and other expressive activities on Ellsworth Drive.

DISCUSSION

A. Public Fora:

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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."[1]

In ascertaining what limits, if any, may be placed on speech protected by the First Amendment, the determining factor is the nature of the forum in which the speech occurs. *Int'l Soc'y For Krishna Consciousness, Inc. v. Rumbaugh*, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541, 549-40 (1992); *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420, 428 (1988). The Supreme Court of the United States has identified three types of fora: the "traditional" public forum, the public forum created by government designation, and the nonpublic forum. *Frisby*, 487 U.S. at 479, 108 S.Ct. at 2500, 101 L.Ed.2d at 428; *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567, 580 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.* , 460 U.S. 37, 44, 103 S.Ct. 948, 955, 74 L.Ed.2d 794, 804-05 (1983). Traditional public fora are "those places which 'by long tradition or by government fiat have been devoted to assembly and debate'." *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449, 87 L.Ed.2d at 580, quoting *Perry Education Assn.*, 460 U.S. at 45, 103 S.Ct. at 954, 74 L.Ed.2d at 804. Streets, sidewalks, and parks historically have been associated with the free exercise of expressive activities, and therefore are generally considered to be traditional public fora. *United States v. Grace*, 461 U.S. 171, 178, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736, 744 (1983). *See also Perry Education Assn. v. Perry Local Educators' Assn.* , 460 U.S. at 45, 103 S.Ct. at 954-55, 74 L.Ed.2d at 804; *Hague v. Committee For Industrial Organization*, 307 U.S. 496, 515-16, 59 S.Ct. 954, 964, 83 L.Ed. 1423, 1436 (1939) ("Wherever the title of streets and parks may rest, 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").

[1] Article 40 of the Maryland Declaration of Rights provides "[t]hat the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." The Maryland Court of Appeals interprets the provisions of the First Amendment to the United States Constitution *in pari materia* with Article 40 of the Maryland Declaration of Rights, and therefore will usually consider claims raised under both provisions together as one issue. *Lubin v. Agora*, 389 Md. 1, 17 n.8, 882 A.2d 833, 843 n.8 (2005).

The fora implicated in this case, a street and its adjoining sidewalks and walkways, therefore would constitute a traditional public forum, but for the fact that they are privately leased. Because the First Amendment applies to state actions and not the actions of private property owners, private property must assume significant attributes of public property dedicated to public use before the First Amendment's protections will apply, and the fact that the public is generally invited to use the property for a designated use does not automatically extinguish the property's private nature. *Central Hardware Co. v. Nat'l Labor Relations Board*, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569, 92 S.Ct. 2219, 2229, 33 L.Ed.2d 131, 143 (1972).

In determining whether privately owned property is subject to the strictures of the First Amendment, Courts have looked to the following factors: whether the property shares physical similarities with more traditional public fora; whether the government has permitted or acquiesced in broad public access to the property; whether it historically has been used as a public forum; and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. *Int=l Soc=y for Krishna Consciousness*, 505 U.S. at 698-99,112 S.Ct. at 2718, 120 L.Ed.2d at 563 (Kennedy, J., concurring in judgment).

In *United States v. Grace*, 461 U.S. at 171, 103 S.Ct. at 1702, 75 L.Ed.2d at 736, the United States Supreme Court addressed whether the sidewalk in front of the Supreme Court building constitutes a public forum. Emphasizing that the Supreme Court building and grounds are not public forum property, the Court then noted, conversely, that "[s]idewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally, without further inquiry, to be public forum property." *Id.* at 179, 103 S.Ct. at 1708, 75 L.Ed.2d at 745. Emphasizing that "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave," the Court held that the sidewalk in front of the courthouse was a public forum for First Amendment purposes. *Id.* at 180, 103 S.Ct. at 1708, 75 L.Ed.2d at 745.

Applying the factors set forth in *Grace*, the Ninth Circuit Court of Appeals held in *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937 (9th Cir. 2001), that the sidewalk in front of the Venetian Casino in Las Vegas, although privately owned, constituted a public forum. In *Venetian Casino Resort*, the casino had entered into an agreement with the Nevada Department of Transportation to construct a sidewalk to replace the previously publicly owned sidewalk in front of the casino which was to attach on both sides of the Venetian's property to public sidewalks "for the purpose of providing unobstructed pedestrian access," whereby the casino agreed to "remove or modify the [Venetian's] improvements at the [Venetian's] expense if they become a hazard or obstruction to either

pedestrian or vehicular traffic." *Id.* at 940. In declaring the private sidewalk to be a public forum, the Court noted that "[t]his replacement sidewalk is a thoroughfare sidewalk, seamlessly connected to public sidewalks on either end and intended for general public use," that, "historically, the sidewalk in front of the Venetian and adjacent to Las Vegas Boulevard had been historically a public forum," and that "[t]here is also little to distinguish the replacement sidewalk in front of the Venetian from the connecting sidewalk in front of the Venetian or from the connecting public sidewalks to its north and south." *Id.* at 943, 944, 945.

In *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th 2002), the Salt Lake City Corporation sold to the Church of Jesus Christ of Latter-Day Saints a portion of Main Street in downtown Salt Lake City, which the Church closed to vehicular traffic and transformed into a pedestrian plaza. The City retained, however, an easement over the street for "pedestrian access and passage only" while declaring that "[n]othing in the reservation or use of this easement shall be deemed to create or constitute a public forum." *Id.* at 1118. The Court of Appeals for the Tenth Circuit held that, despite the easement's express language to the contrary, the street remained a public forum because "it forms part of the downtown pedestrian transportation grid, and it is open to the public" and therefore "shares many of the most important features of sidewalks that are traditional public fora." *Id.* at 1124. The Court further explained that "the use of this property, which is similar to a traditional public sidewalk, is compatible with expressive activities." *Id.* at 1128. Thus, it concluded that, "[i]n retaining the easement, the City not only retained the most important functions of the property, but also the functions most often associated with speech activities." *Id.* at 1131.

Similarly, in *United Church of Christ v. Gateway Economic Development Corporation of Greater Cleveland, Inc.*, 383 F.3d 449 (6th Cir. 2004), the Sixth Circuit Court of Appeals held that the privately owned sidewalk outside of the Gateway Sports Complex constituted a public forum. The sidewalk, which encircles the complex, is owned by a private entity that retains the right to exclude "all persons from using the Gateway Sidewalk . . . to solicit, advertise, or protest." *Id.* at 451. The Court emphasized in its holding that there are "two key reasons" why the Gateway Sidewalks constitute a public forum: because it "blends into the urban grid, borders the road, and looks just like any public sidewalk" and is "made of the same materials and share the same design" as the public sidewalk; and because "like its publicly owned counterparts, [it] also is a public thoroughfare" and "contributes to the City's downtown transportation grid." *Id.* at 452. In sum, the Court concluded that the Gateway Sidewalk "differs from those sidewalks that have not been held to be public because it is fully integrated into the downtown and indistinguishable from its adjoining publicly owned sidewalk both physically and in its intended use." *Id.* at 453. *See also The World Wide Street Preachers' Fellowship v. Reed*, 2006 U.S.Dist. LEXIS 4763, *20 (M.D. Pa. 2006) (holding that a privately owned sidewalk constituted a public form because it was "contiguous with the other portions of the sidewalk").

Conversely, courts have held that privately owned streets and sidewalks do not constitute public fora for First Amendment purposes when the public does not have the right to unrestricted passage on the street or sidewalk, and the street or sidewalk was readily distinguishable from other publicly owned thoroughfares. For example, in *Gibbons v. Texas*, 775 S.W.2d 790 (Tex. App. 1989), the Texas Court of Appeals held that a church-owned street was not a public forum. The street in *Gibbons* was bordered on both sides by church property, and the "church retain[ed] control of the privately owned street at all times and reserve[d] the right to close it off to the public at any time." *Id.* at 793. In *S.O.C., Inc. v. The Mirage Casino-Hotel*, 117 Nev. 403 (Nev. 2001), the Supreme Court of Nevada determined that privately-owned sidewalks on the property of two Mirage Resorts were not public forums. Both sets of sidewalks in that case contained signs posted at various points indicating that they are private property; one sidewalk also was constructed of wooden planks consistent with the theme of the casino, was elevated off the ground, and was separated from the road by a parallel publicly owned sidewalk, while the other sidewalk ran along the interior driveway of the casino and bordered the casino's water attraction.

In this case, Interior Ellsworth and its adjoining sidewalks and walkways share physical similarities with more traditional public fora; have been reserved by the County for broad public access; have historically been used as public fora; and are conducive to expressive activity – that is, expressive activity does not interfere in a significant way with their use. More specifically, the streets, sidewalks and walkways in this case are not in anyway distinguishable from other, publicly owned streets, sidewalks or walkways; they form a part of both the vehicular and pedestrian transportation grids of downtown Silver Spring, and are not marked "private." Further, the Developer has no power under the lease to restrict pedestrian ingress or egress over these areas, and the Developer's ability to restrict vehicular ingress and egress is substantially limited to occasional closures. Before the County leased these spaces to the Developer, they were public fora. Thus, interior Ellsworth is a public forum. Moreover, given the terms of the lease, there is little doubt that the Gateway Plaza, the Silver Spring Plaza and the area referred to as the "Breezeway Easement Area," and all adjacent streets and ways thereto are public fora as well.

B. Limitations on Regulations:

In a traditional public forum, such as Ellsworth Drive, the government or government actor[2] may implement and enforce either content-based regulations of protected speech that are necessary to serving a compelling state interest, and which are narrowly tailored to achieving that purpose (strict scrutiny analysis), *Perry Education Assoc. V. Perry Local Educators= Assoc.*,

[2] In this context, "government actor" means the private entity that holds the private property interest, like the casino in *Venetian Casino Resort* and the church in *First Unitarian Church of Salt Lake City*. Although Developer is not the County's agent, Developer is a government actor in the context of this discussion.

460 U.S.37, 44, 103 S.Ct. 948, 955 (1983); or the government or government actor may impose time, place and manner regulations which are content-neutral, narrowly tailored to serve a significant government interest, and which leave open ample alternative channels of communication. *Id. See also Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753 (1989). With regard to time, place and manner restrictions, the regulation does not have to be the least restrictive means of serving the government interest, so long as the means chosen are not substantially broader than necessary to achieve the government=s interest. *Ward*, 491 U.S. at 798-99, 109 S.Ct. at 680.

C. Photography and Freedom of Expression:

The First Amendment protection of speech engenders a penumbra of rights, such as the right to express ideas, to be exposed to ideas expressed by others, to communicate with the government, and to associate with others in the expression of ideas and opinions. *Brown v. Glines*, 444 U.S. 348, 362-63,100 S.Ct. 594, 606, 62 L.Ed.2d 540, 553 (1980) (Brennan, J., dissenting). Not all forms of expression are protected, however; thus, some forms of speech are not subject to the strictures of the First Amendment. For example, libel, child pornography, obscenity, and fighting words have been recognized as forms of speech which may be freely regulated. *See R.A.V. v. St. Paul*, 505 U.S. 377, 382-83, 112 S.Ct. 2538, 2542-43, 120 L.Ed.2d 305, 317 (1992).

Nevertheless, the United States Supreme Court has recognized that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614 (1973). Thus, picketing, parading, boycotting, marching, demonstrating, as well as pamphleteering, are all forms of expression that the have been recognized as speech protected by the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). The First Amendment also protects expression in the form of entertainment such as motion pictures, programs broadcast by radio and television, as well as live entertainment, such as musical and theatrical performances. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671, 678 (1981). And forms of artistic expression such as music, painting, poetry, pictures, drawings, engravings, and photographs, also are protected by the First Amendment. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569, 115 S.Ct. 2338, 2345, 132 L.Ed.2d 487, 501 (1995); *Kaplan v. California*, 413 U.S. 115, 119-120, 93 S.Ct. 2680, 2684, 37 L.Ed.2d 492, 497 (1973). *See also Massachusetts v. Oakes*, 491 U.S. 576, 591, 109 S.Ct. 2633, 2642 (1989) (Brennan, J., dissenting) (APhotography, painting, and other two-dimensional forms of artistic reproduction . . . are plainly expressive activities that ordinarily qualify for First Amendment protection.@).

Thus, the publication, dissemination, and display of photographs have long been recognized as protected speech. *See Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997). Although the courts have not definitively resolved the issue of whether the taking, as opposed to the display, of photographs is a protected expressive act, we think it likely that a court would consider the taking of the photograph to be part of the continuum of action that leads to the display of the photograph and thus also protected by the First Amendment.

CONCLUSION

Ellsworth Drive is a public forum in which restrictions upon expressive activities are subject to the protection of the First Amendment. Thus, the Developer must comport with the First Amendment in exercising its right to implement reasonable rules and regulations to maintain order and promote the safety, security and economic success of the property.