

Legal Q&A

By Lauren Ford Crawford, TML Legal Counsel

June 2009

Is a city allowed to treat nonresidents differently than residents?

It depends. The answer to that question comes from complex court decisions based on both the U.S. and Texas Constitutions.

According to the Fourteenth Amendment to the U.S. Constitution, a person who is a resident of a state has the right to “equal protection under the laws” and all of the privileges and immunities of the laws of the government, and may not be discriminated against because of gender, religion, ethnicity, or racial background. U.S. CONST. AMEND. 14. These rights are also protected under the Texas Constitution, which provides that “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” TEX. CONST. ART. I § 19.

In addition, citizens are entitled to freedom of speech pursuant to the First Amendment to the U.S. Constitution. Other state and federal laws may also be relevant to the question. The following sections address some of the common questions received by the TML Legal Department about treating those who live outside the city differently than those who live inside.

What is the difference between a traditional public forum, a limited or designated public forum, and a non-public forum for the purposes of free speech issues?

The First Amendment to the U.S. Constitution protects the rights of citizens to be free from government restrictions on their speech. U.S. CONST. AMEND. 1. The Texas Constitution also protects citizens from government restrictions on speech, stating that “no law shall ever be passed curtailing the liberty of speech.” TEX. CONST. ART. 1 § 8. The U.S. Supreme Court has held that not all public property is the same, and any speech restriction on governmental property must be evaluated based on the property in question. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983). There are three basic categories of government property, differentiated by the limitations that may be placed on right of access to that public property.

The first category is made up of property that “by long tradition or by government fiat ha[s] been devoted to assembly and debate.” *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). A location of this type is known as a “traditional public forum” and would include public streets and parks. *De la O v. Housing Authority of the City of El Paso*, 417 F.3d 495, 502-03 (5th Cir. 2005), citing *Perry*, 460 U.S. at 45. In such a forum, government restrictions on speech would be limited to regulations of the time, place, and manner of the speech, restrictions which are narrowly tailored to serve a significant governmental interest and which do not discriminate by content (are “content-neutral”) and leave open alternatives for communication. *Perry*, 460 U.S. at 45. For example, a city would need to limit its regulations regarding a demonstration in a public park, since that is a traditional public forum where a member of the public has a right to speak.

The U.S. Supreme Court has also held that a governmental entity may create a forum that is not traditionally open to the public but has been opened by the governmental body for limited use by certain groups or for discussion of certain subjects. *Pleasant Grove City, UT v. Summum*, 129 S.Ct. 1125, 1127 (2009), citing *Perry*, 460 U.S. at 46 n.7. This type of location is known as a “limited” or “designated public forum.” Similar to a public forum, a city may impose restrictions on speech in such a forum, so long as those restrictions are reasonable and content-neutral. *Pleasant Grove*, 129 S.Ct. at 1127, citing *Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001). While this type of forum will be discussed in more detail in another section of this article, some might argue that a city theater or city-owned meeting space that is rented out to organizations could qualify as a limited public forum; thus, a city could limit the use of these spaces to certain types of organizations, so long as the restrictions were not based on the viewpoint of the organization.

Some property owned by a city may be designated as “non-public,” or not open for public speech. In such a forum, a city may base restrictions on speech and use of the property based on subject matter and the identity of the speaker, so long as the restrictions are reasonable and content-neutral. *Good News Club*, 533 U.S. at 131, citing *Cornelius*, 473 U.S. at 806. It could be argued that the administrative offices of a city hall that are not open to the public could be designated as a non-public forum, and thus a city could enact more restrictive policies regarding public speech.

These designations are all open to interpretation and can be complex. The TML Legal Department strongly recommends discussing this issue with the city’s local legal counsel before adopting any policy that restricts speech on city-owned property.

May a city utility charge a different utility rate to customers living outside city limits?

Because charging a higher utility rate to nonresidents creates a situation in which similarly situated people are treated differently, the city would have to present an important government interest in charging the nonresidents higher rates to avoid violating the ratepayers’ right to equal protection under the law. *See* U.S. CONST. AMEND. 14; TEX. CONST. ART. I § 19. In *City of Texarkana v. Wiggins*, the Supreme Court of Texas held that taxes due to a bond did not create enough of a governmental interest to justify different rates for residents and nonresidents, stating that “the limits of a municipal corporation, of themselves, do not furnish a reasonable basis for rate differentiation.” 246 S.W.2d 622, 626 (Tex. 1952). But the court also held that if providing service costs more for nonresidents, such a difference would be reasonable. *Id.* at 626, 627. In contrast, in *Starns v. Malkerson*, the District Court of Minnesota, with the United States Supreme Court affirming the judgment, held that charging nonresidents a higher tuition rate to attend a state university or requiring them to live in the state for a year to establish residency was valid under the Constitution because residents had contributed to the state economy and paid taxes, and nonresidents had not. 326 F.Supp. 234, 240-41 (D.C. Minn. 1971).

A city wishing to charge higher rates outside the city limits should also keep in mind that under Texas Water Code § 13.043, within 30 days after the date of a final decision on a rate change, a city-owned utility shall provide individual written notice to each ratepayer eligible to appeal who

resides outside the boundaries of the city. If the Texas Commission on Environmental Quality, upon appeal, determines that the rates imposed on the out-of-city customers is unreasonable, it may fix new rates in its final order and include reasonable expenses. TEX. WATER CODE § 13.043.

May a city restrict the use of city facilities to organizations sponsored by people who live in the city?

Under both the U.S. and Texas Constitutions, a law is required to have a rational basis in a legitimate government purpose if it differentiates between two groups of people, particularly if they appear to be similarly situated. Any ordinance that differentiates based on resident status must, to be valid, address a legitimate or important government interest. TEX. CONST. ART. I, § 19; *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985); U.S. CONST. AMEND. 5; U.S. CONST. AMEND. 14; *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

In *Plyler v. Doe*, the U.S. Supreme Court held that a state law depriving undocumented children of the right to be educated in the state's schools simply because of the children's immigration status violated the equal protection clause of the U.S. Constitution. *Plyler*, 457 U.S. at 230. The decision was based on the arbitrary nature of the citizen distinction versus the children's important interest in being educated. *Id.* For the distinction to be acceptable under the equal protection clause, the state had to show a substantial relationship to an important government interest that is served by such a law; for example, that refusing to educate undocumented children would improve the overall quality of education in the State, or that educating undocumented children costs more than educating legally documented children. *Id.* at 229-30.

This concept carries over to the use of recreational and meeting facilities of a city. Though access to these facilities may not seem to be as important as access to public education, the city would still have to show at least an important government interest in denying access based solely on resident/nonresident status. The safest avenue for a city would be to allow nonresidents to use city facilities, because any government interest would be disputed as being not as important as the right of the nonresidents to use the facilities.

However, a city may be able to argue successfully based on *Starns* that a citizen has contributed through taxes to support a recreational center or city meeting facility, unlike a nonresident, and thus charge more for use of these facilities by nonresidents. *Starns*, 326 F.Supp. at 240-41. Such a policy should be discussed with the city's attorney before enactment.

May a city restrict public comment at city council meetings to only people who live in the city?

The Eleventh Circuit federal court in Florida has held that a city council meeting is a limited public forum. As such, a city may enact restrictions that do not differentiate on the basis of content ("content-neutral"). *Rowe v. City of Cocoa, FL*, 358 F.3d 800, 802-03 (11th Cir. 2004). The restrictions may be based on the time, place, and manner of access, so long as the restrictions are narrowly tailored to serve a significant public interest. *Id.* The same court held in a different case that conducting orderly, efficient meetings of public bodies is a significant

government interest. *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th Cir. 1989), citing *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976). The same argument is made in support of equitably enforced time limits on public comment. *Jones*, 888 F.2d at 1333; *Shero v. City of Grove, OK*, 510 F.3d 1196, 1202-03 (10th Cir. 2007). In *Rowe*, the court held that since city council meetings are held in order to conduct the business of the city for the city's residents, it is reasonable for a city to restrict public comment to persons who have a direct interest in the business of the city, such as city taxpayers or customers of the city-owned utility. 358 F.3d at 803.

None of these courts is binding on Texas courts, however, and the Fifth Circuit remains silent on this issue. Thus, the most prudent course of action is to permit all comers to speak at a council meeting. The TML Legal Department strongly recommends that a city discuss this issue with its local legal counsel before enacting any related policy.

May a city have special requirements for peddlers or solicitors who are not based in the city?

Probably not. The City of Billings, Montana, enacted an ordinance declaring uninvited door-to-door salespersons who did not have an office within the city to be a nuisance and prohibited them from doing business via solicitation in the city. The Montana Supreme Court held that this was a violation of the equal protections offered under the U.S. Constitution. *Tipco Corp., Inc. v. City of Billings*, 642 P.2d 1074, 1078 (Mont. 1982), citing U.S. CONST. AMEND. 14. The court held that equal protection of the laws required that all persons under like circumstance be treated alike. *Id.* In order to show that the ordinance was not purely arbitrary and thus discriminatory, the city needed to show that the restrictions therein were rationally related to achieving a legitimate governmental purpose. *Id.* The court held that uninvited door-to-door solicitors were no less of a nuisance if they were employees of local businesses than if they came from out of town. *Id.* Thus, while the restrictions in the ordinance were content-neutral and not in violation of the First Amendment, the court held that they were arbitrary and violated the equal protections of law offered by the Fourteenth Amendment. *Id.* at 1078-79.

One exception to this general rule may apply with regard to solicitation rules set for a housing complex owned and operated by a city's housing authority. In El Paso, the housing authority created a set of policies prohibiting door-to-door sales and requiring nonresidents wishing to enter the complex for political and/or religious activities to provide advance notice to the complex's manager and to solicit only between certain hours. *De la O v. Housing Authority of the City of El Paso*, 417 F.3d 495, 502 (5th Cir. 2005). In this case, which is binding on Texas federal courts, the court held that the complex, while it was a publicly-owned property, was a non-public forum, and thus the authority had much greater latitude in restricting the activities of nonresidents. *Id.* at 503, citing *Perry*, 460 U.S. at 46. The court held that the government's stated interest of preventing crime by requiring notice when nonresidents intended to solicit in the complex was "obviously a weighty one," (*Id.* at 504) and that in light of the overriding need to provide safe housing, they were constitutional with respect to the restrictions on nonresidents. *Id.* at 508.