

CAMBRIA COMMUNITY SERVICES DISTRICT

TO: Board of Directors

AGENDA NO. **8.C.**

FROM: John F. Weigold IV, General Manager
Timothy Carmel, District Counsel

Meeting Date: June 18, 2020

Subject: DISCUSSION AND CONSIDERATION OF
DESIGNATION OF PUBLIC FORUM ON
DISTRICT PROPERTY

RECOMMENDATIONS:

Staff recommends that the Board of Directors review this staff report and consider and discuss allowing signs on District property and creating a designated public forum.

FISCAL IMPACT:

There are no fiscal impacts associated with this item.

DISCUSSION:

Recently a number of signs were posted on a fence at the skate park on Main Street owned by the CCSD, which, after several complaints were received, were removed by District staff and stored offsite for the owners' retrieval. The signs related to the recent protests regarding Black Lives Matter (BLM). Subsequently, Director Rice contacted District Counsel regarding permitting signs on District property and the issue was then raised during public comment at the June 11, 2020 Board meeting. At that time, it was requested that an item be placed on the June 18, 2020 agenda to enable the Board to discuss the matter. Accordingly, this staff report has been prepared to provide some information regarding the legal issues associated with allowing signage on District property.

Speech issues on public property are governed by a legal concept known as the "public forum" analysis. This relates to how a court analyzes restrictions on speech and what is permissible as far as regulation. There are several types of "public forums," with the broadest protections applying to "traditional public forums" (e.g., parks and sidewalks). In contrast to the public forum, a "non-public forum" is government property that has traditionally not been open to the free exchange of ideas, such as the fence on the District's property where the BLM signs were posted. At such a non-public forum the District can prohibit all signage.

If the Board determines that it want to allow signs to be posted on property that otherwise would be a non-public forum, then it becomes what is called "a designated public forum." That occurs when the government intentionally opens (or "designates") non-traditional areas for First Amendment activity. In contrast to being able to prohibit all signage, the ability to limit or regulate speech activities in a designated public forum is extremely limited once such a forum has been opened up. Regulations for a designated public forum are subject to the same strict scrutiny level of review as a traditional public forum. The District would have to allow any speech activity to take place and cannot regulate based upon content, regardless of how objectionable or offensive it might be.

In the experience of District Counsel, who has represented other public agencies, including cities and special districts, typically public agencies do not permit signage on their property. This is because of the complexities of the First Amendment issues when a “forum” is opened up for constitutionally protected expressive activity. While it is theoretically permissible to have reasonable “time, place and manner” regulations in a public forum, in practice it is very difficult to create legally valid restrictions. The law is that such regulations are closely scrutinized by courts in order to protect free expression. To be valid, they must be justified without reference to the content or subject matter of the speech. They must serve a significant governmental interest (which is a high standard to meet), and must leave open ample alternative channels for communication of the information. Adding to the rule forbidding regulation based on content is the principle that government may not discriminate between different kinds of messages or viewpoints in affording access. These rules are strictly applied by the courts when it comes to expressive conduct and activities. For example, one reference that was looked at in preparing this staff report noted that government may not deny access to the public forum for demonstrators on the grounds that the past meetings of such demonstrators resulted in violence.

The most recent U.S. Supreme Court ruling on signs and the First Amendment, *Reed v. Town of Gilbert, Arizona* (2015) 135 S. Ct. 2218, held that absent a compelling reason, a city may not provide preferential treatment in providing opportunities for posting noncommercial messages on signs based on the signs content. At issue in *Reed* were three categories of noncommercial signs (directional signs, political signs, and what the city referred to as “ideological signs”). Although each was a type of noncommercial sign, the permitted size and number of such signs and duration they could be posted varied based on the type of sign, or rather, the “content” of the sign. In an email exchange with District Counsel, Director Rice asked if a public forum is opened up, whether the District could prohibit the posting of campaign signs. The answer is no, since that would be based upon the sign’s content. It was also asked whether the District could require signs to have names and phone numbers. Since cases have ruled that the First Amendment protects the right to anonymous free speech, it would be unlikely such a requirement would pass legal muster.

A question was also raised regarding the consequences of removing any objectionable signs if a designated public forum was created. If that were to occur, the District would be subject to a Civil Rights lawsuit in Federal Court for violation of the First Amendment rights of the person who posted the sign. Also, any time, place, and manner restrictions the District might try to create could be subject to a legal challenge in a Civil Rights lawsuit. If a public agency loses such a Civil Rights lawsuit, not only does it have to pay its own legal fees, but also the legal fees of the suing party, and often the Court will grant a “multiplier” to the fees, which can be very substantial. Very often groups that engage in free speech activities are quick to sue a public agency and there are attorneys that specialize in such suits, since they can recover large sums of money in attorney’s fees.

An interesting illustration of the dilemma that can be created by opening up a forum was reported on June 11, 2020. Although the context is different in that it involves a city street, as the Board is most likely aware, the Mayor of Washington D.C. had the words “Black Lives Matter” painted in large letters on a street in the city. An organization called Judicial Watch is now demanding that it be allowed to put its own signage on the street. The following is a quote from the Judicial Watch website:

Mayor Bowser made a decision to turn DC streets into a forum for public expression. Judicial Watch seeks equal access to use this new forum to educate Americans by painting our organization's motto and motivation, 'Because No One Is Above the Law!' on a Capitol Hill street," said Judicial Watch President Tom Fitton. "This rule of law message is timely, as it a reminder that rule of law applies to – and protects – all Americans. If we are unlawfully denied access and face viewpoint discrimination, we are prepared to go to court to vindicate our First Amendment rights.

Lastly, it should be noted that staff has some concern that if the Board does designate a free speech area at the skate park or another District property, it might become cluttered and messy and there will be need for staff to perform ongoing maintenance.

It is recommended that the Board discuss and consider creating a designated public forum on District property that would allow signs to be posted by the public.