

80006-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
SEATTLE, DIVISION I

RESIDENT ACTION COUNCIL,)	NO. 58260-7-I
)	
Plaintiff/Respondent)	APPELLANT'S
)	BRIEF
vs.)	
)	
SEATTLE HOUSING AUTHORITY)	
and TOM TIERNEY, Executive Director)	
of the Seattle Housing Authority, in his)	
Official Capacity,)	
)	
Defendant/Appellant)	
)	
_____)	

**Appeal From the King County Superior Court
Case No. 05-2-39110-3 SEA
The Honorable Suzanne M. Barnett**

**BRIEF OF DEFENDANT-APPELLANT,
SEATTLE HOUSING AUTHORITY**

James E. Fearn, WSBA # 2959
General Counsel for
Defendants/Appellants Seattle
Housing Authority and Tom Tierney

120 Sixth Avenue North
Seattle, WA 98109-1028
(206) 615-3570

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2005 AUG 15 PM 4:22

ORIGINAL

**APPELLANT BRIEF
TABLE OF CONTENTS**

TABLE OF CONTENTS2

TABLE OF AUTHORITIES3

ASSIGNMENTS OF ERROR5

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 5

STATEMENT OF THE CASE6

ARGUMENT11

 A. Under state law, the entry doors to resident’s units in Housing Authority buildings are the property of the Housing Authority 11

 1. State law requires an analysis of the relative responsibilities and liabilities of landlord and tenant to determine who owns and controls portions of the leased premises not specifically described in a rental agreement.11

 2. Under the state law analysis, the entry doors to residents’ apartments in Housing Authority buildings are the property of the Housing Authority. 12

 B. The Massachusetts court’s decision in Nyer v. Munoz-Mendoza is inapplicable to this case. 14

 C. The US Supreme Court’s decision in City of Ladue v. Gilleo does not prohibit the Housing Authority from adopting management rules that restrict resident displays on apartment doors. 16

 D. Even under City of Ladue v. Gilleo, House Rule #42 does not abridge residents’ First Amendment rights. 18

 E. Speech on public property is subject to reasonable regulations. 20

 1. Apartment doors in Housing Authority buildings are a non-public forum. 20

 2. House Rule #42 is a reasonable regulation. 25

CONCLUSION 27

TABLE OF AUTHORITIES

<i>Adderley v. State of Fla.</i> , 385 U.S. 39, 47, 48, 87 S.Ct. 242, 247, 17 L. Ed 2d 149 (1966).	24, 26, 27
<i>Andrews v. McCutcheon</i> , 17 Wash.2d 340, 135 P.2d 459 (1943)	12
<i>Cherberg v. Peoples Nat. Bank of Washington</i> , 88 Wash.2d 595, 564 P.2d 1137 (1977).	11, 12, 14
<i>City of Ladue v. Gilleo</i> , 512 U.S. 43, 50, 56, 114 S.Ct. 2038 (1994).	5, 6, 16, 17, 18, 19
<i>City of Seattle v. Mighty Movers, Inc.</i> , 152 Wash.2d 343, 350-351, 356, 360-362, 96 P.3d 979 (2004).	21, 22, 23 25, 26
<i>Collier v. City of Tacoma</i> , 121 Wash.2d 737, 854 P.2d 1046 (1993).	22
<i>Columbia Broadcasting System, Inc. v. Democratic National Comm.</i> , 412 U.S. 94, 93 S.Ct. 2080 (1973).	24
<i>Crowder v. Housing Authority of City of Atlanta</i> , 990 F.2d 586, 590, 591 (C.A.11 1993)	20, 21, 25
<i>Edwards v. Habib</i> , 397 F.2d 687, C.A.D.C. (1968).	25
<i>Feigenbaum v. Brink</i> , 66 Wash.2d 125, 401 P.2d 642 (1965).	12
<i>Geise v. Lee</i> , 84 Wash.2d 866, 529 P.2d 1054 (1975).	12
<i>Greer v. Spock</i> , 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976).	23, 24, 27
<i>Hague v. Committee for Indus. Organization</i> , 307 U.S. 496, 59 S.Ct. 954 (1939).	22
<i>Hudgens v. N. L. R. B.</i> , 424 U.S. 507, 518 96 S.Ct. 1029 (1976).	24
<i>Le Vette v. Hardman Estate</i> , 77 Wash. 320, 137 P. 454 (1914).	12
<i>Leuch v. Dessert</i> , 137 Wash. 293, 295, 242 P. 14 (1926).	11, 12, 13
<i>Lowell v. Strahan</i> , 145 Mass. 1, 8-11, 12 N.E. 401 (1887).	15
<i>Lloyd Corp., Limited v Tanner</i> , 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972).	25
<i>Members of City Council of City of Los Angeles v. Taxpayers for Vincent</i> , 466 U.S. 789, 104 S.Ct. 2118 (1984).	23
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).	25
<i>Nyer v. Munoz-Mendoza</i> , 385 Mass. 184, 430 N.E.2d 1214, 1216 (1982).	14, 15, 16
<i>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37, 45-47, 103 S.Ct. 948, 955, 956, 9 Ed.Law Rep. 23 (1983).	20, 21, 22, 25, 26
<i>Pevey v. Skinner</i> , 116 Mass. 129 (1874).	15
<i>Sentinel Communications Co. v. Watts</i> , 936 F.2d 1189, 1201, 1202 (11th Cir.1991).	20
<i>Shepard v. Sullivan</i> , 94 Wash. 134, 162 P. 34 (1916).	11

<i>Stephanus v. Anderson</i> , 26 Wash.App. 326, 613 P.2d 533 (1980).	24, 25
<i>Stoebuck, The Law Between Landlord and Tenant in Washington</i> , 49 Wash.L.Rev. 291, 347--50 (1974).	12
<i>U.S. Postal Service v. Council of Greenburgh Civic Associations</i> , 453 U.S. 114, 129-31, 101 S.Ct. 2676 (1981).	23, 24, 26
<i>U.S. v. Gilbert</i> , 920 F.2d 878, 885 (11th Cir.1991).	21
<i>Washington Chocolate Co. v. Kent</i> , 28 Wash.2d 448, 183 P.2d 514 (1947).	12

ASSIGNMENTS OF ERROR

1. The trial court erred in granting Plaintiff's motion for summary judgment and in concluding that "In the absence of an agreement otherwise, tenant-leased doors, including the exterior surfaces of such doors, constitute part of the tenant's residential premises and are under the control of the tenant during the lease term."

2. The trial court erred in concluding that "Expression by way of signs and materials posted on exterior surfaces of the apartment doors of tenants is constitutionally-protected speech under City of Ladue v. Gilleo."

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Washington law, which requires an analysis of the relative responsibilities and liabilities of landlord and tenant to determine who owns and controls portions of the leased premises not specifically described in a rental agreement, are the unit apartment doors in Housing Authority buildings the property of the Housing Authority or the property of its residents? (Assignment of Error #1)

2. Is a Massachusetts court decision, which holds that the doors of rental units are included in the leasehold property that is leased to the tenant, binding precedent in this case? (Assignment of Error #1)

3. If unit apartment doors are the property of the Seattle Housing Authority, does the First Amendment of the US Constitution, and US

Supreme Court's decision in City of Ladue v. Gilleo, 512 U.S. 43, 50, 56, 114 S.Ct 2038 (1994) prohibit the Housing Authority from adopting management rules that prohibit resident displays on apartment doors. (Assignment of Error #2)

STATEMENT OF THE CASE

The Seattle Housing Authority (hereinafter "SHA" or "the Housing Authority") is a municipal corporation, organized pursuant to the State Housing Authorities Law (Chapter 35.82 RCW) to provide decent, safe and sanitary housing for low-income people in the City of Seattle. The Housing Authority owns and manages more than 6,000 units of low income housing. SHA has been designated a "high performing" housing authority by the US Department of Housing and Urban Development (HUD) and is one of approximately thirty housing authorities in the country (out of more than 3,500) authorized, to operate free of the constraints imposed by most federal housing statutes and regulations.¹

One of the primary reasons for SHA's high performance status is the efforts it makes to maintain the internal and external appearance of its properties and to maintain good relationships between its residents. SHA believes that subsidized low-income public housing should be indistinguishable in appearance, inside and out, from unsubsidized housing. SHA staff works hard to maintain the appearance of its

¹ The factual assertions herein, unless noted otherwise, are supported by the Declaration of Thomas M. Tierney, CP 14, pgs. 197-201.

properties and SHA insists that residents do their part to help maintain the appearance of the buildings in which they reside. In furtherance of this objective, SHA has adopted resident “House Rules” that explain the residents’ obligations for maintaining the interior and exterior appearance of the buildings in which they reside. The House Rules are included as an addendum to the lease, and failure to abide by the House Rules is grounds for eviction. (CP 14, pgs. 202-208). These House Rules include the following provisions:

- 1. EXTERIOR ATTACHMENTS. No wires, aerials, antennas for radio or television, or wires, ropes, or other material or device for clothes drying, or other personal use shall be installed on the roof, decks, patios or other parts of the building. No attachments to the building or structure are permitted without the Senior Property Manager’s advance written approval. No extensions are allowed beyond the Resident’s private rented space.**

- 2. HALLWAYS AND COMMON AREAS. Hallways and common areas are to be kept clear of clutter. No personal items may be kept or stored in the hallways, stairways or other common areas in or about the premises without management’s permission in advance.**

- 3. LANDSCAPE. The Resident shall not alter, disturb, or interfere in any way with the grounds or landscaping. Residents who wish to add plant materials, ornaments or signs to a planting area must get prior management approval. Residents with individual yards are responsible for mowing, watering and general upkeep to ensure that their landscaping is maintained in good condition. Residents who fail to maintain their yards will be subject to lease enforcement, up to and including eviction.**

4. LITTERING. Littering the grounds and parking areas is strictly prohibited. This includes putting out cigarettes on the sidewalks and in driveways or dumping ashtrays on the grounds or in parking areas.

5. PATIOS. Dust mops, rugs, tablecloths and clothing may not be shaken, cleaned or left in any of the public areas, patios, or decks. Patios and decks are to be kept clear of clutter and not used for storage of personal items. No carpeting is allowed on patios or decks. Planters and flower pots shall be no larger than 14 inches in diameter.

6. WINDOWS. Exterior sills and ledges shall not be used for the storage of bottles, food, etc. Only window drapes, mini-blinds, and vertical blinds are allowed as unit window coverings.

7. GROCERY CARTS. Leaving commercial grocery carts on or about the premises is prohibited. Any costs incurred in returning a cart will be charged to the Resident.

Displays and signage on resident apartment doors have been a particular management concern. (CP 14, pgs. 198-201) Many residents have complained about the “cluttered” and “college dormitory” appearances of hall corridors in which doors are decorated with anything, and everything, that can be attached to a door. (CP 14, pgs. 208-209, 210-216). Residents have also reacted strongly to specific items displayed on other resident’s doors, including nude pictures and photographs, swastikas, religious symbols, and profane language. Such displays create hostility between residents, and a serious management problem for the property managers who are responsible for maintaining the peace and

providing for the quiet enjoyment of all residents. In addition, the cost of refinishing decorated doors is a significant expense for the Housing Authority.

To address this problem, the Housing Authority initially considered limiting the amount and type of material that can be displayed on doors (CP 14, pgs. 198-201), but this created as many management problems as it solved. Content based regulation of signs and displays is legally questionable and would have been difficult, if not impossible, to administer. Regulating the size or number of items in a display was equally problematic. There was no consensus among staff or residents as to what a reasonable size for a door display should be, or what would be a reasonable number of items to be displayed. Keeping track of the number of items displayed on hundreds of doors, and having to regularly measure the size of door displays, imposed a significant burden on property managers. Limiting door displays, by size or number of items displayed, would also inevitably result in complaints by many residents about the size and number of items on the door displays of other residents. Lease enforcement actions against residents whose displays marginally exceeded the specified size or item limit would be viewed as harsh, but failure to enforce the limits would result in disregard of the regulations themselves. Finally, limiting the size of door displays would not, in any manner, address the management problems that arise when one resident's display

offends another resident, nor would it meaningfully reduce the refinishing costs the Housing Authority incurs when doors are used for resident displays.

After much deliberation, the Housing Authority decided that elimination of resident door displays was the most fair and effective method of addressing the problem. To implement this decision, the Housing Authority adopted House Rule #42, which reads as follows:

SIGNS. SHA's buildings and properties should blend into their surroundings and, to the extent possible, be indistinguishable from other buildings in the neighborhood. Similarly, the interior common areas of SHA's buildings should be inviting and free from clutter. Signs, flyers, advertisements and other written material, indiscriminately posted on the exterior of buildings and in common areas create a negative appearance which detrimentally affects residents of the building, residents of the surrounding community, and the public generally. For this reason, in all SHA residential buildings no signs, flyers, placards, advertisements or similar material may be posted on exterior walls, interior common area walls and doors, and the surface of unit or apartment doors that face the hall. Signs shall be permitted in designated areas of each building. Signs in such areas, and signs and other insignia required for health and safety purposes, shall be permitted only with the advance written approval of the building's Senior Property Manager.

The Resident Action Council, an organization of Housing Authority residents, filed suit in King County Superior Court challenging the door sign prohibition in House Rule #42 as a violation of the residents' right of free speech as guaranteed by the United States Constitution and the Constitution of the state of Washington. (CP 1, pgs. 1-12) On April

28, 2005 the Honorable Suzanne Barnett granted the Resident Action Council's motion for summary judgment and permanently enjoined the Housing Authority's enforcement of House Rule #42. (CP 16, pgs 222-225). In granting the summary judgment motion the Court held that apartment entrance doors are the private property of the residents, and that the First Amendment of the US Constitution prohibits the Housing Authority from regulating signage on residents' private property.

ARGUMENT

A. Under State law, the entry doors to resident's units in Housing Authority buildings are the property of the Housing Authority.

1. State law requires an analysis of the relative responsibilities and liabilities of landlord and tenant to determine who owns and controls portions of the leased premises not specifically described in a rental agreement.

A lease is a conveyance of a limited estate for a limited term with conditions attached. Shepard v. Sullivan, 94 Wash. 134, 162 P. 34 (1916).

A property owner may lease all or any portion of its property to a tenant.

See *e.g.* Cherberg v. Peoples Nat. Bank of Washington, 88 Wash.2d 595, 564 P.2d 1137 (1977). When a property owner leases less than the entire

property to a single tenant, the owner is presumed to retain control over the common areas of the building. As the court said in

Leuch v. Dessert, 137 Wash. 293, 242 P. 14 (1926):

The leading question, and the one which is determinative of this proceeding, is as to what passed to the respondents under the lease. The rule seems to be

established without any variation that, when the owner of a building leases not the entire building as an entity to one tenant, but lets it in parts to several tenants, each of them occupying a distinct portion of the building, and there is no absolute provision to the contrary, the owner is held to retain control over such parts of the building as are for common use of all, and is responsible for defects there existing. (137 Wash. 295).

The second determinant of ownership between landlord and tenant is responsibility for maintenance and liability for injuries; with responsibility goes ownership, and vice versa. As the court in Cherberg explained:

A landlord has a duty to maintain, control and preserve retained portions of the premises subject to a leasehold in a manner rendering the demised premises adequate for the tenant's use and safe for occupancy by both the tenant and his invitees. *Geise v. Lee*, 84 Wash.2d 866, 529 P.2d 1054 (1974); *Feigenbaum v. Brink, supra*; *Washington Chocolate Co. v. Kent*, 28 Wash. 2d 448, 183, P.2d 514 (1947); *Andrews v. McCutcheon*, 17 Wash.2d 340, 135 P.2d 459 (1943); *Le Vette v. Hardman Estate*, 77 Wash. 320, 137 P.454 (1914). Failure to fulfill this duty results in liability on the part of the lessor for injury caused thereby, *Geise v. Lee, supra*, and failure to fulfill this duty, by omission to repair, can in a proper case constitute an actionable constructive eviction. *Washington Chocolate Co. v. Kent, supra*. See generally Stoebuck, *The Law Between Landlord and Tenant in Washington*, 49 Wash.L.Rev. 291, 347--50 (1974).

2. Under the state law analysis, the entry doors to residents' apartments in Housing Authority buildings are the property of the Housing Authority.

The Housing Authority's lease does not specifically state whether residents' doors are included in the property leased to residents or not. It is clear from the circumstances, however, that the Housing Authority has

retained ownership and control over entry doors to residents' apartments. The Housing Authority leases its buildings to several tenants "each of them occupying a distinct portion of the building." See Leuch supra. To assure that unit doors are "adequate for the tenant's use and safe for occupancy by both the tenant and his invitees," See Leuch supra, the Housing Authority mandates how unit doors will be used. House Rule # 16 provides:

ENTRY DOORS TO APTS. In order to maintain the fire rating of an apartment building and to ensure the privacy and security of all residents, all apartment entry doors must be closed except when in use.

Apartment doors also constitute an integral part of corridor common areas, and the Housing Authority, through House Rule #42, mandates that door exteriors, like the corridor walls, not be cluttered with residents' displays. The Housing Authority is also fully responsible for repair and replacement of damaged apartment doors, and is liable for the injuries that result from defective doors.

Under Washington law the property owner retains "control over such parts of the building as are for common use," and ownership and control are directly linked to responsibility and liability for the retained property. Unit doors provide access to residents' units, but they are also an integral element of the corridor common area for fire and safety purposes and for aesthetic purposes. The Housing Authority is responsible for repair and replacement of damaged apartment doors and

the cost of refinishing doors damaged by residents' displays is a Housing Authority expense. If apartment doors were the property of each resident, each resident would have the discretion to maintain the door or not. Residents who could not, or choose not, to maintain their doors would put themselves and the leased property at risk and create an unsafe and unsightly environment for other residents. If anyone, including the tenant and his or her guest or invitees, suffers an injury as a result of a defective door, the Housing Authority is liable for the injury. The Housing Authority's failure to maintain a resident's door that caused a threat to the resident's security would "constitute an actionable constructive eviction." Cherberg, supra. Having full responsibility for maintenance and upkeep of its apartment doors, and full liability for their upkeep and proper operation, the Housing Authority has retained ownership of, and is the lawful owner of the apartment entry doors in its buildings.

B. The Massachusetts court's decision in Nyer v. Munoz-Mendoza is inapplicable to this case.

In the Superior Court the Resident Advisory Council argued, and the Court found, that the Massachusetts court's decision in Nyer v. Munoz-Mendoza, 385 Mass. 184, 430 N.E.2d 1214 (1982), is binding authority for the proposition that, in the absence of an agreement to the contrary, apartment entrance doors are the property of the tenant. This holding is directly contrary to established Washington law which, as explained above, requires an analysis of the relative responsibilities and

liabilities of the parties to determine ownership of leasehold property not specifically described in the lease.

The court's decision in Nyer does not hold that apartment entrance doors are the property of the tenant in *all* circumstances. In Nyer, the court said:

We start our analysis with the common law rights of the parties. It is long established in this Commonwealth that a demise to a tenant of *premises which include a "floor" or "story" of a building includes therein the right to use the exterior walls of the demised premises*, absent special provisions in a lease or in the terms of the tenancy. *Lowell v. Strahan*, 145 Mass. 1, 8-11, 12 N.E. 401 (1887). In the absence of an agreement, both the interior and exterior of windows of the demised premises are controlled by the tenant. (430 N.E.2d at 1216, authorities omitted, emphasis supplied).

The court then went on to say:

We can see no viable distinction between the windows and access doors of the demised premises. There is nothing to preclude application to this case of the same general principles stated above. *Id.* at 1216.

In footnote 5 of the opinion however, the court observes:

A letting of "rooms," however, is distinguishable. *Pevey v. Skinner*, 116 Mass. 129 (1874). There is no finding here of a letting of rooms. The record shows a two-story apartment unit to be the demised premises. *Nyer* at 1216.

When a tenant leases a floor or story of a building it is reasonable to conclude that the doors on that floor or story are part of the demised premises in the absence of an agreement to the contrary; but as the court in Nyer acknowledges, this rule does not apply when rooms on a floor are

rented. The Housing Authority leases units on a floor. It does not lease a floor or a story to any resident or group of residents. The Court's holding in Nyer is, therefore, inapplicable, to the facts of this case.

Even if the Court's holding in Nyer was directly applicable to the facts of this case, the decision is not binding precedent as the Resident Action Council argued. The U.S. Supreme Court case cited below found that state courts may accept or reject the reasoning, analysis and holding of a court in another jurisdiction in deciding what the law should be on a particular issue. At most, the trial court should have examined the reasoning and analysis of the Massachusetts' Court's decision in Nyer in deciding whether, under state law, portions of the leased property not specifically described in a rental agreement are the property of the landlord or the tenant. It should not have simply found the Nyer decision to be the law in this state.

C. The US Supreme Court's decision in *City of Ladue v. Gilleo* does not prohibit the Housing Authority from adopting management rules that restrict resident displays on apartment doors.

The Resident Action Council argues that City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038 (1994), in which the court held that a city ordinance prohibiting signs on *private* property violated the First Amendment rights of city residents, "is directly on-point in the current action and is fatal to Rule #42." (CP 10, pg. 148, line 6). Ladue, however, involved a city ordinance that, for purely aesthetic reasons,

prohibited nearly all yard signs and window signs on *private property* in the city. As the court explained:

An ordinance of the City of Ladue prohibits *homeowners from displaying any signs on their property* except “residence identification” signs, “for sale” signs, and signs warning of safety hazards. The ordinance permits commercial establishments, churches, and nonprofit organizations to erect certain signs that are not allowed at residences. The question presented is whether the ordinance violates a Ladue resident's right to free speech. 512 US at 45, emphasis supplied.

The court in Ladue recognized that, for First Amendment purposes, private property and public property should be treated differently. The court said:

We rejected the argument that the validity of the city's esthetic interest had been compromised by failing to extend the ban to private property, reasoning that “*private citizen's interest in controlling the use of his own property justifies the disparate treatment.*”*Id.*, at 811, 104 S.Ct., at 2132. (512 U.S. 50, emphasis added).

The Resident Action Council’s argument fails because, as shown above, housing authority apartment doors are owned and maintained by The Housing Authority and are not the private property of its residents. They are, in law and fact, owned and controlled by the Housing Authority. The Housing Authority’s House Rules, unlike the city’s ordinance in Ladue, apply to its own property, and do not restrict expression on private property. Consequently, the court’s holding in Ladue is inapplicable to the facts of this case.

D. Even under *City of Ladue v. Gilleo*, House Rule #42 does not abridge residents' First Amendment rights.

In Ladue, the City argued that its sign prohibition was

“mere regulation of the "time, place, or manner" of speech because residents remain free to convey their desired messages by other means, such as *hand-held* signs, "letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." 512 US 56

The court acknowledged that “. . . regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must ‘leave open ample alternative channels for communication.’” 512 US 56. The Court then found the City’s alternative channels for communication inadequate.

Under the Ladue analysis, the Housing Authority’s prohibition of door displays is also a regulation of the “time, place and manner” of speech. Residents are specifically permitted to post signs in designated public areas of the buildings and in their own windows. House Rule #42 provides, “Signs shall be permitted in designated areas of each building.” Generally speaking, building bulletin boards are the designated areas.

House Rule #8 states:

BULLETIN BOARD. Notices of activities and other information of interest to tenants will be posted on the community bulletin boards. There is a Residents Bulletin Board at each building for tenants use. Posting of notices or material by tenants anywhere else on the property is strictly prohibited.

Residents may post signs and notices of any kind (except material that is obscene or racially, sexually and culturally offensive) on building bulletin boards.

Windows and designated public areas are superior forums for public expression as opposed to the apartment doors, the vast majority of which are on interior corridors from which the general public is excluded. The public bulletin boards are in common areas where they are seen by all residents in the building, and by the general public. Any message a resident wants to communicate *to the public* will be more effectively communicated on a bulletin board than on the resident's door. The windows in a resident's unit are also a more effective forum for communicating with the public than an interior apartment door. Plaintiff argues that windows in high rise buildings are not an adequate forum because signs in such windows sometimes cannot be seen by the public. This assertion is true, but no matter how obscure a window sign may be, there is at least *some* possibility that such a sign will be seen by the public. There is no possibility that a sign on an interior door, facing a corridor, will ever be seen by the general public. Unlike the City's sign prohibition in Ladue, the Housing Authority's prohibition of displays on apartment doors "leave[s] open ample alternative channels for communication." In fact, the alternative channels for communication are superior to the communication that occurs from posting signs on apartment doors.

E. Speech on public property is subject to reasonable regulations.

1. Apartment doors in Housing Authority buildings are a non-public forum.

The Housing Authority is a public entity, and its property is necessarily public property. A public entity's ability to restrict speech on its property depends upon the nature of the forum in which the speech is expressed. In Crowder v. Housing Authority of City of Atlanta, 990 F.2d 586 (C.A.11 1993), a public housing resident sued the Atlanta Housing Authority because he was not permitted to use a building's common areas for Bible study. The court held that, for First Amendment purposes, government-owned property is divided into three categories, the traditional public forum, the designated public forum, and the non-public forum. It then explained:

Traditional public fora generally include public streets and parks. Designated public fora are created when the government opens property to the public for expressive activity and are subject to the same standards as traditional public fora. In traditional or designated public fora, the state may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication." *Perry*, 460 U.S. at 45-46, 103 S.Ct. at 955; *591 *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1201, 1202 (11th Cir.1991). A nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication," and limits on access to such a forum must meet only a reasonableness standard. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955. *Crowder*, 990 F.2d at 590.

In Crowder, the court concluded that an auditorium is a limited public forum. According to the court, “Management opened the auditorium to a wide range of expressive activities, including ceramics classes, political speeches, and religious services.” It found a library, however, to be a non-public forum because “it was not ordinarily used for expressive purposes.”

Id. at 591. As the court said:

Crowder contends that the library should have been treated as a limited public forum because it was a common facility available to the tenants and was an alternative meeting site to the auditorium. The record, however, does not show that tenants regularly or frequently met in the library. Irregular and infrequent use does not transform a common facility into a public forum for expressive group meetings. We agree that the library was a nonpublic forum. *See Perry*, 460 U.S. at 47, 103 S.Ct. at 956 (selective access does not transform government property into a public forum); *U.S. v. Gilbert*, 920 F.2d 878, 885 (11th Cir.1991) (isolated First Amendment use of government-owned portico does not create a public forum).

A public forum, like an auditorium, or even a library, is a place where members of the public can freely express their views. Members of the public have no access to residents’ apartment doors, and residents would not consent to public expression on their doors if the public had such access. Resident’s doors, which are seen only by residents and their invited guests, are not even visible to the public in any meaningful respect and, to the extent they are used at all, are used only for the *private* expressions of the resident who resides in the unit. Apartment doors are, therefore, non-public forums.

In City of Seattle v. Mighty Movers, Inc., 152 Wash.2d 343, 356, 96 P.3d 979 (2004), a case challenging a City ordinance prohibiting sign posting on public utility poles, the Washington State Supreme Court adopted the federal forum analysis saying,

“Rather than merely advisory, we have found United States Supreme Court decisions on what constitutes a public forum to be highly persuasive under Article 1, Section 5 and have consistently followed them even though those decisions are not binding precedent.”

In Mighty Movers the court found public utility poles to be a nonpublic forum because there was no evidence that the City had designated such poles as a public forum, and the poles are not property that “has immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Id. at 351. The court then went on to say:

There is neither historical nor constitutional support for the characterization of a utility pole as a public forum. In order for utility poles to be a traditional public forum they must have the characteristics of one. *See Perry Educ. Ass'n*, 460 U.S. 37, 103 S.Ct. 948; *Collier*, 121 Wash.2d 737, 854 P.2d 1046. Absent these characteristics, they are not a public forum. Streets, sidewalks, and parks are classes of property that meet the public forum test. *See Collier*, 121 Wash.2d 737, 854 P.2d 1046; *Hague*, 307 U.S. 496, 59 S.Ct. 954. Utility poles are an essential part of the City's power system and they have not been a traditional public forum nor have they been historically held open to the general public.

In accord with our precedent following the federal analysis and our reliance on federal cases applying that analysis to specific types of property, we follow *Vincent* and hold that utility poles are not a public forum. Importantly, while utility poles can be used to post signs, the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. *Vincent*, 466 U.S. at 814, 104 S.Ct. 2118. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property." *Mighty Movers*, 152 Wash.2d at 360

No governmental body has designated apartment doors as a forum for public expression. In addition, apartment doors, unlike public utility poles, which have been used for posting signs and messages, have never been available to the public for either posting or viewing of signs and messages. If utility poles are not a traditional forum for public expression, then apartment doors cannot be a traditional forum for public expression. Apartment doors are, therefore, a non-public forum.

According to the court in *Mighty Movers*, the fact that government property "can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." The court said:

There must be some point at which the government's relationship to things under its dominion and control is treated in the same manner as a private owner's property interest in the same kinds of things, and in such circumstances, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *U.S. Postal Serv.*, 453 U.S. at 129-30, 101 S.Ct. 2676 (quoting *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 47

L.Ed.2d 505 (1976) and citing *Adderley v. State of Fla.*, 385 U.S. 39, 47, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)). (152 Wash.2d 360).

In this case, the Housing Authority's relationship with the apartment doors "under its domain and control" should be treated "in the same manner as private owner's property interest."

If Housing Authority residents lived in privately owned housing, they would have no First Amendment right whatsoever to post signs or displays on doors, windows or walls. The protections of the First Amendment protect speech on public property but do not extend to privately owned property. In Hudgens v. N. L. R. B., 424 U.S. 507, 518 96 S.Ct. 1029 (1976), the court said:

It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. See *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

In Stephanus v. Anderson, 26 Wash.App. 326, 613 P.2d 533 (1980), an action in which a tenant asserted a First Amendment right to a retaliatory eviction defense, the court held that First Amendment protections do not extend to tenants in privately owned property in this state. In that case the court explained:

The constitution, however, does not prohibit a private person's infringement of another's First Amendment rights. It forbids only such infringements which may properly be attributable to the State. *Lloyd Corp., Limited v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972). *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Without this requisite state action, there is no constitutional right to a retaliatory eviction defense. *Edwards v. Habib, supra*. The issue presented, therefore, is whether state action exists when a private landlord evicts tenants for the reasons alleged in this case and utilizes the unlawful detainer statutes to obtain a court-ordered writ of restitution. In accord with recently developed limits on the state action concept, we conclude that *Stephanus'* alleged infringement of the tenants' First Amendment rights is not attributable to the State.

It is only because the Housing Authority is a public entity, and its property is public property, that its residents are able to claim First Amendment protections. The Housing Authority should not be precluded by the First Amendment from protecting its property and the interests of all its residents simply because it is a public, not a private entity.

2. House Rule #42 is a reasonable regulation.

Regulation of speech in a nonpublic forum receives “the least scrutiny of all the categories of public property.” Mighty Movers, 152 Wash.2d at 361 (2004). Or, as the court said in Crowder, 990 F.2d at 590, “A nonpublic forum is ‘[p]ublic property which is not by tradition or designation a forum for public communication,’ and limits on access to such a forum must meet only a reasonableness standard.” In Perry Educ.

Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948, 9

Ed.Law Rep. 23 (1983), the court explained:

We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Greenburgh Civic Ass'n*, *supra*, 453 U.S. at 129, 101 S.Ct., at 2684. In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Id.*, 453 U.S. at 131, n. 7, 101 S.Ct. at 2686, n.7. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*, 453 U.S. at 129, 101 S.Ct., at 2684; *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976); *Adderley*, 385 U.S. at 39 and 48.

House Rule #42 does not regulate the content of any speech and makes no "effort to suppress expression merely because [Housing Authority] officials oppose the speaker's view." In House Rule #42 The Housing Authority intends only to "preserve the property under its control for the use to which it is lawfully dedicated." House Rule #42, therefore, meets the reasonableness standard and does not infringe upon the First Amendment rights of residents.

In finding the City's prohibition against posting signs on utility poles to be reasonable, the court in Mighty Movers said:

Seattle's ordinance is reasonable in light of the primary purpose of utility poles, which is to support utility lines. Their secondary purpose is to provide regulatory signs posted by government. As noted, the City has the right "

'to preserve the property under its control for the use to which it is lawfully dedicated.' " *Greer*, 424 U.S. at 836, 96 S.Ct.1211 (quoting *Adderley*, 385 U.S. at 47, 87 S.Ct. 242). The City enacted the ordinance to protect the safety of utility workers who must climb the poles, to enhance public safety by promoting unobstructed vision for drivers and pedestrians, to prevent damage to public property, and to enhance urban aesthetics. The Seattle City Council made the legislative determination that a prohibition against all private signs and posters on utility poles is the best way to protect worker safety and promote the other public interests at stake. 152 Wash.2d at 362.

The primary purposes of apartment doors are to permit egress and ingress to the apartment, to protect the safety of the unit's occupants and the safety of other residents, and to provide a living environment that fosters good relationships between residents. Doors also, however, constitute an integral element of corridor common areas. Although apartment doors may sometimes be used for resident displays, this is not the *purpose* of apartment doors. In regulating the use of its doors, the Housing Authority "no less than a private owner of property" should have the power to "preserve the property under its control for the use to which it is lawfully dedicated." Like the City Council's decision to prohibit private signs and posters on utility poles, the Housing Authority's decision to prohibit door displays is reasonable under the First Amendment.

CONCLUSION

The Superior Court's approval of the Resident Advisory Council's Motion for Summary judgment should be reversed, the permanent

injunction issued by the court should be lifted and the Housing Authority allowed to implement House Rule #42 as written.

RESPECTFULLY SUBMITTED this 7th day of August, 2006.

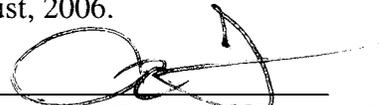


James E. Fearn, WSBA # 2959
General Counsel for
Defendants/Appellants Seattle
Housing Authority and Tom Tierney

CERTIFICATE OF SERVICE

I certify that on August 15, 2006, I caused a true and correct copy of Appellant's Brief to be served on Eric Dunn, attorney for Plaintiff/Respondent, Resident Action Counsel at Northwest Justice Project, 401 Second Avenue S., Suite 407, Seattle, WA 98104.

DATED this 15th day of August, 2006.



James E. Fearn, WSBA # 2959
General Counsel for
Defendants/Appellants Seattle
Housing Authority and Tom Tierney

FILED
COURT OF APPEALS DIV. 4
STATE OF WASHINGTON
2006 AUG 15 PM 4:22