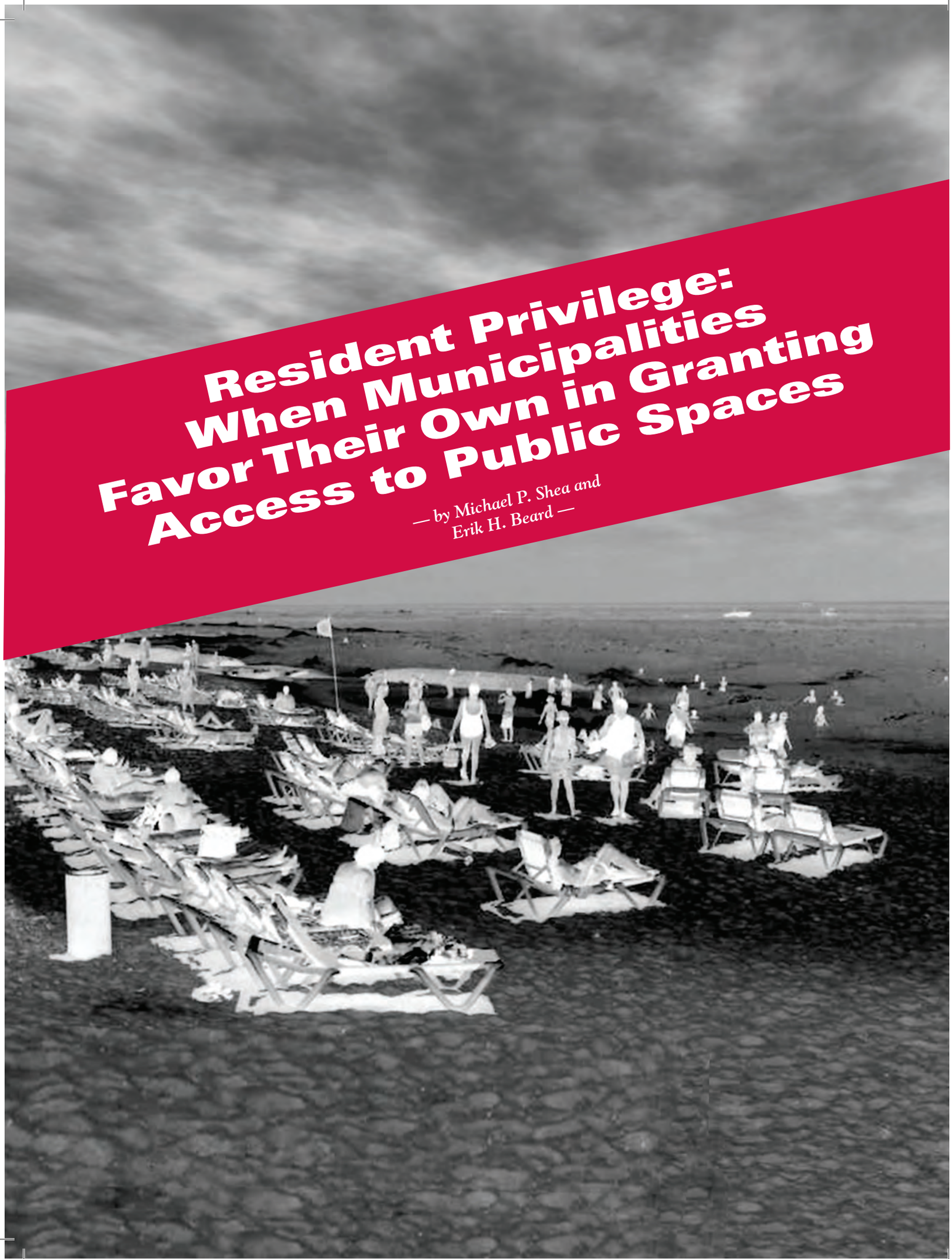


Resident Privilege: When Municipalities Favor Their Own in Granting Access to Public Spaces

— by Michael P. Shea and Erik H. Beard —

Local politicians know that one way to garner goodwill with their electorate is to make their town's increasingly crowded public spaces available to residents on terms not available to out-of-towners. Such preferential treatment conveys a primal message aimed at the resident's sense of pride and ownership: You were smart enough (or wealthy enough) to choose to live in this municipality and you pay the property taxes that support its services, so you should be first in line at the municipal parks, beaches, pools, marinas, parking lots, and the like. If nonresidents don't like it, let them buy a house in town. Such sentiments have led municipalities across the country to adopt resident preferences:

- Greenwich, Connecticut, has adopted policies that offer Greenwich residents exclusive or discounted admission to its popular Long Island Sound beaches.[1]
- Honolulu, Hawaii adopted a policy for the Hanauma Bay Nature Preserve, a beach and wildlife area, that allows Hawaii residents free entry, but charges non-Hawaiians an admission fee.
- Chicago's Park District charges Chicago residents mooring fees that are 25 percent cheaper than the fees charged to nonresidents.
- Arlington, Virginia, extended parking privileges to its residents during the work day, while nonresidents who parked on the same streets were charged with misdemeanors.

Policies like these will only become more prevalent as the population grows and demands on public space increase. The appeal of these policies, however, may be directly proportional to the attendant legal risks. While the legal status of resident preferences is well-established in the context of, say, public schools,[2] these policies often encounter resistance when introduced into public spaces, such as parks, streets, beaches, pools and marinas. Nonresidents often view resident preferences in public spaces as devices aimed at "keeping out the riff-raff," and have challenged them in the courts, with mixed results. Even when unsuccessful, these lawsuits can be expensive and take years to resolve.

To reduce the likelihood of a lawsuit and increase the chances of success if one is filed, municipalities must understand the legal issues raised when they grant their residents preferential access to public spaces. This article discusses two categories of such issues[3]– those arising under the First Amendment and those arising under the Equal Protection Clause[4] – and offers practical suggestions for reducing the municipality's exposure.

The First Amendment

Restrictions on access to public spaces of any kind, including those directed at nonresidents, implicate the First Amendment, which protects rights of speech, association, and assembly, among others. While policies excluding nonresidents from public parks or town greens may be content-neutral and may not even apply to speech on their face, several courts have found that they violate the First Amendment because they reduce opportunities for speech and "balkanize" public discourse by confining the exchange of ideas to residents.[5] Even policies that do not exclude nonresidents, but merely require them to pay fees, or higher fees than those imposed on residents, are considered restrictions on speech.[6] To understand these cases, and to understand how to craft resident preferences that avoid First Amendment concerns, it is necessary to examine the so-called "public forum doctrine," which defines the extent to which the government may restrict constitutionally protected speech[7] on various types of publicly-owned property.[8]

At one end of the forum spectrum are public fora, either traditional public fora, "places which by long tradition or by government fiat have been devoted to assembly and debate,"[9] or designated public fora, property intentionally created by the government "as a place or channel of communication for use by the public at large … or for use by certain speakers, or for the discussion of certain subjects."[10] Traditional public fora include streets, parks, sidewalks, and other places "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."[11] Designated public fora are places not traditionally open to assembly and debate, but those the government nonetheless "intended to designate … as a public forum."[12]

In a public forum, the government's ability to limit access by anyone who might intend to engage in any activities falling under the broad umbrella of constitutionally protected speech is quite limited. Any restriction must be "justified without reference to the content of the regulated speech, … narrowly tailored to serve a significant governmental interest, and … leave open ample alternative channels for communication of the information."[13] The "narrow tailoring" element of this test can be a troublesome hurdle for a resident-preference policy, but it is not an insurmountable one, as shown below.

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Michael P. Shea is a partner in Day Pitney's Commercial Litigation Department and is the leader of Day Pitney's Appellate Practice Group. Mike represents companies and individuals in a variety of commercial disputes, class actions, and government investigations. Recently, Mike successfully defended the Town of Greenwich, Connecticut in a case challenging its beach access policy on First Amendment grounds.



Erik H. Beard is an associate in Day Pitney's Commercial Litigation Department. Erik's practice consists of primarily defense of business and commercial disputes, real estate and tax litigation, and media representation. Erik has also recently concluded a successful representation of the Town of Greenwich, Connecticut in a First Amendment challenge to its beach access policy.

At the other end of the spectrum are nonpublic fora, government property that is not "by tradition or designation a forum for public communication."[14] In a nonpublic forum, such as a military base,[15] jailhouse,[16] or government-owned professional sports complex,[17] "the government may reserve the forum for its intended purposes through reasonable viewpoint-neutral restrictions on expression."[18] Restrictions on access – including residency restrictions – are, thus, far easier to impose for a nonpublic forum. The restrictions "need only be reasonable – they need not be the most reasonable or the only reasonable limitations possible. There is no requirement that the restriction be narrowly tailored or that the government's interest be compelling."[19]

Given this framework, two questions arise for the municipal lawyer: First, since the level of scrutiny applied by the courts depends on the classification of the forum, can the municipality do anything to shape that classification? Second, if the property is considered a public forum, how can a municipality satisfy the "narrow tailoring" test when imposing residency restrictions?[20]

Tinkering with the Forum

Short of selling the land to private parties or permanently changing the use of the land, there is little that a municipality can do to affect the forum determination with respect to a public property as a whole.[21] Nonetheless, there are realistic options for a municipality that wishes to shape the forum classification for limited areas contained within a larger public space.

For example, the court in *Hobbs v. County of Westchester*[22] found that an amusement park located within a public park was a nonpublic forum because it was "largely self-contained … surrounded by fences and gates," and did "not serve as a natural thoroughfare for persons walking from place to place … within [the park.]"[23] The court went on to uphold the government's restrictions on speech as being reasonably related to its interest in maximizing profit.[24] Likewise, in *Presnick v. Delaney*,[25] a swimming pool located in a park was found to be a nonpublic forum due to its distinct "membership and fee requirements," and the fact that it was enclosed inside gates that physically separated it from the rest of the park.[26] The court also noted that finding the pool to have "public forum status would be … inconsistent with … the significant interest in providing poolside safety, not to mention preserving a pleasant atmosphere for [the] paying patrons."[27]

While the courts have refused to recognize a significant governmental interest in policies that *exclude* nonresidents from public fora, they are likely to recognize that policies imposing access fees on nonresidents are supported by legitimate governmental concerns.

Cases like these suggest that municipalities may carve out pockets of public space for their residents – or to which their residents enjoy preferred access – even within areas that might otherwise be considered public fora. Because a resident preference is more likely to withstand First Amendment scrutiny if it is imposed in respect of a nonpublic forum, municipalities should take steps to encourage nonpublic forum recognition in recreational and other areas that they wish to preserve for residents, such as pools, tennis courts, golf courses or other areas potentially in close proximity to, or within the boundaries of, a public park. Such steps might include the following:

- Enclose the area with a fence or other physical barrier to separate it from its surroundings.
- Provide dedicated support facilities, such as separate restroom and concession facilities for municipal swimming pools, distinct from those serving the surrounding property.
- Provide distinct admission fees, entrances and exits, and impose policies for the property in comparison to the surrounding area.
- Position the facility or thoroughfares so that pedestrians cannot or will not walk through or near the facility unless the facility is the pedestrian's destination.
- Treat the facility as separate in public marketing and advertisements. For example, do not market the municipal tennis courts and pool on a park's website, even if these facilities are located in the park. Instead, create separate websites for the tennis court and pool to indicate that, while they may be located *at* a park, they are not part *of* the park.
- Use the facility predominantly, if not exclusively, for its designated purpose. Tennis courts should be used for tennis, and not for outdoor concerts, rallies, or speeches.

Such simple steps can significantly improve the chances that a court will hold a resident-preference policy to the more relaxed standard applicable to a nonpublic forum, and consequently, significantly improve a municipality's chances of successfully defending the policy.

Satisfying the Narrow Tailoring Test – Public Forums

Resident preferences – like any other access restrictions applicable to a public forum – face a tougher test. The challenged policy must be narrowly tailored to serve a significant governmental interest. Thus, determining the legality of a restriction on speech in a public forum requires an assessment of both the interest the government is addressing, and the means it has chosen to address that interest.

The government has a legitimate interest in defraying the costs of services that it provides.[28] Residents, of course, already contribute to defraying these costs through the payment of taxes.[29] These two principles should leave room for a municipality to impose a specific type of resident preference in a public forum, namely, access fees for nonresidents where no such fees (or lower fees) are imposed on residents. While the courts have refused to recognize a significant governmental interest in policies that *exclude* nonresidents from

public fora,[30] they are likely to recognize that policies imposing access fees on nonresidents are supported by legitimate governmental concerns.[31]

The key to formulating a constitutionally valid access fee for a public forum is to ensure that the fee actually furthers the legitimate interest of cost recovery, and nothing more. While the government may charge fees for speech-related activities up to an amount necessary to defray the expense of providing an associated government service (e.g., charging parade organizers the cost of policing the parade), it may not charge fees aimed at generating a profit.[32]

Fortunately, the courts take a broad view of the types of expenses that may be recovered, and have upheld fees reflecting the costs for or associated with:

- salaries and fringe benefits associated with administering the policy;[33]
- other direct costs of providing the service, including such things as office supplies, and building or facility maintenance expenses;[34]
- management and administrative overhead expenses;[35]
- space and utilities costs;
- costs incurred through support provided by other agencies or departments, such as human resources assistance, legal advice, or payroll processing;[36] and
- costs associated with enforcing the policy.[37]

A municipality should consider these expenses before any access fee is adopted, to ensure that the fee comports with constitutional requirements, and review the fee periodically thereafter, to ensure that it continues to act only as an expense-recovery mechanism.

Equal Protection Challenges

The Equal Protection Clause offers a more common but less formidable basis for challenging resident preferences. The constitutional right to equal protection "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly."[38] The level of protection afforded by the Clause depends on the nature of the classification drawn by the governmental restriction. Courts apply "strict scrutiny" to discrimination based on race, nationality, or other "suspect" classifications; "intermediate scrutiny" to discrimination based on "quasi-suspect" classifications such as gender; and the much more lenient "rational basis" review to other classifications, including classifications based on residency.[39] Thus, when examining resident preferences under the Equal Protection Clause, courts will uphold discriminatory treatment so long as the discrimination "bears a rational relation to some legitimate end."[40] This is not a demanding test. For example, the United States Supreme Court upheld Arlington County, Virginia's parking ordinance in an Equal Protection challenge, noting that distinctions between residents and nonresidents could not be presumed "to be invidious," and that the residency policy "rationally promoted" Arlington's asserted interest in minimizing traffic congestion and reducing pollution in residential neighborhoods.[41] Likewise, the Illinois Supreme Court upheld the City of Chicago's policy of charging higher mooring fees to nonresidents, finding that it "reflect[ed] a reasonable approach to equitably distribut[ing] the costs of providing these [mooring] facilities, and [was] founded on a rational basis."[42]

Indeed, considering the residents' tax contributions, some courts have suggested that higher fees imposed on nonresidents are not discriminatory at all, based on the theory that the resident and nonresident are not similarly situated.[43] Nonetheless, while rational basis review is very lenient, it is prudent to ensure that there is at least some legitimate, consistently-articulated rationale to support a resident-preference policy.

Conclusion

Offering residents preferential access to increasingly crowded public spaces can help make a municipality an attractive place to live and promote goodwill between municipal leaders and their constituents. But limiting access to public spaces can also implicate constitutional rights, and such access restrictions can generate controversy and litigation. With proper planning, municipalities can steer a constitutionally safe path between the desires of their residents for special treatment, and the perceptions of out-of-towners that they are being unfairly excluded.

Notes

1. The authors have represented the City of Greenwich in litigation over access to its beaches.

2. Martinez v. Bynum, 461 U.S. 321, 328-29 (1983) (in context of public schools, "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents," and is not an Equal Protection violation).

3. Lawsuits challenging resident preferences in public spaces may also raise issues under state constitutions, statutes, and common law. *See, e.g.,* Leydon v. Town of Greenwich, 257 Conn. 318, 350 (Conn. 2001) (striking down a residents-only beach policy under Connecticut constitutional free speech provisions, as well as the First Amendment); City of Daytona Beach Shores v. Florida, 483 So.2d 405, 408 (Fla. 1985) (examining beach access fees under Florida statutory law and Florida's public trust doctrine); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972) (striking down a higher beach access fee for nonresidents than residents under New Jersey's public trust doctrine).

4. The federal Privileges and Immunities Clause also limits a municipality's ability to prefer residents over nonresidents, but may be invoked only by persons who are nonresidents of both the municipality and the *state* in which it is located. United Building & Constr. Trades Council of Camden County v. Mayor and Council of City of Camden, 465 U.S. 208, 217-18 (1984).

5. *Leydon*, 257 Conn. at 337 n.22 (policy that restricts beach access to residents and their guests implicates speech because "any nonresident who is unable to find a town resident to accompany him or her to [the beach] cannot engage in *any* activity there, including expressive and associational activity"); Warren v. Fairfax County, 196 F.3d 186 (4th Cir. 1999) (en banc) (policy limiting use of grassy mall to county residents, county employees, and county non-profits violated the First Amendment. Chief Judge Wilkinson, concurring, noted that "limit[ing] a forum

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such as this one to those who live within the jurisdiction is to balkanize our civic dialogue." *Id.* at 199).

6. Kempner v. Town of Greenwich, No. 3-06-cv-1393 (JCH), 2007 U.S. Dist. LEXIS 53258, at *12-13 (D. Conn. July 23, 2007).

7. A First Amendment claim, of course, requires constitutionally protected speech. While recreation alone does not implicate free speech, *see, e.g.*, Daly v. Harris, 215 F. Supp. 2d 1098, 1108-09 (D. Haw. 2002) (lying on the beach, snorkeling, swimming, and other beach recreation were not "within the realm of First Amendment protection"), it is not difficult for a plaintiff to plead a cognizable free speech claim given the First Amendment's breadth. *See Leydon*, 257 Conn. at 328 n.13 (plaintiff sufficiently pled free speech claim by alleging he "intended to express himself by conversing with others on topics of social and political importance"); City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("freedom of speech means more than simply the right to talk and to write," and includes "speech that does not pertain directly to politics").

8. *See generally*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue").

9. *Id.* at 45.

10. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

11. *Perry Educ. Ass'n*, 460 U.S. at 45.

12. *Cornelius*, 473 U.S. at 802 (citing public meeting spaces and theaters as examples of designated public fora).

13. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal quotation marks omitted).

14. *Perry Educ. Ass'n*, 460 U.S. at 46.

15. Greer v. Spock, 424 U.S. 828 (1976).

16. Adderley v. Florida, 385 U.S. 39 (1966).

17. Int'l Soc'y for Krishna Consciousness, Inc. v. N. J. Sports & Exposition Auth., 691 F.2d 155, 161 (3d Cir. 1982).

18. Hobbs v. County of Westchester, No. 00Civ.8170(JSM)(LMS), 2002 U.S. Dist. LEXIS 24569, at *14 (S.D.N.Y. Dec. 23, 2002).

19. *Id.* at *14-15.

20. It is usually not difficult to satisfy either of the other two elements of the test applicable to speech restrictions in a public forum. The nature of residency policies makes them content-neutral, and in a municipality, there will almost always be ample alternative venues for speech available to a nonresident.

21. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (U.S. 1983) (a government was not required to "indefinitely maintain" a designated public forum for speech); Ark. Educ. Television Comm. v. Forbes, 523 U.S. 666, 678 (U.S. 1998) (the "objective characteristics of" traditional public fora "require the government to accommodate private speakers").

22. 2002 U.S. Dist. LEXIS 24569 (S.D.N.Y. Dec. 23, 2002).

23. *Id.* at *15-17.

24. *Id.* at *18-19.

25. 110 F. Supp. 2d 74 (D. Conn. 1999).

26. *Id.* at 79.

27. *Id.*

29. *See, e.g.,* Cox. v. New Hampshire, 312 U.S. 569, 577 (1941) (upholding parade permit fees designed to recoup the expense involved in holding the parade); Northeast Ohio Coalition for the Homeless v. City of Cleveland, 105 F.3d 1107, 1110 (6th Cir. 1997) (upholding a $50 fee for a peddler's license because it defrayed the "administrative costs incident to the implementation of an ordinance embodying compelling governmental interests").

29. *See, e.g.,* Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 389 (1978) (upholding substantially higher hunting license fees for out-of-state residents and noting that, "[t]he resident obviously assists in the production and maintenance of big-game populations through taxes").

30. *See, e.g.,* Leydon v. Town of Greenwich, 257 Conn. 318, 346 (Conn. 2001) ("Moreover, even if we assume that the town has a compelling interest in restricting nonresident access to the park—an assumption that finds no support in the record—the ordinance is not narrowly tailored to accomplish that end").

31. In *Kempner v. Town of Greenwich*, 562 F. Supp.2d 242 (D. Conn. 2008), the court did not ultimately reach the issue of whether higher beach access fees were consistent with the First Amendment, because the court found that the plaintiffs lacked standing.

32. *Cox*, 312 U.S. at 577.

33. Turley v. N.Y. City Police Dep't, 988 F. Supp. 667, 669 (S.D.N.Y. 1997) (First Amendment challenge to a permit requirement for street performers in New York City); Nat'l Awareness Found. v. Abrams, 50 F.3d 1159, 1163 (2d Cir. 1995) (upholding a fee designed to defray the administrative and enforcement costs of a fundraising licensing policy).

34. *Turley*, 988 F. Supp. at 669; *Nat'l Awareness Found.*, 50 F.3d at 1163; Int'l Soc'y for Krishna Consciousness, Inc. v. Evans, 440 F. Supp. 414, 422 (S.D. Ohio 1977) (upholding booth rental fee at state fair that was designed to defray operational expenses of the fair).

35. *Turley*, 988 F. Supp. at 669.

36. *Id.* at 669-70.

37. *Nat'l Awareness Found.*, 50 F.3d at 1165 (fee to defray the administrative and enforcement costs of a licensing policy upheld).

38. Vacco v. Quill, 521 U.S. 793, 799 (1997).

39. *See, e.g.,* City of Cleburne, Tex., v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

40. *Vacco,* 521 U.S. at 799.

41. County Bd. of Arlington County, Va. v. Richards, 434 U.S. 5, 7 (1977).

42. Broeckl v. Chicago Park Dist., 131 Ill. 2d 79, 89 (1989).

43. *Id.* at 797 ("if the mooring fees charged to both residents and nonresidents were the same, the residents of the park district would be paying a disproportionate share of the costs of maintaining the park district's services and facilities"). **M**

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898, 903 (8th Cir. 2005); *but see*, Huntington Branch, NAACP v. Town of Huntington.

16. *See* Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1254 (10th Cir. 1995); *but see*, Huntington Branch, NAACP, 844 F.2d at 936 (requirement to show

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