



May 15, 2014

The Honorable Charles R. Samuels, President
The Honorable Ellen F. Robertson, Vice President
The Honorable Jonathan T. Baliles, Chris A. Hilbert, Kathy C. Graziano,
Parker C. Agelasto, Cynthia I. Newbile, Reva M. Trammel, and
Michelle R. Mosby, Members of the City Council of Richmond
900 E. Broad Street
Richmond, Virginia 23219

Dear President, Vice President and Members of Council:

This week Rebecca Glenberg, the ACLU of Virginia's Legal Director, sent the enclosed letter to the City Attorney raising concerns about the lease the City signed recently which essentially turns Monroe Park over to a private entity for thirty years. As you'll see in the letter, our concern is the protection of the First Amendment rights of the people who seek to use the park for expressive activities. The letter explains that even while it is leased to a private party, Monroe Park remains a "traditional public forum" – government property where the Supreme Court has said that free speech rights are most protected.

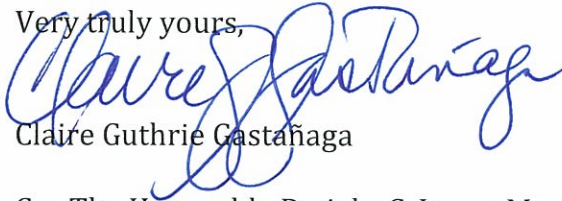
The ACLU of Virginia believes that, as public space becomes increasingly scarce, it is essential that we maintain public parks as forums for expression. As our Legal Director points out in her letter, the lease the City has signed leaves many questions unanswered about the public's right to use the park for free speech purposes. These include whether individuals and small groups will be able leaflet and collect petition signatures in the park without a permit, and whether the lessee will be able to enter into extended subleases with entities that may exclude the public. Our letter asks the City Attorney to provide answers to those questions.

As you all know, the lease allows the lessee to develop policies for the use of the park, but does not specify whether the policies must respect the free speech rights of the public. A separate agreement grants City Council veto power over the use policies. This imposes an important burden on the City Council to ensure that the First Amendment rights of the public are protected fully in the use policies.

Policies that fail to protect the public's free speech rights could expose both the City and the park lessee to liability.

The ACLU of Virginia will be monitoring the situation closely and would like to work cooperatively with the City and its attorney to ensure that any use policies you approve meet all the applicable constitutional requirements, are consonant with the underlying goals of the First Amendment, and protect fully the public's right to speak without government interference and to access the Park as a public forum. As this process moves forward, however, we will not hesitate to step in if we believe that First Amendment rights are being violated.

Very truly yours,



Claire Guthrie Castañaga

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Cc: The Honorable Dwight C. Jones, Mayor
Enclosure



May 14, 2014

Via Electronic Mail

Allen L. Jackson
City Attorney
900 E. Broad St., Suite 300
Richmond, VA 23219
ALLEN.L.JACKSON@RICHMONDGOV.COM

Re: Monroe Park Lease

Dear Mr. Jackson:

The City of Richmond has granted a thirty-year lease of Monroe Park to Monroe Park Conservancy (MPC), a private entity. The ACLU of Virginia has reviewed the lease and has significant concerns about the protection of First Amendment rights in the park. We ask that you promptly address these concerns and provide assurances that the park will continue to operate as a public forum for expression.

As you know, public parks are quintessential traditional public forums, 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." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The lease with MPC will not divest the park of its public forum status. See, e.g., *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002); *Corral v. Montgomery County*, 2014 U.S. Dist. LEXIS 27848 (D. Md. Mar. 5, 2014); *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace*, 745 F. Supp. 65, 76 (D. Mass 1990).

Accordingly, Monroe Park must continue to operate as a public forum throughout the term of the lease. This means that speech may only be limited by reasonable time, place, and manner restrictions that "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Moreover, regulations must not give undue discretion to officials. *Id.*

It is not clear whether the lease agreement or any other instrument guarantees these First Amendment protections. Neither the lease nor the authorizing ordinance refers to the park's public forum status or the free speech rights of the public.

The following lease provisions appear to have some bearing on this issue:

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- Section 6(a) provides: “Tenant shall comply with all laws, rules, orders, ordinances and regulations of federal, state, county and municipal authorities pertaining to the Premises”
- Section 6(b) provides: “Tenant, through its Board of Directors, shall establish policies for the use of the Premises (the ‘use policies’). The Use Policies shall be subject to the approval of the Chief Administrative Officer of the City of Richmond or a designee thereof.”
- Section 5(d) provides that MPC “intends to enter into use, sublease, license, and similar agreements with performing arts groups and other third parties to use the Premises or portions thereof” for periods of up to 30 days, and that “the use of the Premises by the sublessee/licensee will not require a permit for such use to be issued by the Landlord pursuant to the Richmond City Code”
- Section 5(d) further provides: “All other subleases and license negotiated by the Tenant shall be subject to the reasonable approval of the Director of the City of Richmond’s Department of Parks, Recreation, and Community Facilities” and “shall require that the subtenant or licensee . . . comply with the use policies established by the Board of Directors of the Tenant.”
- Section 5(d) further provides: “Tenant shall be solely responsible for setting policies for the use of the Premises by third parties, and for negotiating the terms of, all subleases and licenses.”

These lease provisions leave open a number of questions, including the following:

- Will admittance to the park by the general public be governed by state and local law, or MPC’s “Use Policies”?
- Will MPC’s “Use Policies” be required to comply with First Amendment norms concerning the use of a traditional public forum?
- Who will enforce MPC’s “Use Policies”?
- Will the park continue to be available for individual or small group free speech activities (e.g., leafleting, voter registration, soliciting petition signatures) without a permit?
- Will the park continue to be available for larger rallies and demonstrations? Who will be responsible for issuing permits for such events, and under what terms?
- Will subleases/licenses under Section 5(d) of the lease be granted on a content-neutral basis, or with MPC have complete discretion to determine who will be granted such subleases/licenses?

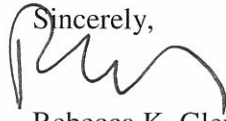
- Will sublessees/licensees using the park under Section 5(d) of the lease be allowed exclusive use of the park during the term of the sublease/license? Will they be permitted to exclude members of the general public?

These questions go to the heart of Monroe Park's continued availability as a forum for free expression. We therefore request an explanation of how these questions are answered under your understanding of the lease. Additionally we urge you to review any "Use Policies" submitted by MPC to ensure that they comply with First Amendment requirements, and advise City Council to reject any that do not pursuant to Resolution No. 2014-R64-64. If "Use Policies" have already been submitted, I hereby request them under the Virginia Freedom of Information Act.

Failure to treat Monroe Park as a public forum will expose both MPC and the City to costly litigation. It is therefore in the interest of all parties to ensure that the First Amendment will be respected.

I would welcome the opportunity to meet with you to discuss this matter further. I can be reached at 804-523-2152 or rglenberg@acluva.org. Thank you for your attention to this matter.

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Sincerely,

Rebecca K. Glenberg
Legal Director