

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
)	REPLY BRIEF
vs.)	
)	
SEATTLE HOUSING AUTHORITY)	
and TOM TIERNEY, Executive Director)	
of the Seattle Housing Authority, in his)	
Official Capacity,)	
)	
Defendant/Appellant)	
)	
)	

FILED
 COURT OF APPEALS DIV. I
 STATE OF WASHINGTON
 2006 OCT -9 PM 1:09

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

REPLY 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

**APPELLANT’S REPLY BRIEF
TABLE OF CONTENTS**

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
ARGUMENT	4
A. <u>Respondent’s reliance upon City of Ladue v. Gilleo is misplaced.</u>	4
B. <u>Apartment doors are not the residents’ private property.</u>	8
C. <u>Nyer v. Munoz-Mendoza is inapplicable and irrelevant to this case.</u>	12
D. <u>Respondent confuses privacy rights and property rights.</u>	13
E. <u>Absent an agreement to the contrary, common areas are retained by the landlord.</u>	14
F. <u>No constitutional rights are abridged by the Housing Authority’s claim that it owns the apartment doors in its buildings.</u>	15
G. <u>Housing Authority property is public property to which the public fora analysis should be applied.</u>	19
H. <u>Housing Authority corridors, doors, and other common areas are a non-public forum.</u>	20
CONCLUSION	22

TABLE OF AUTHORITIES

<i>Andrews v. McCutcheon</i> , 17 Wash.2d 340, 345-346, 135 P.2d 459 (1943)	8, 9, 14, 15, 16
<i>City of Bremerton v. Widell</i> , 146 Wash.2d 561, 51 P.3d 773 (2002)	8, 10
<i>City of Ladue v. Gilleo</i> , 512 U.S. 43, 50, 56, 114 S.Ct. 2038 (1994).	4, 5, 6, 7, 8, 12, 13, 16, 19, 22
<i>City of Seattle v. McCreedy</i> , 124 Wash.2d 300, 877 P.2d 686 (1994).	8, 10, 12, 13, 15
<i>Cornelius v. NAACP Legal Def. & Educ. Fund</i> , 473 U.S. 788, 799-800, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1985).	20
<i>Crowder v. Housing Authority of City of Atlanta</i> , 990 F.2d 586, 593 (C.A.11 1993)	8, 11, 19
<i>Daily v. New York City Housing Authority</i> , 221 F.Supp.2d 390, 396 (S.D.N.Y. 2002).	19, 20
<i>Daniel v. City of Tampa, Fla.</i> , 38 F.3d 546, 550 (11 th Cir. 1994).	19, 20, 21
<i>Desyllas v. Bernstine</i> , 351 F.3d 934, 944 (9 th Cir. 2003)	8, 11, 21, 22, 23
<i>de la O v. Housing Authority of City of El Paso, Tex.</i> , 417 F.3d 495, 503-505 (5 th Cir. 2005).	5, 6, 19, 20
<i>DiLoreto v. Downey Unified School Dist. Bd. Of Educ.</i> , 196 F.3d 964, 965 (1999)	21
La Fave, W. (1987). <i>Search & Seizure</i> § 8.5 at 298-99 (2 nd ed.).	10
<i>Leuch v. Dessert</i> , 137 Wash. 293, 295, 242 P. 14 (1926).	14, 15, 16
<i>Nyer v. Munoz-Mendoza</i> , 385 Mass. 184, 430 N.E.2d 1214 (1982).	12, 13
<i>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)	21
<i>Pevey v. Skinner</i> , 116 Mass. 129 (1874).	13
<i>Travis v. Owego-Apalachin Sch. Dist.</i> , 927 F.2d 688, 691 (2d Cir. 1991)	20
<i>U.S. v. Matlock</i> , 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974)	10
<i>Vasquez v. HACEP</i> , 271 F.3d 198, 204 (5 th Cir. 2001).	19

ARGUMENT

A. Respondent's reliance upon City of Ladue v. Gilleo is misplaced.

Respondent, Resident Action Council's, primary argument in this appeal is simple. According to the Resident Action Council (hereafter "the RAC"), there is "no meaningful distinction" between the Housing Authority's House Rule #42 and the ordinance struck down in City of Ladue v. Gilleo (Respondent's brief, page 8). "Gilleo is directly on-point in the current action and is fatal to Rule #42." (Respondent's brief, page 5) There are, however, several crucial legal and factual differences between this case and City of Ladue that the RAC either fails to appreciate or refuses to acknowledge.

Two essential differences between this case and City of Ladue are found in the opening paragraph of the court's decision in Ladue, which states:

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 U.S. 45, emphasis added)

In Ladue, the City, pursuant to its police power, enacted a law, in the form of an ordinance, which prohibited expression throughout an entire city. The City did not, as the Housing Authority did in this case,

adopt a regulation or lease provision that applied solely to its own property. The second essential difference between this case and Ladue relates to the nature and effect of the challenged regulations. The ordinance in City of Ladue significantly restricted the ability of private property owners to make political statements on their own property. Margaret Gilleo, the plaintiff in City of Ladue, owned “one of the 57 single-family homes in the Willow Hill subdivision of Ladue.” (512 U.S. 45) In its opinion the court said:

Displaying a sign from *one's own residence* often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. A sign advocating “Peace in the Gulf” *in the front lawn* of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed *on the grounds of a stately mansion* than when pasted on a factory wall or an ambulatory sandwich board. (512 U.S. 56-57, emphasis added)

From this language, it is apparent that when the court speaks of “own residence” it is speaking of a privately owned residence. It is also apparent from the court’s general legal analysis that the issue being addressed in Ladue is the authority that cites to prohibit speech on residential property that is privately owned.

In de la O v. Housing Authority of City of El Paso, Tex., 417 F.3d 495 (5th Cir. 2005) the plaintiff challenged a Housing Authority regulation that restricted door-to-door religious proselytizing and political activity on

housing authority property. Like the RAC, the plaintiff in de la O relied upon a US Supreme Court decision that struck down a municipal ordinance requiring a permit to engage in door-to-door activity in the city.

In rejecting the plaintiff's challenge in de la O the court said:

As much as *de la O* wishes to liken her case to Watchtower, it is inapposite. The ordinance at stake in Watchtower applied to the entire municipality and was not limited to non-public fora such as the HACEP facilities. Tellingly, the Court did not even discuss forum analysis in its opinion. Consequently, it is obvious that Watchtower was decided under an entirely different rubric and is not controlling here. (417 F.3d at 505, emphasis added)

Similarly, as much as the RAC would like City of Ladue to be binding authority in this case, City of Ladue is inapposite. The ordinance in City of Ladue applied “to the entire municipality and was not limited to non-public fora such as the [Housing Authority’s] facilities.” In addition, “Tellingly, the Court [in City of Ladue] did not even discuss forum analysis in its opinion.” “Consequently, it is obvious that [Ladue] was decided under an entirely different rubric and is not controlling here.”

The RAC attempts to force this case into the City of Ladue mold by stating, without supporting authority, that City of Ladue applies to *all* residential property, whether rented or owned, and whether publicly or privately owned. The RAC asserts that

“Distinctions as to the public or private origin of particular residences were simply not relevant nor germane to the reasoning of *Gilleo*, and nothing in the opinion suggests that the result would have been any

different had the plaintiff had [sic] been a tenant renting her home, whether from a private or government landlord.” (Respondent’s brief, page 21)

Distinctions between public and private residences were not relevant or germane to the reasoning of LaDue because free speech rights on public property, and on private leased property, were not an issue in the case. The only issue in the case was the lawfulness of a city ordinance restricting speech on private property city wide. The First Amendment rights of citizens on public property, and the First Amendment rights of tenants in leased property, were not decided because no party in the case asserted those rights. Courts do not decide the rights of persons not party to the litigation. The court’s decision in Ladue is silent as to the rights of citizens to post signs on public property, and as to the rights of tenants to post signs on publicly or privately owned leased property. The RAC attempts to characterize (or mischaracterize) the court’s silence on these issues as a decision by the court to apply its decision to public property and leased property, but the court’s silence cannot be cited as authority on issues the court did not decide.

The RAC’s assertion that the court’s decision in City of Ladue would not “have been any different had the plaintiff had [sic] been a tenant renting her home, whether from a private or government landlord” is pure speculation. There is no way to know what the court would have

held in City of Ladue if the City had prohibited its tenants, or city residents generally, from posting signs on City owned property.

B. Apartment doors are not the residents' private property

The RAC, again citing inapposite authority, next contends that apartment doors are the tenants' private property, and speech on apartment doors is therefore protected by the court's decision in City of Ladue. In the RAC's words:

“Yet individual public housing units, when occupied by individual tenants, are not treated as “public property” for purposes of free speech. See, e.g. *Crowder* at 593. That is because the units, while ultimately owned by SHA, are being rented to private tenants whose possessory interests trump SHA's ownership interests, and provide the tenants with superior rights of control over their own homes. See *McCready* at 305.

The RAC further states that “without question, an individual tenant's apartment door is reserved for the tenant's exclusive use.” (Respondent's memorandum, page 25-26). In support of this contention, the RAC cites five cases, Andrews v. McCutcheon, 17 Wash.2d 340, 135 P.2d (1943); City of Seattle v. McCready 124 Wash.2d 300, 877 P.2d 686 (1994); Desyllas v. Bernstine, 351 F.3d 934 (9th Cir. 2003); Crowder v. Housing Authority of City of Atlanta, 990 F.2d 586 (11th Cir.1993); and City of Bremerton v. Widell, 146 Wash.2d 561, 51 P.3d 733 (2002). None of these cases holds that apartment doors are “individual areas” subject to the tenant's control.

Andrews v. McCutcheon, supra, holds that a stairway leading to the leased premises, if not specifically mentioned in the lease, is presumed to be part of the leased premises and becomes the responsibility of the tenant. Although the court in Andrews recognizes a distinction between common areas and leased property, it does not hold that any particular portion of the property, including apartment doors, are either common areas or part of the leased property. In Andrews the court explained that, if the stairway is used by more than one tenant, the stairway is a common area and remains the responsibility of the landlord. As the court said:

The landlord may *expressly or impliedly reserve control over the stairway* in those cases where it is for the exclusive use of a single tenant and his invitees, *or he may expressly or impliedly include a stairway in his leases to the several tenants* and make it a part of the leased premises. *As to whether or not this has been done, in either case, is a question of fact.* When the landlord either expressly or impliedly reserves control over the stairway, whether there be one tenant or several, the tenant or tenants will be protected in his or their right to the use of the stairway, and the landlord has the legal duty to keep and maintain the stairway in a reasonably good and safe condition for use by such tenants and their invitees. (17 Wash.2d 345-346, Emphasis added)

Under the court's holding in Andrews, whether the Housing Authority impliedly reserved control over the apartment doors in its buildings is a question of fact. Nothing in the opinion says, or even implies, that common areas belong to the tenant in the absence of an agreement to the contrary.

The remaining cases cited by the RAC hold that, while landlords have control over common areas, tenants have a privacy interest in their own units that prohibits unwarranted intrusions by the landlord. None of the cases hold that tenants have an ownership interest in any particular portion of the property. In City of Seattle v. McCready the issue was whether landlords or tenants can authorize a search of the tenant's apartment. The court in that case held:

[I]t is the right of possession rather than the right of ownership which ordinarily determines who may consent to a police search of a particular place. *Thus, the landlord and tenant cannot be said to have "common authority" over rented premises, as that phrase is used in U.S. v. Matlock, [415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974)], the tenant's right is superior, and thus the landlord cannot give consent which will be effective against the tenant.* It logically follows, as the cases have held when the issue has presented itself, that the tenant may consent to a search of the leased premises during the term of the lease and that evidence found in a search based upon this consent is admissible against the landlord. W. LaFare, *Search and Seizure* § 8.5, at 298-99 (2d ed. 1987). *Because the tenant, not the landlord, has the privacy interest in the leased premises, we join the jurisdictions which hold that tenants possess the authority to consent to a search of their individual apartment units, notwithstanding any objections by their landlords.*

While this court has not addressed the question directly, our case law has not altered the common law rule. In *City of Seattle v. McCready*, 124 Wash.2d 300, 877 P.2d 686 (1994), we recognized that landlords and tenants possess joint control over the common areas of a multiunit dwelling. Accordingly, we held that city building inspectors have the authority to inspect the common areas of an apartment at the invitation of a tenant.(124 Wn.2d 305-306, emphasis added).

City of Bremerton v. Widell, supra, involved non-residents who were convicted of criminal trespass to challenge the Bremerton Housing Authority's anti-trespassing policy. In that case the court acknowledges that landlords and tenants have joint control over common areas in a multi-unit building, but there is no mention in the decision of any privacy or other rights that tenants have to common areas in general or to their doors in particular.

In Desyllas v. Bernstine the plaintiff argued that a university's removal of his handbills from university common areas violated his First Amendment rights. In its decision, the court held that the plaintiff had no First Amendment right to post bills in the common areas because those areas are not a traditional public forum. Nothing in the case holds that tenants have an ownership interest in common areas, or supports any position taken by the RAC in the case.

In Crowder v. Housing Authority of City of Atlanta, a housing authority resident argued that the housing authority's refusal to allow bible study in the housing authority library and common areas violated his First Amendment rights. In its decision the court, applying the public forum analysis, concluded that the library was not a forum for public expression, but the common areas were, and therefore the complete ban on bible study in the common areas violated the First Amendment. Although the court observed, in passing, that the plaintiff could have used his own unit for

bible study (990 F.3d 593), the court never said that the tenant “had unfettered free speech rights in her [sic] own unit” as the RAC asserts (Respondent’s brief, page 24).¹

Nothing in the authorities cited by the RAC supports its assertion that apartment doors are part of the tenant’s unit over which they exercise ultimate control. McCready mentions the right of tenants to control who may and may not enter their units, but the decision does not confer or reserve to tenants any “superior right” or right to “exclusive use” to any portion of the property, and does not even mention apartment doors. The other authorities cited by the RAC not only do not confer any rights upon tenants to use of any specific portion of the leased property, they do not even discuss or mention such rights. Based upon the authorities cited, this Court should categorically reject the RAC’s assertion that tenant doors are by law reserved for individual tenants’ exclusive use and therefore private property subject to the court’s holding in City of Ladue.

C. Nyer v. Munoz-Mendoza is inapplicable and irrelevant to this case.

The RAC encourages this court to adopt the reasoning of the Massachusetts court in Nyer v. Munoz-Mendoza, 385 Mass. 184, 430 N.E.2d 1214 (1982) saying:

This Court may find *Nyer* particularly persuasive, considering that virtually no substantial difference exists between the injunction reversed by *Nyer* and the objectionable content of Rule 342.

¹ Thomas Crowder, the tenant in the case, is a “he” not a “her.”

As explained in the Housing Authority's Brief on Appeal (Section B, pages 14 to 16), the court's decision in Nyer provides no useful guidance in this case whatsoever. The tenant in Nyer leased an entire floor in a building and the court concluded that, in the absence of an agreement to the contrary, the doors on that floor should be treated as part of the leased premises. Each Housing Authority tenant leases an individual unit on a floor, which the court in Nyer acknowledged should be subject to a different analysis.² The RAC's reliance upon Nyer is as misplaced as its reliance upon Ladue. The facts in Nyer are completely different than the facts in this case, which as the court in Nyer explained, requires a different analysis. Nyer, therefore, provides no useful guidance in this case whatsoever.

D. Respondent confuses privacy rights and property rights.

The proper analysis for determining which portions of a property are included in the leased premises, and which portions are not, is described in Section A of the Housing Authority's Brief on Appeal (pages 11 to 14). The RAC acknowledges that "SHA is ultimately responsible for [apartment doors] and correctly acknowledges an obligation to provide working doors and keep them in good working order." (Respondent's brief, page 33) The RAC then asserts, again without supporting authority,

² In footnote 5 of the opinion, 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." 154 Mass. 187

that “. . . when a tenant moves into an apartment, SHA must cede control over the access door to the tenant, for it is the tenant who must be able to decide when to open, close, enter or exit through her door.”

The RAC completely confuses the tenant’s *privacy right* (see e.g. City of Seattle v. McCready, supra) with *ownership rights* (see e.g. Andrews v. McCutcheon, supra). Privacy rights, the right to decide who can and cannot come into a unit, are inherent in the lease, and are conveyed whether actually mentioned in the lease or not. Ownership rights, (which portions of the entire property are included in the leased premises), however, are first determined by the lease, and then by applying accepted legal principals and examining the rights and responsibilities of the landlord and tenant as it relates to that portion of the property in question. In Andrews v. McCutcheon, supra, the court applied those principals and determined that the stairs were part of the leased premises. The tenant’s privacy rights and right to quiet enjoyment are not a factor when determining whether a particular portion of the property has been leased to the tenant or retained by the landlord. As explained in the Housing Authority’s Appeal Brief (pages 11-14), all the relevant indicia demonstrate that the Housing Authority has retained ownership of its apartment doors.

E. Absent an agreement to the contrary, common areas are retained by the landlord.

The RAC, again without supporting authority, maintains that landlords must specify in the lease or written agreement the portions of the property over which they intend to retain control. Absent such an agreement, according to the RAC, “the common law rule (i.e., the tenant has control) must prevail. (Respondent’s brief, page 36) These statements are demonstrably untrue. In Leuch v. Dessert, 137 Wash. 293, 242 P. 14 (1926) the court held:

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, emphasis added)

In Andrews v. McCutcheon, *supra*, the court said:

The landlord *may expressly or impliedly* reserve control over the stairway in those cases where it is for the exclusive use of a single tenant and his invitees, or he may expressly or impliedly include a stairway in his leases to the several tenants and make it a part of the leased premises. As to whether or not this has been done, in either case, is a question of fact. (17 Wn.2d 345-346)

Contrary to the RAC’s assertions, the common law rule is that absent an agreement, the common elements of a property remain with the landlord.

F. No constitutional rights are abridged by the Housing Authority’s claim that it owns the apartment doors in its buildings.

Based on its erroneous understanding of the law relating to ownership of common areas, the RAC contends that the Housing

Authority cannot require its residents to surrender ownership of common areas (i.e. their apartment doors) because to do so

“ . . . would violate the well-established principle that the receipt of a government benefit may not lawfully be conditioned upon the surrender of a constitutional freedom. It being transparent that SHA’s sole purpose for attempting to reserve control over the exterior surfaces of apartment doors is to undermine the legal protections afforded to tenant speech on those doors, any such agreement – whether now existing or later created – would be invalid.” (Respondent’s brief, pages 37-38)

As is explained above, residents have no automatic entitlement to, or ownership interest in, common areas. Until those rights are legally determined, there is nothing to be surrendered. The RAC, however, assumes that the issue has been decided, and that all common areas not reserved to the Housing Authority in the lease, including doors, are the residents’ property. The RAC then maintains that any effort by the Housing Authority to assert its ownership of common areas would compel residents to surrender their constitutional rights.

The constitutional rights referred to are unclear. If the asserted constitutional rights come from the court’s holding in City of Ladue v. Gilleo, the claimed right is premature because there has been no final determination that Ladue provides constitutional protections to tenants in public housing.³ If residents have some other constitutional right or entitlement to common areas, the RAC does not explain the source or

³ If Ladue is applicable, and any regulation of speech on residential property is prohibited, then this entire argument is unnecessary.

basis for that entitlement. Nevertheless, based upon the assumption that common areas are the tenants' property, and that tenants have unspecified constitutional rights, the RAC argues that any attempt by the Housing Authority to assert ownership over common areas violates the tenants' unspecified constitutional rights. In other words, according to the RAC, the Housing Authority, in arguing that residents have no constitutional right to free expression in common areas, is precluded from making any claim to those common areas, because to do so would abridge the very constitutional right the residents assert.

Whether housing authority residents have a constitutionally protected right to free expression in common areas is the primary issue to be decided in this case. Until the constitutional right asserted by the RAC is established in this case, the RAC cannot argue that any Housing Authority claim to ownership of common areas abridges that right.

The RAC's assertion that the Housing Authority's "sole purpose for attempting to reserve control over the exterior surfaces of apartment doors is to undermine the legal protections afforded to tenant speech on those doors" is completely contradicted by the record in this case. The Housing Authority's reasons for reserving control over its apartment doors are explained in the Declaration of Thomas Tierney as follows:

In 2005 SHA staff began to address concerns that had been expressed for some time, by both building property managers and residents, regarding displays on residents' doors and windows. Residents complained

about the “cluttered” and “college dormitory” appearance that door displays give to the interior corridors. (An example of the concerns expressed by residents is attached as Attachment “B”) Under the House Rules, residents’ doors, for safety reasons, are required to be kept closed except when in use. When closed, the doors are essentially part of the corridor walls, and displays on doors might just as well be on the walls themselves. Clutter on the doors, then, becomes an obstacle to residents’ enjoyment of the hall-way common area, just as clutter on the hall-way walls would detract from the attractiveness of these common areas. Other residents have complained about the content that is displayed on doors. Residents have displayed, for example, Nazi swastikas, confederate flags, photographs and paintings that are considered obscene, and statements and photographs that are interpreted as demeaning to particular ethnic, cultural and religious groups. (Photographs of actual door displays are attached as Attachment “C”). Property managers complained about the negative effects that door displays have on relationships between residents and the problems they have maintaining the peace when one resident is inflamed by the display on another resident’s door. Property managers also share the residents’ concerns about the cluttered appearance that decorated doors give to the common-area corridors, and expressed concern about the negative effects signs in windows have on the exterior of buildings and on relationships between residents. Finally, property managers complain about the cost of refinishing doors when residents vacate. Refinishing costs vary from \$150 to \$450 per door. With 6,500 doors, door refinishing costs can be substantial. (CP 14, pages 198-201)

To address these problems, limitations on residents’ ability to use their doors for communication were unavoidable, but the limitations on speech were a consequence of the regulations, not the purpose or intent of the regulations.

The RAC criticizes the Housing Authority for wanting, like private landlords, to be “free to disregard constitutional considerations as well.” (Respondent’s brief, page 37). Although the Housing Authority observed, in its Brief on Appeal (Appellant’s brief, page 24), that tenants in privately owned properties do not have free speech rights, the Housing Authority has not argued that the constitutional restrictions that apply to all public entities do not, or should not, apply to the Housing Authority. In fact, the Housing Authority concedes that it is subject to First Amendment constraints, and that the limits of those constraints are determined through application of the public forum analysis.

G. Housing Authority property is public property to which the public fora analysis should be applied.

The RAC argues that Housing Authority residents are entitled to constitutional protections because Housing Authority property is public property (Respondent’s brief, pages 38-41). At the same time, the RAC argues that Housing Authority property is private property for the purpose of applying City of Ladue v. Gilleo (Respondent’s brief, pages 4-8), and because Ladue applies, the public fora analysis does not (Respondent’s brief, pages 18-22). Every court that has considered the First Amendment rights of public housing residents has found housing authority property to be public property. See e.g. Crowder v. Housing Authority of City of Atlanta, *supra*; de la O v. Housing Authority of City of El Paso, Tex., *supra*; Daniel v. City of Tampa, Fla., 38 F.3d 546, 550 (11th Cir. 1994);

Daily v. New York City Housing Authority, *supra*; Vasquez v. HACEP, 271 F.3d 198, 204 (5th Cir.2001). The Housing Authority finds no reported case in which property owned by a public entity has been deemed private for determining the nature of First Amendment rights. Housing Authority residents have First Amendment protections because they occupy public property. The question to be determined is what are the limits of those rights and how are the limits to be determined? As the court explained in Daily v. New York City Housing Authority, 221 F.Supp. 2d 390, 396 (S.D.N.Y. 2002):

The First Amendment does not guarantee unlimited access to all government property for expressive purposes. “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 or to the disruption that might be caused by the speaker's activities.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799-800, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1985); see also *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 691 (2d Cir. 1991). Rather, the freedom to speak on government property depends on the nature of the forum where the speech is delivered.

H. Housing Authority corridors, doors, and other common areas are a non-public forum.

In all cases involving the First Amendment rights of tenants in public housing, and of citizens on public property, the public fora analysis has been applied. When the public fora analysis has been applied, the courts have uniformly concluded that public housing common areas are a

non-public forum. In de la O v. Housing Authority of City of El Paso, Tex., in which the plaintiffs asserted a First Amendment right to the use of public housing corridors, the court said:

It is beyond dispute that the primary purpose for the very existence of HACEP's facilities is to provide affordable housing to those in El Paso needing financial assistance. Certainly, the complexes are used for social interaction, but HACEP was not created to facilitate the expression of ideas or serve as a meeting place for citizens. Other than making a cursory assertion that this case is distinguishable from *Daniel*, 38 F.3d at 550 (holding that housing projects are non-public fora), plaintiffs make no real attempt to explain how the complexes could be considered even designated public fora. It seems obvious, therefore, that for purposes of our further analysis, HACEP's facilities are non-public fora.
(417 F.3d 503-504)

Corridors, doors and other common areas in Housing Authority property are part of facilities whose purpose is to provide housing for low-income people. These facilities were “not created to facilitate the expression of ideas” or serve as a place for public expression. In Desyllas v. Bernstine, the court, in discussing application of the public fora analysis to university property, said:

“[T]he standard by which limitations upon [speech rights on public property] must be evaluated differ[s] depending on the character of the property at issue.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). We must first determine the character of the campus areas, such as the columns where Desyllas's fliers were posted, that are not approved under university policy for handbill-posting. Unlike the approved bulletin boards, the unapproved areas are not a public forum. *See DiLoreto*, 196 F.3d at 964 (1999) (noting that public fora such as public parks and

sidewalks have traditionally been open to expression).

The areas that were not approved for posting fliers also are not designated public fora because the university did not intend to open them for expression, as manifested by the university's "Bulletin Board Posting Policy." *See id.* at 964 (noting that the classification of designated public fora hinges on the government's intent). Thus, the campus areas not approved for handbill-posting are nonpublic fora, and "[t]he government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker's viewpoint." *Id.* at 965 (citation omitted).

The corridors and doors on housing authority property have similarly not been approved for sign posting. To the contrary, posting signs in these areas has been specifically prohibited by House Rule #42. The corridors and doors of Housing Authority property are a non public forum and the Housing Authority "may limit expressive activity" in these areas "if the limitation is reasonable and not based on the speaker's viewpoint," which is precisely what the Housing Authority has done in House Rule #42.

CONCLUSION

The RAC argues that the court's decision in City of Ladue v. Gilleo is binding precedent in this case, but it clearly is not. Neither the facts in City of Ladue nor the court's legal analysis have any relationship to the facts or the required legal analysis in this case. Housing Authority residents' First Amendment protections derive from the Housing Authority's ownership of Housing Authority property, not from the court's holding in City of Ladue. As public property, Housing Authority

corridors and apartment doors are non-public forum, subject to reasonable, content neutral limitations on speech. The aesthetic, maintenance and management concerns that caused the Housing Authority to adopt House Rule #42 have been found reasonable by the courts. In Desyllas v. Bernstine, the court held:

The hallways, doorways and columns of the PSU campus are designated off-limits to fliers primarily for aesthetic reasons. The university's policy states that handbills shall not be posted in those areas because doing so causes damage. Widner's removal of Desyllas's press conference fliers, along with other fliers posted on the columns near Smith Center, is consistent with the university's purpose to preserve the appearance of campus structures. (351 F.3d 944)

House Rule #42 was enacted to preserve the appearance of Housing Authority structures. Nothing in the record even suggest that, in adopting or in implementing House Rule #42, that the Housing Authority has restricted any expression based upon the viewpoint of the speaker. Finally, the Housing Authority provided reasonable alternative means for communication (See, Appellant's Brief, pages 18-19).

House Rule #42 does not in any manner abridge the First Amendment rights of Housing Authority residents and should upheld.

RESPECTFULLY SUBMITTED this 5th day of October, 2006.


James E. Fearn, WSBA # 2959

CERTIFICATE OF SERVICE

I certify that on October 6, 2006, I caused a true and correct copy of Appellant's Reply 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 via U.S. First Class Mail.

DATED this 6th day of October, 2006.



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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006-OCT-9 PM 1:09