

March 4, 2019

Rhonda Bishton
Regulatory Coordinator
Department of General Services
100 Bank St., Suite 420
Richmond, VA 23219

RE: Lee Monument Proposed Regulations

Dear Ms. Bishton:



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As you know, on January 18, 2018, the American Civil Liberties Union of Virginia (“ACLU-VA”) submitted comments on the NOIRA and Emergency Regulations for Public Use of the Robert E. Lee Monument in Richmond, VA (1 VAC 30-150) (Emergency Regulations) that outlined specific concerns about the Emergency Regulations based on the legal analysis and recommendations set out in the white paper we published titled [*Permitting Demonstrations – Guiding Principles*](#). We enclosed the white paper with our comments and incorporated it by reference.

We have now reviewed the Proposed Regulations for Public Use of the Robert E. Lee Monument in Richmond, VA (1 VAC 30-150) (Proposed Regulations) and were disappointed to find that none of the constitutional concerns we expressed about the Emergency Regulations have been addressed or corrected.

Our analysis of the validity of any regulation of public use of the state-owned Lee Monument grounds is based on the fact that the Lee Monument grounds are and have been a traditional public forum. Lee Monument has always been used as a public park and a public gathering space which has routinely held large events including protests, rallies, Easter Parades, and live music events. Moreover, the Fourth Circuit has ruled that even mere median strips are in fact traditional public forums. The U.S. Supreme Court has said that “the nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.” Because it includes a public walkway and grassy area and has been used traditionally as a public park, the Lee Monument grounds are, in fact and law, a public forum and should be regulated as such.



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1 VAC 30-150-30(F) violates the constitutional requirement that regulation of speech be based on content neutral rules. Accordingly, it does not align with several of the guiding principles set forth in our white paper: Guiding Principle 1: No permitting decisions will be made based on the content of the speech (including anticipated audience reaction to the content of the speech) or the identity of the speaker. Guiding Principle 5: Permit regulations will specify that all permit applications will be granted unless specific, content-neutral, and narrowly defined exceptions apply. Guiding Principle 10: Any other restrictions on free speech will be reasonable, content-neutral, and narrowly tailored to legitimate government interests, and will allow ample alternative means of communication.

1 VAC 30-150-30(F) reads in relevant part: “Certain portions... may not apply to established events that have been approved for more than three consecutive years by the Department of General Services and the City of Richmond permitting processes prior to the enactment of this regulation.” Allowing a “grandfather clause” for all “established” annual events on Monument Avenue, such as the Easter Parade, constitutes content discrimination, where the government favors certain private actors over others. *The ACLU of Virginia recommends removing the “grandfather clause” from the Proposed Regulation or amending the provisions included in the final rules so that they are equally applicable to all based on content-neutral factors.*

1 VAC 30-150-20(2) and 1 VAC 30-150-40(A) violate the constitutional requirement that restrictions on speech be narrowly tailored and, accordingly, that permits be required only when necessary to serve a legitimate government interest and be reasonable time, place, manner restrictions. Accordingly, our Guiding Principle 2 reads as follows: No permits will be required for individuals or small groups (under 20 people) or for spontaneous demonstrations held in response to current events.

Requiring a permit for an event that is expected to draw as few as ten (10) people is not reasonable. The space will and has easily accommodated larger groups without causing a disruption to pedestrian or vehicular traffic. In fact, the Proposed Regulations acknowledge that the space can accommodate up to 500 people if permitted. As it stands now, 10 people could picket while standing on the city-owned sidewalk adjacent to the state property. There is



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no compelling state interest to ban those 10 people from gathering at the base of the monument or walking around the grassy area. ***The ACLU recommends requiring permits only for groups expected to draw 20 or more people.***

Though we appreciate the clarity of a deadline for submitting permits (as Guiding Principle 3 recommends), the provisions in the Proposed Regulations for “spontaneous” demonstrations are unreasonable (1 VAC 30-150-40(A)). Pursuant to the proposed regulations, the permit must be submitted at least 45 days in advance. Even proposed events that are to occur in less than six days require a permit under these regulations (1 VAC 30-150-40(C)). Generally, organizing a large demonstration takes significant time and planning. Thus, the requirement to obtain a permit – so long as the permitting process is reasonable and the decision is prompt – imposes little to no additional burden on speech. There are, however, events that take place in response to a “current” event that allow little or no planning. In these cases, the burden posed by a permit requirement is far higher than in an ordinary demonstration which can be planned in advance. ***Therefore, the ACLU of Virginia recommends that there be an exemption from the permitting requirements for spontaneous demonstrations when it would be impossible for a speaker to seek a permit in advance.***

Other proposals in the Proposed Regulations do not allow for maximum public use and do not appear to be narrowly tailored to achieve a legitimate public purpose. See Guiding Principles 9 (permits may include reasonable, content-neutral limitations on the size of events based solely on administrative considerations such as the capacity of the available space and legitimate law enforcement needs but discretion to impose such limits may not be unfettered) and 10 (any other restrictions on free speech will be reasonable, content-neutral, and narrowly tailored to legitimate government interests, and will allow ample alternative means of communication). For example, events can only occur “Monday through Friday: 9 a.m. to 4 p.m. and 7 p.m. to 9 p.m., Saturday: 9 a.m. to 9 p.m., [and] Sunday: 2 p.m. to 9 p.m.” (1 VAC 30-150-30(A)(1-3)) and “events may last a maximum of two hours, with an additional 30 minutes to set up and 30 minutes to break down the event.” (1 VAC 30-150-30(B)).



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This proposed permit process is overly restrictive, cumbersome, and allows far too much discretion on the part of police and state officials to use the permit process as a pretext for denying permits to controversial speakers and groups. This appears particularly true in light of the prior uses of the area and previous unrestricted access to Lee Monument and the surrounding area and the “grandfather” clause that appears to grant a blanket exception to these restrictions for “established events” like the Monument Avenue 10k, the Easter Parade and the Richmond Marathon, all of which start earlier than “allowed” on Saturday or Sunday and all of which have traditionally featured bands and stages on the Lee Monument grounds from time to time. *The ACLU of Virginia recommends that these restrictions be narrowed and applied uniformly to all events.*

While the Proposed Regulations require that a permit denial be accompanied by written reasons, the rules do not appear to provide constitutional due process in the form of a procedure for appealing the denial or revocation of a permit. Our Guiding Principle 8 addresses that issue: Permit regulations shall provide that a permit will not be revoked without notice and an opportunity to contest the revocation which notice shall be given promptly to provide the applicant enough time to seek an alternative venue or to challenge the revocation. *The ACLU of Virginia recommends that the regulations be amended to provide due process when a permit is denied or revoked.*

Finally, as we said in our comments on the Emergency Regulations, we do not find the provisions related to the regulation of weapons at events held on the Lee Monument grounds objectionable on constitutional grounds. The proposed restrictions on weapons outlined in 1 VAC 30-150-30(C)(1) are reasonable time, place manner rules that do not raise constitutional questions under the First or Second Amendments to the United States Constitution.

There have been suggestions that the administration intends to amend the protest regulations applicable to Capitol Square using these Proposed Regulations to guide that process. The ACLU of Virginia has expressed serious concerns about the constitutionality of the rules governing public access to Capitol Square for First Amendment activities on more than one occasion:

<https://acluva.org/en/press-releases/aclu-virginia-governor-capitol-square-demonstration-regulation-unconstitutional> and

<https://acluva.org/en/news/time-fix-assembly-restrictions-state-capitol>.

We supplied the administration with guidelines we thought should be followed in amending the Capitol Square regulations similar to those now included in the white paper referenced in these comments. Any amendment of the Capitol Square regulations that mirrors any of the Proposed Regulations about which we have constitutional concerns will also be of suspect validity.



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In conclusion, the ACLU of Virginia believes that the Proposed Regulations raise serious constitutional concerns that must be addressed in the rule-making process. We welcome an opportunity to consult with you during the revision process.

Respectfully submitted,

A handwritten signature in blue ink, which appears to read "Claire G. Gastañaga". The signature is fluid and cursive.

Claire G. Gastañaga
Executive Director

Enclosure