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OPINION OF THE MICHIGAN
COURT OF APPEALS
(DECEMBER 29, 2016)

STATE OF MICHIGAN
COURT OF APPEALS

ANN WALDRON DAWSON, JEFFREY ALAN
GRUNOW, WAYNE ERXLEBEN, SHIRLEY
ERXLEBEN, LAURA GRACE STERENBERG,
GARY KIEVIT, and MARY KIEVIT,

Plaintiff-Appellants,

v.

CITY OF GRAND HAVEN,

Defendant-Appellee.

No. 329154
Ottawa Circuit Court
LC No. 15-004224-CZ

Before: BORRELLO, P.J., and SAWYER and
MARKEY, JJ.

PER CURIAM

Plaintiffs appeal as of right the August 25, 2015 order of the trial court that granted summary disposition under MCR 2.116(C)(8) to defendant. We affirm.

More than 50 years ago, the “Dewey Hill monument” was donated to defendant as a memorial for those

who served and died in the Vietnam War. The monument was placed on Dewey Hill, a sand dune that defendant owned on the Grand River. The Dewey Hill monument consisted of an elaborate lifting mechanism and foundation that was designed to maintain the sand dune. When the lifting mechanism is raised, a cross is displayed. The cross can be made into an anchor by placing attachments on the bottom and top of the cross. For many years, defendant raised the lifting mechanism to display the anchor or the cross when requested by individuals in the community. For many years, First Reformed Church, where several of the plaintiffs are members, paid the required fee and requested that the cross be displayed for its Worship on the Waterfront services, which were held at the waterfront stage and bleachers across the Grand River from Dewey Hill.

In January 2015, defendant passed Resolution 15-013. Pursuant to the resolution, the lifting mechanism of the Dewey Hill monument could only be raised to display the anchor. In their complaint, plaintiffs alleged that Resolution 15-013 violated the Free Speech Clause and the Equal Protection Clause of the Michigan Constitution. Plaintiffs moved for summary disposition under MCR 2.116(C)(9) and (C)(10), while defendant cross-moved for summary disposition under MCR 2.116(C)(8). The trial court granted summary disposition to defendant on the ground that the Dewey Hill monument was government speech.

On appeal, plaintiffs argue that the trial court misapplied *Pleasant Grove City, Utah v. Summum*, 555 US 460; 129 S.Ct. 1125; 172 L.Ed.2d 853 (2009), and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 US ___, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015), in concluding that the Dewey Hill monument

was government speech. According to plaintiffs, the Dewey Hill monument was a limited public forum and defendant engaged in viewpoint discrimination by excluding religious speech from the forum. We review a trial court's decision on a motion for summary disposition de novo. *Moser v. Detroit*, 284 Mich.App. 536, 538; 772 N.W.2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Johnson v. Pastoriza*, 491 Mich. 417, 435, 818 N.W.2d 279 (2012). A court must accept all well-pleaded factual allegations as true and construe them in a light most favorable to the nonmoving party. *Id.* A motion under MCR 2.116(C)(8) should be granted only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.* We also review constitutional issues de novo. *Varran v. Granneman (On Remand)*, 312 Mich.App. 591, 607; 880 N.W.2d 242 (2015).

The Michigan Constitution guarantees the freedom of speech: "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const. 1963, art. 1, § 5.¹ "The

¹ Although plaintiffs claimed in the complaint that Resolution 15-013 violated the Free Speech Clause and the Equal Protection Clause of the Michigan Constitution, plaintiffs have made no argument regarding equal protection. Accordingly, plaintiffs have abandoned any claim that Resolution 15-013 violates the Equal Protection Clause. *See Peterson Novelties, Inc v. Berkley*, 259 Mich.App. 1, 14; 672 N.W.2d 351 (2003).

Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City*, 555 U.S. at 467.² Government is entitled to say what it wishes, and to select the views that it wants to express. *Id.* “This freedom includes ‘choosing not to speak’ and ‘speaking through the . . . removal’ of speech that the government disapproves.” *Mech. v. Sch. Bd. of Palm Beach Co., Florida*, 806 F.3d 1070, 1074 (CA 11, 2015) (citation omitted).³

Under the Free Speech Clause, government is not without restriction in regulating private speech on government land. *Pleasant Grove City*, 555 U.S. at 469. The United States Supreme Court has adopted a forum analysis; the extent to which government can control private expression on government land depends on the nature of the forum. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). For traditional public forums, which are those forums that have traditionally been available for public expression, such as streets and parks, any content-based restrictions are subject to strict scrutiny. *Perry Ed. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 103 S.Ct. 948; 74

² Because the Michigan Constitution provides the same protection for the freedom of speech as the United States Constitution, this Court may consider federal authority when determining the extent of Michigan’s free speech protection. *Thomas M Cooley Law School v. Doe 1*, 300 Mich.App. 245, 256; 833 N.W.2d 331 (2013).

³ Other constitutional provisions, such as the Establishment Clause, and statutes may limit government speech. *Walker*, 576 US at ___, 135 S.Ct. at 2246, 192 L.Ed.2d at 282; *Pleasant Grove City*, 555 U.S. at 468.

L.Ed.2d 794 (1983); *Hotel Employees & Restaurant Employees Union, Local 100 of New York, NY & Vicinity, AFL-CIO v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 545 (CA 2, 2002). Content-based restrictions for “designated public forums,” which are created when government opens up property that has not traditionally been regarded as a public forum for use by the public at large for assembly and speech, are also subject to strict scrutiny. *Pleasant Grove City*, 555 U.S. at 469-470; *Cornelius*, 473 U.S. at 802. Government may also create a “limited public forum;” this forum is created when government reserves a forum for use by certain groups, such as student groups, or for discussion of certain subjects, such as school board business. *Walker*, 576 U.S. at ___, 135 S.Ct. at 2250, 192 L.Ed.2d at 286; *Perry Ed. Ass’n*, 460 U.S. at 46 n.7. Restrictions for limited public forums must not discriminate on the basis of viewpoint, and they must be reasonable in light of the purpose served by the forum. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106, 121 S.Ct. 2093; 150 L.Ed.2d 151 (2001). “The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius*, 473 U.S. at 802.

In *Pleasant Grove City*, 555 U.S. 460, the city owned a 2-1/2 acre park, which contained 15 permanent monuments. Eleven of the monuments, including a Ten Commandments monument, had been donated by private groups or individuals. The respondent, a religious organization, requested permission to erect in the park a monument that listed its seven aphorisms. After the city rejected the request, the respondent sued the city, claiming that the city violated the Free

Speech Clause of the United States Constitution by accepting the Ten Commandments monument and rejecting its monument. The United States Supreme Court stated, “There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.” *Id.* at 470.

The United States Supreme Court explained that government entities have long used monuments to speak to the public. *Id.* A monument, according to the Supreme Court, by definition, is a structure that is designed as a means of expression, and when a government entity arranges for the construction of a monument, it does so because it wants to convey some thought or instill some feeling in those who see it. *Id.* Certainly, stated the Supreme Court, a monument that is commissioned and financed by a government entity for placement on government land constitutes government speech. *Id.* Likewise, the Supreme Court opined that a privately financed and donated monument that a government entity accepts and displays on government land is government speech. *Id.* It stated:

It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.

In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land. [*Id.*]

The Supreme Court believed it was fair to say that government entities are selective in the monuments they accept. *Id.* at 471-472. It stated:

Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech. [*Id.* at 472.]

According to the Supreme Court, the monuments in the 2-1/2 acre park were government speech. *Id.* The city had controlled the messages conveyed by the monuments by exercising approval over the selection of the monuments. *Id.* at 473.

The Supreme Court rejected an argument, premised on an analogy between permanent monuments and the delivery of speeches, that a public park was a traditional public forum for monuments. *Id.* at 478-480. The Supreme Court explained that forum analysis was applied in situations where government property was capable of accommodating a large number of speakers without defeating the essential function of the land. *Id.* at 478. But a public park could not be opened up for the installation of permanent

monuments by every person or group wanting to engage in that form of expression. *Id.* at 479. However, the Supreme Court cautioned:

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument—for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property. [*Id.* at 480.]

Our analysis is limited to the Dewey Hill monument. We find no merit to plaintiff's claim that the Dewey Hill monument should be considered part of an "outdoor public theatre" that includes the waterfront stage and bleachers. The relevant forum is defined by the access sought by the speaker. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Ed.*, 196 F.3d 958, 965 (CA 9, 1999). There has been no claim that plaintiffs, or even First Reformed Church, have been denied access to the waterfront stage and bleachers. Indeed, the complaint indicates that First Reformed Church was still using the waterfront stage and bleachers for its Worship on the Waterfront services. Rather, the claim is that Resolution 15-013 denied plaintiffs some use of the Dewey Hill monument.

Dewey Hill is owned by defendant, as is the Dewey Hill monument. The Dewey Hill monument is a permanent monument, although it does not display a permanent message. The lifting mechanism can be raised to either display the cross or the anchor. But

this fact and the fact that defendant would raise the lifting mechanism upon request and payment of a fee do not place the Dewey Hill monument in the “limited circumstances” where a forum analysis might be properly applied to a permanent monument. *Pleasant Grove City*, 555 U.S. at 480. The Dewey Hill monument was donated to defendant. By accepting the Dewey Hill monument and allowing it to be placed on Dewey Hill, defendant agreed that the messages conveyed when the lifting mechanism was raised and the cross or the anchor were displayed were ones that it wanted to convey or to which it wanted to be associated. *See id.* at 470-472. There is no claim that defendant allowed any symbol, other than the cross or the anchor, to be displayed when the lifting mechanism was raised. In other words, defendant maintained direct control over the messages conveyed by the Dewey Hill monument. Because defendant did not allow individuals to place private messages, even messages limited to a certain topic, on the Dewey Hill monument when the lifting mechanism was raised, the Dewey Hill monument is government speech and forum analysis is inapplicable to it.

Walker, 576 U.S. ___, 135 S.Ct. 2239, 192 L.Ed.2d 274, where the United States Supreme Court considered whether specialty license plates are government speech, supports this conclusion. In *Walker*, the Supreme Court reasoned that Texas’s policies and the nature of the specialty plates indicated that Texas did not intend the plates to serve as a designated public forum or a limited public forum because, in part, the state exercised final authority over the designs of the specialty plates and because license plates have traditionally been used for government speech. *Id.* at ___, 135 S.Ct.

at 2250-2251, 192 L.Ed.2d at 286-287. Likewise, the nature of the Dewey Hill monument and defendant's policies indicate that defendant did not intend the monument to serve as a limited public forum. Permanent monuments have traditionally conveyed messages from government, *Pleasant Grove City*, 555 U.S. at 470-471, and defendant exercised authority over the messages conveyed by the monument. Defendant only allowed the cross or the anchor to be displayed when the lifting mechanism of the Dewey Hill monument was raised. And the fact that defendant allowed two messages to be conveyed through the Dewey Hill monument does not mean that the messages sent were not those of defendant. *See Walker*, 576 U.S. at ___, 135 S.Ct. at 2251-2252; 192 L.Ed.2d at 287.

We acknowledge that, although defendant exercised authority over the messages conveyed by the Dewey Hill monument, it allowed individuals to help propagate those messages. Individuals could request that the lifting mechanism be raised so that the cross or the anchor was visible, and defendant received payment of a fee whenever individuals made such a request. However, in *Walker*, the United States Supreme Court specifically rejected arguments that a forum analysis is applicable when individuals assist in propagating a message and when government profits from speech. *Id.* at ___, 135 S.Ct. at 2251-2252; 192 L.Ed.2d at 287-288. Regarding profits, the Supreme Court stated, "The existence of government profit alone is insufficient to trigger forum analysis." *Id.* at ___, 135 S.Ct. at 2252, 192 L.Ed.2d at 287-288. Based on *Walker*, defendant could exercise its freedom to speak, even when it receives assistance, including in monetary form, from individuals for the purpose of

conveying its message. By accepting the Dewey Hill monument and exercising authority over the messages conveyed by it, it is clear that defendant was speaking through the monument. *See id.* at ___, 135 S.Ct. at 2252, 192 L.Ed.2d at 288.

We are not persuaded by plaintiffs' argument that the Dewey Hill monument should be considered a limited public forum because Resolution 15-013 provided that Dewey Hill was a limited public forum. Whether the Dewey Hill monument is a limited public forum is a question of law, *see Mich. United Conservation Clubs v. Dep't. of Treasury*, 239 Mich.App. 70, 76, 608 N.W.2d 141 (1999), *aff'd* 463 Mich. 995 (2001) (stating that constitutional issues are questions of law); *Helms v. Zubaty*, 495 F.3d 252, 256 (CA 6, 2007) (stating that whether a county official's agreement that he had an open door policy converted his office into a designated public forum was a question of law), and we are not bound by a party's statement of law, *Kimmelman v. Heather Downs Mgt. Ltd.*, 278 Mich. App. 569, 576, 753 N.W.2d 265 (2008).

In conclusion, the Dewey Hill monument is government speech. Because the Free Speech Clause does not regulate government speech, *Pleasant Grove City*, 555 U.S. at 467, and because the freedom of government to speak includes the right to removal of speech with which the government disapproves, *Mech*, 806 F.3d at 1074, Resolution 15-013, which prohibited the lifting mechanism of the Dewey Hill monument from being raised to show the cross, did not violate the Free Speech Clause. We affirm the trial court's grant of summary disposition to defendant.

Affirmed.

/s/ Stephen L. Borrello

/s/ David H. Sawyer

/s/ Jane E. Markey

OPINION AND ORDER
OF THE CIRCUIT COURT OF OTTAWA
(AUGUST 25, 2015)

STATE OF MICHIGAN
IN THE 20TH CIRCUIT COURT
FOR THE COUNTY OF OTTAWA

ANN DAWSON, JEFF GRUNOW, WAYNE AND
SHIRLEY ERXLEBEN, LAURA STERNBERG,
GARY AND MARY KIEVIT,

Plaintiffs,

v.

CITY OF GRAND HAVEN,

Defendant.

File No. 15-4224-CZ

Before: Hon. Jon HULSING, Circuit Court Judge

This is not a case involving government regulation of private religious speech. Neither is there a question before the Court whether the intermittent display of a governmental owned religious symbol (the cross) on public property violates the Establishment Clause of the First Amendment. Rather, the question before the Court is whether it can order a municipality to display municipality-owned property in such a way as to form a religious symbol contrary to the wishes of that

municipality's governing body.¹ The answer to that question is an unequivocal "No." Defendant's motion for summary disposition is granted and this case is dismissed.

Background

Dewey Hill is a prominent and aesthetically pleasing sand dune owned by the City of Grand Haven, located across the Grand River at the west end of Grand Haven's main downtown street. At the top of Dewey Hill are a flag pole and a monument, described as a "feature pole." The feature pole is attached to a lift mechanism affixed to the ground,² which is designed to maintain the stability of the dune. The fixture includes a basic cross-shaped support to which anchor parts are attached at the top and bottom of the pole. Grand Haven, which is known as "Coast Guard City USA," raises the anchor to celebrate the annual Coast Guard Festival and the City's Fourth of July celebration. For the past fifty years, the City has allowed community groups to raise the fixture to display either the anchor or the unadorned cross on request. Groups renting the waterfront bleachers from the City for religious services have paid the fee and arranged for the display of the cross which is across the river on Dewey Hill. Some of the plaintiffs are members of a

¹ It is axiomatic that a local municipality is governed by its elected board. (*See* MCL 117.3(a) in which a city, in its charter, is required to establish an elected legislative body and designate the mayor as the chief executive officer of the city.) It is likewise axiomatic that a municipality through its governing body operates, maintains and develops its property. (*See* MCL 117.4e(3)).

² Thus, the feature pole is best described legally as a fixture, *infra*.

church that has had the cross on display for Sunday evening services.

Resolution 15-013, entitled “Resolution Limiting Dewey Hill Access and Removing It as a Public Forum,” addresses the various uses made of Dewey Hill and directs that approval of future uses must take into consideration preserving the dune from adverse impact. The Resolution addresses the fixture in paragraph 4 and provides that the fixture, which can be configured as either a cross or an anchor would, commencing January 1, 2015, “be configured solely as an anchor and, as so configured, may be used in conjunction with musical fountain programs or when requested in conjunction with other community activities” for a fee to cover the costs of raising and lowering the pole.

Plaintiffs are seeking a declaration that the Resolution, by eliminating the display of the fixture as a cross, was an unconstitutional regulation of religious speech, a violation of equal protection, and content-based religious discrimination. Plaintiffs request writs of mandamus and a permanent injunction against enforcement of the Resolution, nominal damages, and the award of attorney’s fees. They have moved for summary disposition on their claims pursuant to MCR 2.116(C)(9) and (10). The City of Grand Haven responded to plaintiffs’ motion and filed a cross-motion for summary disposition on plaintiffs’ claims. It maintains that plaintiffs’ complaint failed to state a claim on which relief can be granted and should be dismissed pursuant to MCR 2.116(C)(8).

Both parties agree that the material facts are not in dispute and that this case can be decided on the pleadings. At oral argument on the cross-motions, plaintiffs and defendant agreed that the fixture,

including the anchor parts and the cross-shaped support, are all owned by the City, a fact implied but not clearly stated in the pleadings.

Standard of Review

With respect to defendant's motion for dismissal pursuant to MCL 2.116(C)(8), for failure to state a claim on which relief can be granted, the court tests the legal sufficiency of the complaint, accepting all well-pleaded factual allegations as true and construing them in a light most favorable to the nonmovant. *Maiden v. Rozwood*, 461 Mich. 109, 119-20; 597 N.W.2d 817 (1999). The court may consider any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v. Dep't. of Corrections*, 215 Mich. App. 485, 486, 546 N.W.2d 668 (1996). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden*, 461 Mich. at 119, quoting *Wade v. Dep't. of Corrections*, 439 Mich. 158, 163, 483 N.W.2d 26 (1992).

Analysis

Plaintiffs contend that the City created a public forum by allowing members of the public to request that the cross or anchor be displayed on the fixture and that, at this point, having established a public forum, the City cannot alter its practice and permit only the anchor to be displayed. By disallowing display of the cross, plaintiffs maintain, the City is discriminating on the basis of religious content.

Defendant argues that the City's fixture displays are governmental speech, which is not subject to a

First Amendment free speech analysis, and that the City has the right to determine what messages it sends through the use of its own governmental property. The Court agrees with defendant.

The United States Supreme Court has examined questions relating to government speech in depth in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009), and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, U.S. ___, 135 S.Ct. 2239, L.Ed.2d ___ (2015). The question of whether the Dewey Hill fixture is governmental speech or a public forum for private speech is clearly answered by these cases and is determinative for these motions.³

The *Summum* case involved the refusal of Pleasant Grove City to accept a monument for permanent placement in its city park. The religious group offering the monument argued that, by accepting a broad range of permanent exhibitions at the park, the city

³ Federal authority construing the First Amendment may be considered in interpreting Michigan's guarantee of free speech. As the court stated in *Thomas M. Cooley Law Sch. v. Doe I*, 300 Mich.App. 245, 255-56, 833 N.W.2d 331, 338 (2013):

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ." The Michigan Constitution provides that "[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech . . ." The United States and Michigan Constitutions provide the same protections of the freedom of speech, and this Court does not interpret the Michigan Constitution's protections of speech more broadly than the federal constitution's protections.

had created a forum for private speech in the form of monuments and thus was required by the Free Speech Clause to display the proposed monument.

The *Sumnum* Court held that it was not “difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech” because “[p]ermanent monuments displayed on public property represent government speech.” 555 U.S. at 470. Reviewing the history of monuments erected by governmental entities, the Court stated that “[a] monument, by definition, is a structure that is designed as a means of expression.” *Id.* It explained that “privately financed and donated monuments that the government accepts and displays to the public on government land” are no less governmental speech than monuments that the government itself finances and noted that “throughout our Nation’s history, the general government practice with respect to donated monuments has been one of selective receptivity.” *Id.* at 470-471. “The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.” *Id.* at 472.

The Court also explained that the installation of permanent monuments in a park could not be analogized to the use of a park for the delivery of speeches and the holding of demonstrations. *Id.* at 478. It explained that, while “[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program, . . . if public parks were considered to be traditional public forums for the purpose of erecting

privately donated monuments, most parks would have little choice but to refuse all such donations.” *Id.* at 479-480. The Court in *Sumnum* concluded that the city’s decision to accept or reject a monument was governmental speech and thus was not subject to the Free Speech Clause or forum analysis. *Id.* at 481.

This point was reiterated in *Walker*, which involved the rejection by Texas of a license plate design that included the Confederate battle flag. The Court held: “Forum analysis, which applies to government restrictions on purely private speech occurring on government property, is not appropriate when the State is speaking on its own behalf.” 135 S.Ct. at 2242 (citation omitted). The Court also noted: “The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government’s role into that of a mere forum-provider.” *Id.* at 2251.

Plaintiffs’ contention that the display of the cross is private speech and the city’s resolution is unlawful discrimination is based on three arguments. First, plaintiffs argue that the feature pole displays are not permanent in appearance because the cross and anchor can be lowered from view.⁴ Even if this asser-

⁴ As indicated above, the “feature pole” is a fixture. *Black’s Law Dictionary* (5th ed.) defines a “fixture” as “an article in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the land.” “A thing is deemed to be affixed to land when it is attached to it by roots, imbedded in it, permanently resting upon it, or permanently attached to what is thus permanent, as by means of cement, plaster, bolts, or screws.” [Emphasis added]. That parts of a fixture are adjustable does not make the fixture removable. Thus, Plaintiff’s argument that the “feature pole” is a temporary display is erroneous. It is

tion were true, nothing in the case law supports the conclusion that a government-owned monument that is displayed intermittently is not “a means of expression,” hence it is still government speech. Plaintiffs make this argument in an attempt to fit their claim into the line of cases like *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440, 2442, 132 L.Ed.2d 650 (1995), in which the United States Supreme Court supported the right of the Ku Klux Klan to place an unattended cross on the town square in Columbus, Ohio, during the Christmas season. The Court noted that Capitol Square had been widely used as a public forum for many years and that the Board regulating its use “permitted a variety of unattended displays.” *Id.* at 758. The Court held that the Ku Klux Klan cross could not be barred from a public forum that was “publically announced and open to all on equal terms.” *Id.* at 770. Our case cannot be analogized to *Capitol Square*. The cross displayed by the Ku Klux Klan was owned and maintained by the Ku Klux Klan who sought to display it in a town square where the municipality allowed other speech. In the case at bar, the fixture is owned by the municipality and private individuals are demanding that the fixture be displayed in such a way so as to create religious speech.

Plaintiffs’ second argument is that, by offering community members two configurations of the monument, which they may request to have raised by payment of a fee, the City created a public forum for private secular and religious speech. *Walker* directly addressed the issue of whether private citizens’ part-

an adjustable fixture—thus contrary to plaintiffs’ assertions, the “feature pole” is permanent.

icipation in design choices and their payment of fees changes the speech from government speech to private speech. As quoted above, the *Walker* Court held that the participation of private citizens in design and propagation of a message does not mean that the government has created a forum for private speech. 135 S.Ct. at 2251. The Court also held that the payment of a fee for a specialty license does not create a forum for private speech. *Id.* at 2252. In *Summum*, the Court noted that a government may say what it wishes, and select the views it wants to express, despite the fact that it is receiving private assistance for delivering the government controlled message. 555 U.S. at 467-468.⁵ A private individual's interpretation of government speech does not bind that government to that interpretation as a government speaks for itself.

Third, plaintiffs argue that once the City accepted a monument that could display both an anchor and a cross, and opened a forum to private speech; it cannot partially close the forum by excising the religious speech while continuing to display secular speech.⁶ They argue that the government speech cases do not

⁵ Plaintiffs also argue that the City admitted the monument was a public forum in the title of its Resolution: "Resolution Limiting Dewey Hill Access and Removing It as a Public Forum." The Resolution does not, however, refer to the feature pole as a public forum. The Resolution limits access to the Hill as a whole and removes the Hill as a public forum.

⁶ The Court notes that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capital Square* at 761-762. To reiterate, whether the City's configuration of its property to form a cross violated the Establishment Clause is not before the Court.

support a discontinuation of a message solely on the basis of the facts in *Summum* and *Walker*, which concerned whether the government was compelled to adopt additional messages. The principles announced in these cases, however, concerning the government's right to speak for itself, apply as clearly to the choice to stop displaying a message as the choice to add a message. A government is free to change its policy and position.⁷ More significantly, plaintiffs' argument that the City discriminated in deciding to stop part of its display fails because it is based on the premise that the City has created a forum for private speech, which it has not done through its past use of the Dewey Hill monument, as discussed above.⁸

⁷ Of course, governmental speech is not unlimited.

⁸ The cases plaintiffs cite in support of their argument that the City unlawfully discriminated against religious speech all involve governmental entities that had created a public forum and were trying to regulate *private* speech. Therefore, they are not analogous to the case at bar. For example, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) does not apply because the defendant school created a limited public forum by making the school available for the use of district residents for instructional, social, civic and recreational meetings and entertainment events open to the general public and then sought to restrict individual expression based on religion. *Id.* at 102. Similarly, in *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the university created a limited public forum by funding student publications and was not allowed to discriminate within that forum based on the content of the writing that otherwise fit within the limited forum. In *Reed v. Town of Gilbert, Ariz.*, 576 U.S. ___, 135 S.Ct. 2218, 2236, ___ L.Ed.2d ___ (2015), the town's ordinance regulating the posting of signs discriminated against private speech on the basis of content.

The fact that the City owns and controls the Dewey Hill monument and determined the circumstances through which community members could arrange for it to be displayed requires the conclusion, in light of the Supreme Court cases on government speech, that the City did not create a public forum through its use of the Dewey Hill feature pole. The fixture displays, being government speech, are not subject to Free Speech forum analysis.

Conclusion

Plaintiffs disagree with a policy decision of the Grand Haven City council. Setting policy is precisely what governing bodies are required to do. That government speech offends portions of the electorate is to be expected. The alternative is no alternative in that the government could not take a position on any matter. The City of Grand Haven's Resolution limiting the fixture to promoting the United States Coast Guard and the City's long relationship with the Coast Guard is a valid exercise of its inherent authority to establish policy. Should plaintiffs seek to change that policy, they are free to do so through political means.

For the reasons set forth above, defendant's motion for summary disposition is GRANTED. In that plaintiffs have failed to state a claim, their motion is DENIED and need not be further addressed. The case is DISMISSED on summary disposition for failure to state a claim on which relief may be granted, pursuant to MCR 2.116(C)(8).

IT IS SO ORDERED.

/s/ Jon Hulsing

App.24a

Circuit Judge

Dated: 8-25-2015

This is a final order that closes the case.

**ORDER OF THE SUPREME COURT
OF MICHIGAN DENYING APPLICATION
FOR LEAVE TO APPEAL
(OCTOBER 24, 2017)**

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

ANN WALDRON DAWSON, JEFFREY ALAN
GRUNOW, WAYNE ERXLEBEN, SHIRLEY
ERXLEBEN, LAURA GRACE STERENBERG,
GARY KIEVIT and MARY KIEVIT,

Plaintiffs-Appellants,

v.

CITY OF GRAND HAVEN,

Defendant-Appellee.

SC: 155272
COA 329154
Ottawa CC: 15-004224-CZ

On order of the Court, the application for leave to appeal the December 29, 2016 judgment of the Court of Appeals is considered and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

**WRIT OF MANDAMUS, VERIFIED COMPLAINT
FOR DECLARATORY JUDGMENT, INJUNCTIVE
RELIEF AND NOMINAL DAMAGES
(JUNE 12, 2015)**

STATE OF MICHIGAN
IN THE 20TH CIRCUIT COURT
FOR THE COUNTY OF OTTAWA

ANN DAWSON, a/k/a Jane Doe 1; JEFF GRUNOW,
a/k/a John Doe; WAYNE and SHIRLEY ERXLEBEN;
LAURA STERENBERG; GARY and MARY KIEVIT,

Plaintiffs,

v.

CITY GRAND HAVEN,
a Municipal Entity of the State of Michigan,

Defendant.

Case No. 15-4224-CZ

Before: Hon. Jon HULSING, Judge

There is a resolved civil action arising out of the transaction or occurrence alleged in this complaint.

NOW COMES Plaintiff, ANN DAWSON, et al., by and through counsel, Helen Brinkman, and hereby brings this writ/complaint against Defendant THE CITY OF GRAND HAVEN, its officers, agents, servants, employees, attorneys, and successors in office, and in support thereof alleges the following:

ADDRESSES OF THE PARTIES

1. Plaintiff, ANN DAWSON, formally known as JANE DOE 1, in the previous compliant, is a resident of the City of Grand Haven, County of Ottawa, State of Michigan and resides at 2 Edwards Ave.

2. Plaintiff, JEFF GRUNOW, formerly known as JOHN DOE, is a former resident of the City of Grand Haven and the son of one of the persons who engineered and constructed the Cross on Dewey Hill. He currently resides at 9734 E. Frito Ave, Mesa, Arizona.

3. WAYNE AND SHIRLEY ERXLEBEN; LAURA STERENBERG; and GARY and MARY KIEVIT are certain residents of the City of Grand Haven, in the County of Ottawa, State of Michigan who reside at 1139 Franklin, 1700 Robbins Road and 109 Clinton Ave, respectively and are members of First Reformed Church which conducts Worship on the Waterfront.

4. Defendant THE CITY OF GRAND HAVEN, (hereafter referred to as "Defendant") is a public municipal entity, its officers, agents, servants, employees, attorneys, and successors in office, with its primary place of business 519 Washington Ave, in the City of Grand Haven, County of Ottawa, State of Michigan.

5. This action concerns City property commonly known as Dewey Hill, located in the City of Grand Haven, County of Ottawa, State of Michigan, within the jurisdiction of the Ottawa Circuit Court pursuant to Const. 1963, Art. I, § 2 and MCL 37.2801 and 2803 and MCR 3.301(A)(1)(c) and 3.305.

INTRODUCTION

6. This is a civil rights action, brought pursuant to Michigan Constitution 1963, 1, § 2 & 5 and MCL 37.2102 *et seq*, challenging the constitutionality of Defendant's Resolution 15-013 adopted by the Defendant on January 5, 2015.

7. Said Resolution was adopted by the Defendant, the elected City Council members, representatives of the Plaintiff. The elected Mayor did not vote to adopt the resolution.

8. Dewey Hill is located across the Grand River on the waterfront, in the City of Grand Haven. It is more generally described as a high hill that hosts a musical fountain and occasionally hosts monuments for display which include secular and non-secular speech, through presentations with the musical fountain, and an anchor for the Coast Guard Festival, a star and a Cross.

9. The Cross and Anchor, hereinafter referred to as the Dewey Hill monument, is composed of an elaborate lifting mechanism and foundation that is designed to ecologically maintain the sandy dune that is Dewey Hill. The displays of the cross and the anchor are designed to work with this soil-retaining hoist.

10. The Cross and Anchor are one and the same structure, the Anchor being represented by placing attachments to the bottom and top of the Cross.

11. The Dewey Hill monument was commissioned and has been displayed in the City for over 50 years and is considered a historical and commercial attraction and monument.

12. Upon information and belief, both were made and donated as a memorial to those who served and lost their lives in the Vietnam War.

13. The Cross version of the Monument is used by First Reformed Church as part of the Worship on the Waterfront, held on Sunday evenings in the summer. The Church rents the City Waterfront Bleachers and the Cross is erected as part of that service.

14. On October 20, 2015, Defendant City was approached by Mitch Kahle, a non-resident of Grand Haven, who is associated with the Freedom From Religion Association, and represented a group he identified as "Remove the Grand Haven Cross". He indicated that he wanted equal access or have all access removed from Dewey Hill. He indicated he wanted Constitutional Equal Access. Page 2 of the October 20 minutes is incorporated by reference hereto as part of paragraph 14 on the following page.

[. . .]

General Business/Call to Audience

Mayor McCaleb made a call to the audience, allowing audience members to address Council on any issue.

Mr. Gerald Smith, 933 Moreland, thanked Council for all of their work. He requested that bicycles be prohibited on the boardwalk.

Mr. Martin Vander Broek, 2 Grandview, commented that New York City banned smoking in the downtown area and asked if there were any plans to do so in the City of Grand Haven.

Mr. Mitch Kahle, Norton Shores resident, stated he was from the group "Remove the Grand Haven

Cross.” There was a wonderful community discussion last Wednesday. The group would like to see equal access and funding for Dewey Hill displays for anyone. An equal access policy needed to be established or nothing should be allowed. He wanted to defend the Constitution. He noted he planned on attending future council meetings.

Consent Agenda

14-319 Moved by Council Member Scott, seconded by Council Member Monetza, to approve the October 6, 2014 special work session and regular meeting minutes. This motion carried unanimously.

14-320 Moved by Council Member Scott, seconded by Council Member Monetza, to approve the bills for the period, totaling \$2,069,953.71. This motion carried unanimously. (Attachment A)

Council Member Fritz noted that a large share of the bills amount was due to pass-through tax dollars.

14-321 Moved by Council Member Scott, seconded by Council Member Monetza, to approve the new special event, Christmas Carol Sing, in Bolt Park on Tuesday, December 2, 2014, from 6:30 p.m.-7:30 p.m. This motion carried unanimously.

14-322 Moved by Council Member Scott, seconded by Council Member Monetza, to approve the new special event, Eastend Pickers, to be held at Sluka Field, on Friday and Saturday, April 3-4, 2015, from 9:00 a.m.-5:00 p.m. This motion carried unanimously.

[. . .]

15. Webpage showing affiliation with Freedom From Religion is attached and incorporated by reference to Paragraph 15 on the following 4 pages.

Freethinker of the Year Award

Presented annually by the Freedom From Religion Foundation to recognize defenders of the constitutional principle of separation of church and state

MITCH KAHLE – 2012



Mitch Kahle, founder of Hawaii Citizens for the Separation of State and Church, received FFRF's Freethinker of the Year award at the 34th national convention Oct. 8, 2011, in Hartford, Conn., for his

work in convincing the Hawaii Senate to drop prayers to open legislative sessions. A longtime FFRF supporter, he was assaulted by Senate security for civilly protesting prayers.

I'm so honored to be here. Thank you so much for this award, and I am very proud of all of you. Before I begin, I would like to show you a brief video that has some clips from Hawaii news media about things we've done in the past.

[VIDEO]: This is KITV-4 news at 5. A familiar sight at the Kolehale Pass in Wahiawa is no more. The Army today tore down the Schofield cross today, saying it would cost too much to repair. But a citizen group said the landmark came down because of their lawsuit.

[MITCH KAHLE]: The Army has \$285 billion dollars a year. The cross was a minor expense but a major exposure. We think it violates the First Amendment, and we are glad that they're taking it down and we don't have to continue with the lawsuit.

[VIDEO]: So, your kid joins a youth club, right? A place to meet other kids, to learn and grow and have some fun, and each kid gets a membership card, a card the child has to sign. And on that card it says, "I believe in God. Have a problem with that?"

[KAHLE]: If you don't believe in God, then signing a card that says, "I believe in God" is patently offensive.

[VIDEO]: The Boys and Girls Club of Navy, Hawaii (at Pearl Harbor), is removing the phrase, "I believe in God" from its membership cards.

[VIDEO]: Talk over whether multiple theories of origin should be taught in classrooms is stirring controversy at tonight's Board of Education meeting.

[KAHLE]: Creationism will not be allowed to be taught in Hawaii's public schools science curriculum. (Kahle, after a four-hour meeting): I am very pleased. This puts an end to the controversy, and we're not going to have to have the educational system dragged into what is in essence, going to be a legal battle.

[VIDEO]: The demonstrators say they won't go away until the Scouts stop discriminating against homosexuals. "We are protesting the Boy Scouts because they discriminate. They discriminate against gay youth, and they discriminate against youth who do not believe in God."

[KAHLE]: If you're morally straight, don't discriminate.

[VIDEO]: A group which says lawmakers have no right to post religious symbols on their State Capitol office doors struck back today. The group says the religious symbols violate the separation of church and state, and so they posted their own symbols on the doors as a protest.

[VIDEO]: Some folks are questioning tomorrow's Good Friday holiday. A handful of protesters making their way through the Capitol today, are upset that it's a state and county holiday. Activist Mitch Kahle, dressed as Jesus, was accompanied by members of the Hawaii Citizens for Separation of State and Church.

[KAHLE]: It is an exclusively Christian holiday. There are no secular precepts to Good Friday whatsoever. And so we would like to see the state take action to create an Aloha Day holiday in its place.

[VIDEO]: An advocacy group is protesting prayer tonight at the Honolulu City Council. The group believes that the invocation at the start of council meetings is unconstitutional. Mitch Kahle spent hours going over city records. In his mind, they all show one thing.

[KAHLE]: In the last year, all of the prayers except one have been of a Christian nature. They are showing favoritism to the Christian religion over the wide diversity of religions that there are in Hawaii.

[VIDEO]: A group that advocates the separation of church and state wants the city to remove four words taken from the oath taken by new Honolulu police officers. Until tonight, the police officers' oath ended with the phrase, "so help me God," but it was removed after a local citizens group complained the phrase violated our state constitution.

[KAHLE]: The actual wording of the oath does not include, "so help me God."

[VIDEO]: Our top story tonight, a code of honor controversy at McKinley High School. It has to do with the words "love for God" in the school's honor code, which dates to 1927.

[KAHLE]: This is posted in the classrooms, it's part of the student handbook and it probably appears

elsewhere, although those are the two areas that we're concerned about most now.

[VIDEO]: In the unresolved problems segment tonight, we continue our investigation into the holy war that the American Civil Liberties Union has launched against God and America. Are we going to play this game, Mr. Kahle? Or are we going to be honest?

[KAHLE]: It's your program, Bill. We can play whatever game you want. It's inappropriate for a public school to be telling students what to believe and how to feel. And I'm really surprised that you would actually support the government telling students what to think and believe.

[BILL O'REILLY]: I'm not supporting anything like that.

[VIDEO]: When lawmakers got to work, the day began with a scuffle and an arrest. Just as the invocation was being delivered in the Senate chamber, protesters from the Hawaii Citizens for the Separation of State and Church interrupted.

[KAHLE]: This is a violation of the Constitution! This is a violation of the Constitution!

[VIDEO]: Seven months after he was hauled off in handcuffs and charged with disorderly conduct, a judge has found Kahle not guilty. Kahle's protest lasted about seven seconds, then sat down. But the sergeant-at-arms was determined to remove Kahle.

Speech resumes:



I'm what's known as a public troublemaker, and I would encourage all of you to join me in doing the same. It's about participating in your community. When you do participate in your community, whether you go to a city council meeting or go to a board of education meeting, or go to your legislature, this is where you see the most egregious violations of separation of state and church.

I want to clarify that I always use the term "state and church," not "church and state," and that's because the state is superior to church always. We need to remember that.

I have been protesting government prayer for over 15 years. I am personally, deeply offended when I am forced to participate in some sort of a prayer. It causes a disconnect in my brain, and I have to say I actually get angry.

The question I have when people ask, "Well, why do you get so angry?" is "Why aren't you?" I think everyone should be angry at this sort of thing.

You can write letters, and that's a great way to start. It's very important that when you identify a violation that you remain calm, initially, and that you start out by writing a letter of complaint. Make your voice heard. Make it known that what the government is doing is improper and that you would like them to stop.

Sometimes you have to write more than one letter, and don't be discouraged if you're ignored. I had been ignored on the issue of legislative prayer long enough that I decided I had a right that when the gavel was pounded to bring the session to a start, and when the president of the Senate invited audience members to please rise, I knew I had every right to stand up and object to a violation of my civil rights.

I wrote letters of complaint and letters of warning that we would be coming to the Capitol and standing up to object to the prayer, if it violated the Constitution. We had examined videotapes of previous sessions and had seen that the prayers had been, over 90%, overtly Christian. Pretty much always ending in Jesus' name.

And so we made good on our threat, and on the day of the incident—April 29, 2010—we wrote letters to the president of the Senate, with copies to the attorney general, that we were going to come and object to the prayer.

They had members of the Sheriff's Department there. Before going into the Senate chamber, we sat down with the head of security and explained to him our rights and explained what we were going to do. He said his officers would be neutral. I didn't know that that meant beating us up.

We went up to the gallery and waited for the prayer to begin. And, as you saw just a little bit in the video, what happened was as I made my objection, I was summarily singled out and dragged out of the chambers. My wife, Holly, who is also very active in all sorts of causes, stood up a little bit later, and made the exact same objection that I did, but they were really intent on singling me out.

When the prayer ended and they were dragging me out, all the people in the gallery were yelling, "Amen, amen." So what the government had decided was that voicing approval to the prayer was OK, but voicing disapproval to the prayer got you dragged out and thrown to the ground, my arm badly bent behind my back.

Then they noticed that my friend, Kevin, was filming the whole thing, so they attacked him. The Senate sergeant-at-arms, Bienvenido Villaflor, a former WBA world champion boxer, came over and gave the camera a direct left. From a professional boxer, it's quite a sight to see, and then told his underlings to "get that camera."

They knocked Kevin to the ground and smashed the camera. All the while, five deputy sheriffs stood by and did nothing. Then I was thrown to the ground, handcuffed and taken away. I was charged with disrupting government operations, resisting arrest and disorderly conduct.

To be honest with you, like I said, I am a public troublemaker, and this put a big smile on my face the minute it started to happen. I knew it was going to be a great opportunity. I was taken to the Hawaii state prison and locked up. Though two of the three cells

were empty, I was put in a cell with a very nice gentleman named Castro, who'd been in prison for 17 years, but it was fine. After almost three hours, Holly came and bailed me out.

Thankfully, there are progressive-minded lawyers in Hawaii, just like there are almost everywhere. My six-month defense, which included four hearings and a trial, was done completely pro bona. I was not charged a dime. I want to thank my attorney, Bill Harrison, for that.

Immediately after my acquittal, which was really a wonderful thing, because the judge looked at the video and her mind was instantly made up that I was innocent. From the bench she said it was wrong what was done to me and said I had every right under those circumstances to stand up and object to that prayer because it was a violation of my constitutional rights.

Truth on our side

It's very important that you understand that in these cases we are on the right side of the law. We are the ones with truth on our side, so we can do these things with extreme confidence. Believe in the constitutional idea of separation.

We have filed a 14-count lawsuit in federal court against the state of Hawaii, the sergeant-at-arms and his staff and the Sheriff's Department, and that lawsuit is currently proceeding in federal court.

From my perspective, everything in this case has been positive. I want to carry this forward not as an example that you should get arrested and whatnot, but that when our rights are violated so flagrantly,

right in our face, we need to object. We need to say, "What you're doing is wrong and you need to stop it."

These young people are so inspiring, I mean, I'm a 230-pound man, 6 foot 2, and little Jessica [Ahlquist, a student activist awardee], she's going to have a little bit of a problem. What I really would encourage everybody to do is to identify the violations that are going on in your community, because they are. FFRF sent 475 letters of complaint this year, and that's just the tip of the iceberg. I would be willing to wager that there is not a government body in this country that doesn't at some time at least violate the First Amendment in this way.

We were at a function recently, and just out of the blue, it was not even on the agenda, someone from the audience said, "Well, we should have a prayer." She proceeded to go up in front of all the people to say a blatantly Jesus prayer. As soon as she sat down, my wife went over to her and said, "That was highly inappropriate. That was very offensive of you to do. You shouldn't say a prayer, and if you're ever going to say a prayer, you should keep Jesus out of it."

The woman replied, "Well, I can't say a prayer if I can't say Jesus." So we said, "Well, then don't say one."

We don't tolerate overt statements of racism, at a party, for example. You just don't tolerate it. We have to sort of adopt that tactic when it comes to religion. This might be controversial to say, but religion is a form of discrimination. We have to say something against it.

Mitch Kahle cofounded Hawaii Citizens for the Separation of State and Church (HCSSC) in 1996.

Kahle has been a long-time civil rights activist since the mid-1980s while attending Boston University. After moving to Hawaii with Holly Huber in 1992, he became active in local efforts to legalize marriage for same-sex couples. Kahle and HCSSC have been involved in dozens of high-profile state-church controversies in the Islands. Professionally, Kahle is a documentary filmmaker and entrepreneur. In his free time Kahle enjoys sailing, hiking, and is a jazz bass player and composer.

[. . .]

16. The publicity of the event included internet, television and print media that picked up the controversy and broadcast public meetings that were held.

17. On January 5, 2015, the Defendant adopted Resolution 15-013 by a vote of 3 to 2. The resolution is attached to the 1/5/15 minutes of the meeting as Appendix D. A true copy of the both the applicable minutes and the resolution are included in this paragraph in their entirety on the next 4 pages.

[. . .]

Regular City Council Meeting- Relevant Excerpts

Mayor McCaleb and Council Member Scott said Johnson Hill had done a lot of projects and knew the community well. The City had a good working relationship with them.

15-011 Moved by Council Member **Monetza**, seconded by Council Member **Scott**, to approve a professional services agreement with Abonmarche to evaluate wall condition and possible relocation at

Waterfront Stadium and authorize the mayor and city clerk to execute the necessary documents. This motion carried unanimously.

City Manager McGinnis reported Abonmarche had done some preliminary work to establish the condition of the existing drainage and sheet pile wall. This agreement would have them look more closely to determine the possibility of extending the wall into the river. The extension would allow more room in the Waterfront Stadium area. Abonmarche would also be requested to apply for a permit from the DEQ.

Council thought that the wall should be investigated. Whatever would be built on would have to have a solid foundation.

15-012 Moved by Council Member **Scott**, seconded by Council Member **Monetza**, to approve the extension of a temporary, 90-day traffic control order for Seventh Street from Grant to Colfax to facilitate the opening and closing of traffic gates during student drop-off and pick-up times at Lakeshore Middle School to expire on June 5, 2015. This motion carried with a vote of 4 to 1. In favor: Hierholzer, Scott, Monetza, and McCaleb. Opposed: Fritz. (Attachment C)

Public Safety Director Hawke explained the south gate was opened during drop-off/pick-up times to alleviate congestion at the exit. It opened up another area for students to be picked up. It was not aesthetically pretty, but safer than last year and the beginning of this school year. It has been an evolution to make things safer in the area.

Council discussed issues with the current setup and wanted more discussions and ongoing planning before the end of the school year. A permanent solution

was needed before the beginning of the next school year.

15-013 Moved by Council Member **Monetza**, seconded by Council Member **Hierholzer**, to limit Dewey Hill access, removing it as a public forum. This motion carried with a vote of 3 to 2. In favor: Fritz, Monetza, and Hierholzer. Opposed: Scott and McCaleb. (Attachment D)

The resolution was read aloud for the audience.

Council Member Monetza stated, if allowed to be a public forum, Dewey Hill would stop being a beautiful backdrop to the downtown and become a hideous billboard. Selling Dewey Hill to resolve this issue would be a betrayal to future citizens. It would be unforgivable to convey this public trust to a private party. It did not fit the mission of the City to get into a protracted and expensive court fight over a supposed right to use public resources to own and display anyone's religious symbols. That is the realm of the private sector. The proposed resolution would limit Dewey Hill as a public forum and limit it to the use as a natural space for broadly accepted long-standing public uses. He supported the resolution and limitations it described.

Council Member Scott was not in favor of the proposed resolution. The current requestors to use the hill for other displays had not presented the City with any details, no permits were issued for a critical dune area, no engineering information was presented, and no one discussed the request with the City administration. The people of Grand Haven should vote on whether to keep the hill or sell it to a private entity.

Council Member Hierholzer said Dewey Hill was an important part of the City and was a focus of the waterfront. He would hate to give up control of the dune. If the issue went to court, the City would have to spend a lot of tax dollars. The community could place a cross in the community, but would have to be on private property.

Council Member Fritz noted there was more than one religion in the world and Grand Haven was a diverse community. The waterfront should not be used as a public forum. He wanted to put the current issue to rest and let the City get back to business.

Mayor McCaleb said there were other avenues open to the City so the proposed resolution was not needed at this time. The City had not violated any law since Dewey Hill was an open forum and treated as such. The City had to be responsible by asking questions of those who ask to use public property. The complainants had been asked for plans, and what was presented was woefully inadequate for the harsh conditions on Dewey Hill. She thought the question as to sell the property to a private entity should go to the vote of the people.

Mr. David Davis, 1637 Grant, did not agree with the possibility of a permanent Coast Guard memorial as it was an environmental issue and asked that it be removed from the resolution.

Unfinished Business

15-014 Moved by Council Member **Scott**, seconded by Council Member **Hierholzer**, to approve the final resolution amending Article Three, Section 40-304 of the . . .

[. . .]

Attachment D

Resolution Limiting Dewey Hill Access and Removing It as a Public Forum

WHEREAS, Dewey Hill was identified in the City's February 2013 policy concerning "Access to and Use of Public Property" as city property that could be open to non-commercial public use; and,

WHEREAS, Dewey Hill is designated as a critical dune for the purposes of the Michigan Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.101 *et seq.*; and,

WHEREAS, the City's Environment and Natural Resources Committee has reviewed the effect of current and potential future uses of Dewey Hill, and recommended a policy to limit intrusion on the dune, protect vegetation, limit erosion, reduce debris and litter, and generally to preserve the dune from adverse impacts; and,

WHEREAS, Dewey Hill is one of the most significant natural landmarks within the City, complementing the downtown and connecting the City aesthetically to the simple pristine beauty of the lakeshore environment; and,

WHEREAS, Dewey Hill has historically been a focal point for community-wide celebrations including display of the American Flag, regular performances of the musical fountain, and seasonal celebrations, such as, Independence Day and Coast Guard Festival celebrations; and,

WHEREAS, the City has received requests to site additional structures on Dewey Hill, or to substantially alter existing structures, which would require access for construction, erection, and repeatedly changing displays; and,

WHEREAS, the City legally cannot and should not selectively allow displays if that selection could even be perceived as based on the content of the displays; and,

WHEREAS, the City has cultivated a close friendship with the United States Coast Guard Service, and has been officially designated “Coast Guard City USA”; and,

WHEREAS, the City seal and the United States Coast Guard seal both include an anchor, and so an anchor is symbolic of their close relationship.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. Commencing January 1, 2015, Dewey Hill shall no longer be available for any display except in accordance with this resolution.

2. The American flag shall continue to be displayed on Dewey Hill.

3. The City Council may each year adopt resolutions permitting fireworks displays and other displays in conjunction with the annual Independence Day holiday and Coast Guard Festival. Before adopting any such resolution, the City Council shall review past celebrations and their impact on the dune, consider measures to be employed to minimize the effects on the dune during the proposed upcoming celebration, consider any special weather or other conditions that may affect the fragility of the dune, and consider other

factors the City Council deems to be important for its annual review and consideration.

4. The feature pole currently located on Dewey Hill shall be configured solely as an anchor and, as so configured, may be used in conjunction with musical fountain programs or when requested in conjunction with other community activities. Anyone requesting use of the anchor display for purposes other than in conjunction with Independence Day celebration, the Coast Guard Festival, or a musical fountain program, shall pay a fee to the City that is determined to pay the cost to raise or lower the pole.

5. The Musical Fountain may continue to be used. Musical fountain operation, maintenance, repair, replacement, and improvement shall be undertaken in a manner to minimize impacts on the dune, considering any special weather or other conditions that may affect the fragility of the dune, and addressing any other factors the City Manager may from time to time determine should be considered.

6. In honor of the service and sacrifices of the men and women of the United States Coast Guard, and with the advice and consent of the Coast Guard, the City may choose to replace the feature pole anchor display by constructing a permanent memorial on Dewey Hill. Any such memorial shall be designed and constructed in close cooperation with the Coast Guard, in accordance with all applicable Coast Guard protocols, design elements, and standards; in a manner consistent with MDEQ permit requirements, if any; in a manner which will have minimal environmental impact on the fragile dune; and shall be funded from private sources.

7. The City's February 2013 policy concerning "Access to and Use of Public Property" and any other City policies, practices, or procedures are, to the extent of any conflict with this policy, hereby amended. Accordingly, this resolution shall control over any inconsistency with any other City resolution or policy.

Certificate

I hereby certify that the foregoing is a true and complete copy of a Resolution adopted by the City Council of City of Grand Haven, County of Ottawa, Michigan, at a regular meeting held on January 5, 2015, and that public notice of the meeting was given pursuant to Act 267, Public Acts of Michigan, 1976, as amended.

IN WITNESS WHEREOF, I have hereto affixed my official signature on January 5, 2015.

/s/ Linda L. Browand

City Clerk

City of Grand Haven

[. . .]

18. Defendant's actions in singling out the Dewey Hill Cross, the target of the anti-religious group, and keeping the Coast Guard Anchor, the non-religious part of the monument, constitutes an action regulating speech in an established forum allowing that speech and content discrimination on the sole basis of religion, in violation of the Michigan Constitution Article 1, sections 2 and 5 and Civil Rights Act.

19. Plaintiff seeks a Writ of Mandamus and/or declaratory judgment holding Defendant's Resolution

eliminating religious speech and expression on Dewey Hill unconstitutional on its face and as applied to Plaintiffs, the persons which the governmental entity represent and represented. MI Const. 1963 Art. 1, Sec. 1.

20. Plaintiff also seeks a permanent injunction against the enforcement of Defendant's Resolution as well as nominal damages and an award of costs and attorneys' fees associated with this action.

JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to MCR 3.301(A)(1)(c) and 3.305, MCL 37.2801 and MCL 37.2803 and Const. 1963, Art. 1, §§ 1, 2, 3, 4 and 5, as it arises under the Constitution and laws of the State of Michigan which seeks to redress the deprivation, under color of law, of any right, privilege, or immunity secured by the Constitution of Michigan or by a Municipality providing for equal rights of citizens and in that it seeks to recover damages and to secure equitable and other relief.

22. Plaintiffs claims for Writ of Mandamus, declaratory and injunctive relief are authorized by MCL 37.2801 and 37.2803, and this Court has the authority to award Plaintiffs their costs and attorneys' fees associated with this action.

23. Venue is proper within this judicial district, pursuant to MCL 37.2102(1) and MCL 37.2103(g) and (h) because Defendant is a municipality and the Dewey Hill monument is located within this judicial district.
Id

PARTIES

24. Plaintiffs are residents of Grand Haven, Ottawa County, Michigan and John Doe is an interested party, and said persons are entitled to just action by their representatives in government as set forth in MI Const. 1963, Art. 1, Sec. 1. Specifically, Plaintiffs noted in paragraph 3 above are persons who are not only residents but use the Cross as part of Worship on the Waterfront events on Sunday evenings in the summer.

25. Defendant, the City of Grand Haven City is a public entity formed under the laws of the State of Michigan and is located in Ottawa County, Michigan. Defendant, through its officers, agents, servants, employees, and attorneys, promulgates and enforces under the color of law the policies, practices, and customs governing the use of Dewey Hill. According to Michigan law, Defendant is a public entity that may sue and be sued.

ALLEGATIONS OF FACT

26. Plaintiffs are the residents of Grand Haven, Ottawa County, Michigan and an interested party who are entitled to Constitutional representation by Defendant elected officials. MI Const. Art. 1, Sec 1.

27. Dewey Hill is located in the City of Grand Haven, County of Ottawa, State of Michigan.

28. Dewey Hill is a limited public forum and memorial.

29. It is visually across the Grand River and flanked by a marina and sand dunes. There is no visual nexus to any governmental building or marker.

30. Defendant is the municipality vested with governing the Dewey Hill area and the Citizens of Grand Haven.

31. After the October 20, 2014 request by Mitch Kahle from the “Remove the Grand Haven Cross” group, the Defendant City, on January 5, 2015, enacted Resolution 15-013, permitting the continued display of the Coast Guard Anchor on Dewey Hill but eliminating the Cross, citing the likelihood of a lawsuit based on anti-Christian advocates. A true and correct copy of Resolution 15-013 and the minutes attendant that Resolution are reproduced in full in paragraph 17 above and is incorporated by reference herein.

32. This Resolution was passed by a vote of 3 to 2.

33. Defendant’s Resolution contains content based discrimination against religious free speech, in the Dewey Hill Cross Monument by eliminating the religious portion and specifically retaining the secular version of the monument, embodied in the Coast Guard Anchor.

ALLEGATIONS OF LAW

34. The Preamble to the Michigan Constitution is an example of Government’s nondiscrimination against religious speech. It reads, “We, the People of the State of Michigan, grateful to Almighty God for the blessings of freedom and earnestly desiring to secure these blessings undiminished to ourselves and our posterity do ordain and establish this Constitution.” Such speech is not a violation of the Establishment Clause and does not make the governmental entity subject to legal action.

35. The Defendant has a duty to its citizenry. MI Const. 1963, Art.1 § 1. “All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.” *Id.*

36. The action embodied in Resolution 15-013 is viewpoint discrimination and violates the equal protection clause of MI Const. 1963, Art. 1, § 2, “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.”

37. The legislation implementing MI Const. 1963, Art. 1, Sec. 2 is at MCL 37.2101 *et seq*, which provides for Circuit Court action. *See also* Michigan Court Rule MCR 3.301(A)(1)(c) and 3.305.

38. The Resolution also violates free speech clause of MI Const. 1963, Art. 1, Sec. 5, which states, “Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.”

39. “The goal of the Civil Rights Act was to **broaden the scope** of equal protection rather than the standard of equal protection developed by the courts in the course of interpreting the equal protection provisions of United States and Michigan Constitutions”. *Civil Rights Department v. Waterford*, 425 Mich. 173, 387 N.W.2d 821 (1986). (Emphasis added).

40. The Resolution endorses a hostility toward religious speech as condemned in *Good News Club vs.*

Milford Central School, 202 F.3d 502 (2001) citing “the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.”

41. The exclusion of the Cross is not “viewpoint neutral” as required by law. “The First Amendment does not forbid a **viewpoint-neutral exclusion** of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.” *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 806 (1985) (Emphasis added).

42. Defendant’s Resolution regarding the regulation of religious speech and expression on Dewey Hill unlawfully denies equal protection of religious speech while retaining the secular speech in a forum that has always existed to allow the religious portion of that speech and is therefore religious content based discrimination and invalid on its face.

43. Defendant’s Resolution regarding the regulation of religious speech and expression on Dewey Hill are an unlawful restraint on protected speech in a limited public forum.

COUNT ONE

Violation of the Article 1 Section 5 of the Michigan Constitution—Freedom of Speech

44. Plaintiff repeats and re-alleges the allegations in paragraphs 1 through 43 above and incorporates those allegations herein by reference.

45. Defendant’s Resolution 15-013 as reproduced in paragraph 17 above is content based discrimination against religious speech and expression on Dewey Hill, by its language, on its face, in contravention of the

Plaintiffs' right of freedom of speech guaranteed by the MI Constitution Art. 1, Sec. 5 and MCL 37.2101 *et seq.*

46. Wherefore, Plaintiff requests the relief set forth below in the prayer for relief.

COUNT TWO
Violation of Article 1, Section 2 of the
Michigan Constitution—Equal Protection
against Discrimination

47. Plaintiff repeats and re-alleges the allegations in paragraphs 1 through 46 above and incorporates those allegations herein by reference.

48. Defendant's Resolution 15-013 as reproduced in paragraph 17 above denies equal protection of religious speech through content based discrimination and expression on Dewey Hill and is, on its face, a Constitutional violation of the right of equal protection guaranteed by the MI Const. 1963 Article 1, Sec. 2.

49. Wherefore, Plaintiff requests the relief set forth below in the prayer for relief.

COUNT THREE
EX PARTE MOTION for Show Cause on
Mandamus/Injunctive Relief

50. Plaintiff repeats and re-alleges the allegations in paragraphs 1 through 49 above and incorporates those allegations herein by reference.

51. Pursuant to MCR 3.305(C), which states, "On ex parte motion and a showing of the necessity for immediate action, the court may issue an order to show cause. The motion may be made in the complaint.

The court shall indicate in the order when the defendant must answer the order”, the Plaintiffs hereby request this Honorable Court to accept this complaint as an ex parte motion for the Defendant to Show Cause why preliminary injunctive relief against enforcement of Resolution 15-013 is not appropriate pending the resolution of this matter.

52. “Preliminary injunctive relief is automatically appropriate for violation of Free Speech clause as “the Supreme Court has recognized that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547 (1976); *see also Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County*, 274 F.3d 377, 400 (6th Cir.2001).” *JS v. Holly Area Schools*, 749 F.Supp.2d 614, 629 (ED Mich. 2010). (Emphasis and highlight added).

53. The factors to consider in entering a preliminary injunctive order includes the urgency for immediate response. The urgency here is the peak time for Worship on the Waterfront has already begun and the services are being conducted without the Cross.

54. The necessity is to avoid the continued appearance, already publicized, that the City of Grand Haven is hostile to the Cross as religious speech. *See Good News Club, Supra* in paragraph 36.

55. Wherefore, Plaintiffs requests the relief set forth below in the prayer for relief.

PRAYER FOR RELIEF

56. Plaintiffs repeats and re-alleges all allegations made above and incorporates those allegations herein

by reference, and Plaintiffs respectfully asks that this Court grant the Plaintiffs the following relief and enter final judgment against Defendant City of Grand Haven:

- A. Enter a Declaratory Judgment that Defendant's Resolution 15-013 regarding the Cross on Dewey Hill violates, on its face, the rights guaranteed and protected by the Free Speech clause of the Michigan Constitution, MI Const. 1963, Art. 1, Sec. 5 as viewpoint discrimination against religious speech;
- B. Enter a Writ of Mandamus that repeals Defendant's Resolution 15-013 for violation of the Free Speech Clause and Equal Protection Clause of the Michigan Constitution as content based religious discrimination;
- C. Enter a Declaratory Judgment that Defendant's Resolution regarding the Cross on Dewey Hill violates on its face, the rights guaranteed and protected by the Equal Protection clause of the Michigan Constitution, MI Const. Art. 1, Sec. 2 as content based religious discrimination;
- D. Enter a Writ of Mandamus that repeals Defendant's Resolution 15-013 for violation of the Equal Protection Clause as content based religious discrimination;
- E. Enter an injunction against future discriminatory action against the Dewey Hill Cross Monument or musical fountain based on religious content;

- F. Award Plaintiff nominal damages in an amount not to exceed \$19.00;
- G. Award Plaintiff their reasonable attorneys' fees and costs associated with this action; and
- H. Award Plaintiff any other and further relief as this Court deems equitable and just.

Respectfully submitted on this 12th day of June,
2015:

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**APPELLANTS' BRIEF ON APPEAL—
RELEVANT EXCERPTS
(OCTOBER 28, 2015)**

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ANN DAWSON, JEFF GRUNOW, WAYNE and
SHIRLEY ERXLEBEN; LAURA STERENBERG;
GARY and MARY KIEVIT,

Appellant/Plaintiffs,

v.

CITY GRAND HAVEN,
a Municipal Entity of the State of Michigan,

Appellee/Defendant.

Court of Appeals Case No. 329154
Lower Court Case No. 15-004224-CZ

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[. . .]

STATEMENT OF ISSUES ON APPEAL

ISSUE I

**Did the Lower Court Err in Application of Law
Creating an Ownership Test for Government
Forum Analysis?**

The Court Answered, “No”

The Plaintiff/Appellants Answer, “Yes”

The Defendant/Appellee Answers, “No”

ISSUE II

**Is the Type of Public Forum on Dewey Hill a Limited
Public Forum?**

The Court Answered, “No”

The Plaintiff/Appellants Answer, “Yes”

The Defendant/Appellee Answers, “No”

ISSUE III

**Does Resolution 15-013 Constitute Religious
Viewpoint Discrimination in Violation of the Free
Speech and Equal Protection Clauses of the
Michigan Constitution?**

The Court Answered, “No”

The Plaintiff/Appellants Answer, “Yes”

The Defendant/Appellee Answers, “No”

ISSUE IV

**Is There a Compelling State Interest Sufficient to
Justify Religious Viewpoint Discrimination in
Resolution 15-013?**

The Trial Court Did Not Answer This Question

The Plaintiff/Appellants Answer, “No”

The Defendant/Appellee Did Not Address This
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. . . under subrule (C)(8) tests the legal sufficiency of a plaintiff's complaint on the pleadings alone. *Id.* at 119-120. In assessing the motion "[a]ll factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. This includes "any reasonable inferences or conclusions that can be drawn from the facts." *Eason v. Coggins Memorial*, 210 Mich. App. 261, 263 (1995). The motion should be granted only when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Wade v. Dep't of Corrections*, 439 Mich. 158, 163 (1992).

When reviewing findings of fact on appeal, the standard of review is whether the trial court's decision is clearly erroneous. MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v. Lanzo Constr. Co.*, 272 Mich. App. 470, 473 (2006).

CONSTITUTIONAL STANDARD OF REVIEW

Because Michigan Constitution's free speech provisions are coterminous with those provided in the First Amendment of the United States Constitution, both state and federal law are applicable. *Estate of Grable v. Brown (In re Dudzinski)*, 257 Mich. App. 96, 100 (2003). "Therefore, federal authority construing the First Amendment may be considered in interpreting Michigan's guarantee of free speech." *Id.* citing *Michigan up & Out of Poverty Now Coalition v. State of Michigan*, 210 Mich. App. 162, 168-69 (1995).

MI Const. 1963, Art. 1, § 2, states¹ “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.” The legislation implementing MI Const. 1963, Art. 1, Sec 2 is at MCL 37.2101 *et seq*, which provides for Circuit Court action. *See also* Michigan Court Rule MCR 3. 301(A) (1)(c) and 3.305.

[. . .]

. . . and limit it to the use as a natural space for broadly accepted long-standing public uses.” (Complaint #17) (Emphasis added). First Reformed’s Worship on the Waterfront is a “long-standing purpose” as corroborated by the fact that First Reformed continues to conduct Worship on the Waterfront, renting the bleachers and stage, after the Resolution went into effect. They still offer the hoist as speech; but not as a cross. (Appendix A). Contrary to MCL 37.2102(1) it forbids the “full and equal utilization of public accommodations.” They accommodate the public to raise the cross covered as an anchor but will deny Plaintiffs equal utilization as a cross, “because of religion”. This is textbook religious viewpoint discrimination (*See* Issue III).

¹ The Preamble of the Michigan Constitution states, “We, the People of the State of Michigan, grateful to Almighty God for the blessings of freedom and earnestly desiring to secure these blessings undiminished to ourselves and our posterity do ordain and establish this Constitution.”

Allowing First Reformed Church to continue to raise the hoist as an anchor for Worship on the Waterfront refutes any argument Dewey Hill feature pole is government speech or that the Resolution “closed’ the public nature of forum. The language is content specific. It does not transform the venue into government speech. The lower court’s declaration that “[t]his is not a case involving government regulation of private religious speech.” is patently untrue. The cross is religious speech. *Pinette, supra*. The minutes declare, “The proposed resolution would limit Dewey Hill as a public forum and limit it to the use as a natural space for broadly accepted long-standing public uses.” Emphasis added.” (Complaint #17). Worship on the Waterfront’s display of that backdrop in the public auditorium is a long-standing public use.

Thus, Dewey Hill was and remains open as a limited public forum based on the language on its face and in the City’s implementation of Resolution 15-013.

C. Conclusion

Dewey Hill is the *sine qua non* of a long-standing limited public forum for religious speech both in its design and use, and on the language of the Resolution itself. Summary judgment, in the instant case, was not predicated on the uncontested facts nor language of the Resolution, as required by MCR 2.116(C)(8). The lower court’s findings of fact and conclusions of law that Dewey Hill is a government forum and “not a case involving government regulation of private speech” (Opinion, page 1) is plain error. MCR 2.613(C).

[...]

Issue III

Does Resolution 15-013 Constitute Religious Viewpoint Discrimination in Violation of the Free Speech and Equal Protection Clauses of the Michigan Constitution?

Having dismantled the ownership test and established this is a limited public, not government, forum, all that is left is to properly apply sound constitutional principles to the Resolution's elimination of the cross.

The lower court's reticence in holding the City to its constitutional obligations began in failing to heed beyond the first half of the following sentence in *Summum*:

“While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property.” *Summum* at 469. (Emphasis added).

* * *

“Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest and restrictions based on viewpoint are prohibited.” *Summum* at 469 (emphasis added).

“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve

compelling state interests.” *Reed, et al v Town of Gilbert*, 576 U.S.____; 135 S. Ct. 2218, 2226; 192 L.Ed.2d 236 (2015) (Emphasis added).

Because Dewey Hill is a limited public forum, some government restrictions are permissible—but only as it relates to speech not already included within the parameters of the forum. That is not the situation here. This cross has always been in the forum and is covered by the constitutional protections of the Free Speech and Equal Protection clauses of the Michigan Constitution.

A. Parameters of Lawful Restrictions in Limited Public Forums

Rosenberger provides the parameters for governmental regulation of private speech in a limited public forum. The test is whether the government is acting to keep out speech not originally part of the forum, or engaging in viewpoint discrimination which is directed toward speech already within the forum:

“Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.” *Rosenberger*, at 830 internal citations omitted, Emphasis added.

“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *Rosenberger* at 829.

As noted above, Dewey Hill is a limited public forum which was originally created to include the cross. Having facilitated its message for 50 years, the City is bound by the original intent of forum and cannot exclude speech traditionally included therein. *Id.*

The lower court held without reference to authority that “The principals annunciated in these cases, however, concerning the government’s right to speak for itself, apply as clearly to the choice to stop displaying a message as the choice to add a message.” (Op. p. 7). That is contrary to what *Rosenberger* and its progeny state:

“Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum,’ nor may it discriminate against speech on the basis of its viewpoint.” *Rosenberger* at 829-830 internal citations omitted, Emphasis added.

So here, where the cross has always been part of the purpose of that forum, the City cannot exclude it on religious viewpoint grounds. *Id.* Resolution 15-013 does not “respect the lawful boundaries” the City had “itself set”. It “may not exclude speech where its distinction is not ‘reasonable in light of the purpose

served by the forum”. *Id.* “[N]or may it discriminate against speech on the basis of its viewpoint.” *Id.* Accordingly, Resolution 15-013 does not pass strict scrutiny and must be presumed unconstitutional. *Reed, supra*, 135 S. Ct. at 2226.

The Court’s duty to enforce the constitution against religious viewpoint discrimination is highlighted in *Rosenberger*. There the Supreme Court held the . . .

[. . .]

B. Resolution 15-013 Is Unconstitutional on Its Face and as Applied

The Resolution states, “Anyone requesting use of the anchor display . . . shall pay a fee to the City that is determined to pay the cost to raise or lower the pole.” (Complaint paragraph 17, in Appendix D under paragraph labeled #4 of the Resolution) (Emphasis added). But as to the continued display of the cross it states the “feature pole currently located on Dewey Hill shall be configured solely as an anchor and, as so configured, may be used in conjunction with musical fountain programs or when requested in conjunction with other community activities.” (Complaint paragraph 17, in Appendix D under paragraph labeled #4 of the Resolution)(Emphasis added).

Therefore, the Resolution is content based legislation directed at removing the cross from Dewey Hill solely due to its religious content. “Content based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling

state interests.” *Reed, supra* 135 S.Ct. at 2226 (Emphasis added).

There is no content neutral justification for raising it covered as an anchor, but banning it uncovered as a cross. *Reed, supra*, 135 S. Ct. at 2226; *JS, supra* 625-629. Thus, both on its face and in application to the Plaintiff/Appellants, the Resolution is content based religious viewpoint discrimination.

Issue IV

Is There a Compelling State Interest Sufficient to Justify Religious Viewpoint Discrimination in Resolution 15-013?

The lower court opined that it did not have the power to force the City to host a religious message it disagrees with. (Opinion at p. 1). That conclusion is wholly mistaken. The Courts have a duty to apply strict scrutiny to preclude legislative religious discrimination. *Reed, supra*, 135 S. Ct. at 2226. “Under that Clause, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Id.* Where equal protection and free speech rights are abridged, it is unconstitutional absent a compelling state interest. *Id.*

[...]

STATEMENT OF RELIEF REQUESTED

WHEREFORE, for all of the following reasons, the Plaintiff/Appellants hereby request the lower court’s ruling be set aside as clearly erroneous in its findings of fact and conclusions of law and declare

Resolution 15-013 unconstitutional viewpoint discrimination on its face and as applied.

Respectfully submitted,

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Date: October 28, 2015

**APPLICATION FOR LEAVE TO APPEAL—
RELEVANT EXCERPTS
(FEBRUARY 8, 2017)**

STATE OF MICHIGAN
IN THE SUPREME COURT

ANN DAWSON, JEFF GRUNOW, WAYNE and
SHIRLEY ERXLEBEN; LAURA STERENBERG;
GARY and MARY KIEVIT,

Appellant/Plaintiffs,

v.

CITY GRAND HAVEN,
a Municipal Entity of the State of Michigan,

Appellee/Defendant.

Supreme Court Case No. 155272
Court of Appeals Case No. 329154
Lower Court Case No. 15-004224-CZ

STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals Err in Declaring the Equal Protection Argument Waived Where It Was Clearly Titled and Argued in the Brief on Appeal and in the Complaint Filed in Circuit Court?

The Court of Appeals answered: No.

The Plaintiffs answer: Yes.

Defendant presumably would answer: No.

II. Did the Lower Court Err in Failing to Accept the Facts Pled in the Complaint as True and View Them in a Light Most Favorable to the Non-Moving Party?

The Court of Appeals answered: No.

The Plaintiffs answer: Yes.

Defendant presumably would answers: No.

III. Did the Lower Court Err in Declaring the Dewey Hill Cross Government Speech Under *Walker* and *Summum*?

The Court of Appeals answered: No.

The Plaintiffs answer: Yes.

Defendant answers: No.

IV. Is Resolution 15-013 Unconstitutional Viewpoint Discrimination on Its Face and/or as Applied in Violation of the Free Speech and Equal Protection Clauses of the Michigan Constitution?

The Court of Appeals answered: No.

The Plaintiffs answer: Yes.

Defendant answers: No.

V. Is There a Compelling State Interest Justifying Religious Viewpoint Discrimination in Resolution 15-013?

The Court of Appeals answered: No.

The Plaintiffs answer: No.

Defendant answers: Yes.

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address the cases that discuss requests for *inclusion* of new or different speech into an existing forum. This includes *Summun, Walker, and Diloreto v. Downey Unified School*, 196 F.3d 958 (9th Cir., 1999). Such is not the case here. The government has the right to choose what speech to initially allow in a forum, prior to its debut. *See Golden v. Rossford Exempted Vill. Sch. Dist.*, 445 F. Supp. 2d 820, 823 (ND Ohio, 2006). However, once it is opened with the cross at its foundation, it cannot be removed. *Rosenberger, supra*, 829-830; *Lambs Chapel v. Center Moriches*, 508 U.S. 384, 394; 113 S. Ct. 2141; 124 L.Ed.2d 352 (1993), *JS v. Holly Area Schools*, 749 F. Supp. 2d 614, 628 (ED Mich., 2010).

“[A]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum. . . or if he is not a member of the class of speakers for whose especial benefit the forum was created. . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”

“The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject

from a religious standpoint.” *Lamb’s Chapel* at 394 (Emphasis added).

This forum hosts private speech and its historical inclusion of a public speaker raising the cross triggers constitutional protections. As such, it is certain Resolution 15-013 “involve[s] government regulation of private religious speech” in violation of both the Free Speech and Equal Protection clauses of the Michigan Constitution. Const. 1963, Art. 1, Sec. 2&5; MCL 37.2102(1). We therefore rely on this Court’s mandate to secure Michigan’s Constitutional guarantees and ask it to strike down Resolution 15-013 as religious viewpoint discrimination.

C. Resolution 15-013 Is Unconstitutional on Its Face and as Applied

The Courts have a duty to apply strict scrutiny to preclude legislative religious discrimination. *Reed*, *supra*, 135 S. Ct. at 2226. “Under that Clause, a government, including a municipal government vested with state authority, ‘has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’” *Id.* Resolution 15-013 is a content based law, removing the cross from the hill because it is religious.

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed* at 135 S. Ct. 2226. Emphasis added.

* * *

“More to the point, the Church’s signs inviting people to attend its worship services are

treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. *Id.* at 2227. Emphasis added

As noted above, Resolution 15-013 indicates Dewey Hill is a limited public forum which was originally created to include the cross. No less ambiguous is its language indicating its sole purpose and effect was to remove the cross option on Dewey Hill. The Resolution states, “Anyone requesting use of the anchor display . . . shall pay a fee to the City that is determined to pay the cost to raise or lower the pole.” (Complaint paragraph 17, Appendix B). But as to the continued display of the cross it states the “feature pole” currently located on Dewey Hill shall be configured solely as an anchor and, as so configured, may be “used in conjunction with musical fountain programs or when requested in conjunction with other community activities.” (Complaint paragraph 17, Appendix B). The plain language, on its face and as applied to Worship on the Waterfront, excludes the religious speech formally within that limited public forum, while inequitably favoring the secular option on the same structure. (Complaint, #17, Appendix B). And, contrary to MCL 37.2102(1), it denies the “full and equal utilization of public accommodations”.

“Content based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to

serve compelling state interests.” *Reed, supra* 135 S.Ct. at 2226. There is no content neutral justification for removing the cross in this case. *JS, supra* 625-629 (*See* Issue V)

As it applies to First Reformed Church’s Worship on the Waterfront, the Resolution denies their right to hoist the cross as a backdrop to their concert/event in the theater/stadium. There is no question the Resolution effectively eliminates their religious message as was formally accommodated in that forum. The sole purpose in enacting it, according to the minutes of the meeting, was to eliminate religious speech on the hill. (Appendix B). Thus, both on its face and as applied to Plaintiff/Appellants, the Resolution is content based religious viewpoint discrimination under the Equal Protection and Free Speech Clauses. MI Const. 1963, Art. 1, Secs 2&5.

In addition, legislation enacted at the directive of the Equal Protection Clause to enforce legislative equality for suspect classes, MCL 37.2102(1), likewise secures for the citizens of Michigan the “full and equal utilization of public accommodations” without discrimination based on religion. Resolution 15-013 contravenes the Plaintiffs’ civil rights under the statute as well.

CONCLUSION

It is frankly not possible for the Court of Appeals to have missed the Equal Protection arguments both in the (C)(8) pleadings and the brief on appeal. It is not waived and a review of the complaint provides, following the (C)(8) strictures, a textbook example of religious viewpoint discrimination in Resolution 15-013, both on its face and as applied. Under MCL 37.2102(1)

it also denies equal protection to accommodations for religious speech. This is clearly erroneous under the law and we ask for preemptory reversal or leave granted to declare Resolution 15-013 unconstitutional as a content based law.

[. . .]

. . . peremptorily reverse the decision of the Court of Appeals on our Equal Protection arguments and find, based on the (C)(8) facts taken in a light most favorable to the Plaintiffs, the Dewey Hill cross is a limited public forum, rejecting the per se test that weighs government ownership of the property over declarations and use as a limited public forum, and finding Resolution 15-013 to be content-based religious viewpoint discrimination, both on its face and as applied to Plaintiffs' Worship on the Waterfront event, and violative of their civil rights under MCL 37.2102(1), without compelling state interest which passes strict scrutiny, even as it relates to the Establishment Clause. Const 1963, Art 1, Secs 2 & 5. In the alternative, we ask the Court grant our application for leave to appeal and that upon plenary review, the Court reverse the decision of the Court of Appeals and declare Resolution 15-013 unconstitutional religious viewpoint discrimination, on its face and as applied, on the basis of the (C)(8) facts pled in the complaint and as permitted in MCR 2.116(C)(9) and (D)(4).

App.82a

Respectfully submitted,

By: /s/ Helen V. Brinkman
Helen V. Brinkman (P 40233)
Attorney for Plaintiff/Appellants

Dated: February 8, 2017

**RESOLUTION 15-013 AND GRAND HAVEN
CITY COMMISSION, MEETING MINUTES AND
MOTION (JANUARY 5, 2015)**

15-013 Moved by Council Member Monetza, seconded by Council Member Hierholzer, to limit Dewey Hill access, removing it as a public forum. This motion carried with a vote of 3 to 2. In favor: Fritz, Monetza, and Hierholzer. Opposed: Scott and McCaleb. (Attachment D)

The resolution was read aloud for the audience.

Council Member Monetza stated, if allowed to be, a public forum, Dewey Hill would stop being a beautiful backdrop to the downtown and become a hideous billboard. Selling Dewey Hill to resolve this issue would be a betrayal to future citizens. It would be unforgivable to convey this public trust to a private party. It did not fit the mission of the City to get into a protracted and expensive court fight over a supposed right to use public resources to own and display anyone's religious symbols. That is the realm of the private sector. The proposed resolution would limit Dewey Hill as a public forum and limit it to the use as a natural space for broadly accepted long-standing public uses. He supported the resolution and limitations it described.

Council Member Scott was not in favor of the proposed resolution. The current requestors to use the hill for other displays had not presented the City with any details, no permits were issued for a critical dune area, no engineering information was presented, and no one discussed the request with the City administration. The people of Grand Haven should vote on whether to keep the hill or sell it to a private entity.

Council Member Hierholzer said Dewey Hill was an important part of the City and was a focus of the waterfront. He would hate to give up control of the dune. If the issue went to court, the City would have to spend a lot of tax dollars. The community could place a cross in the community, but would have to be on private property.

Council Member Fritz noted there was more than one religion in the world and Grand Haven was a diverse community. The waterfront should not be used as a public forum. He wanted to put the current issue to rest and let the City get back to business.

Mayor McCaleb said there were other avenues open to the City so the proposed resolution was not needed at this time. The City had not violated any law since Dewey Hill was an open forum and treated as such. The City had to be responsible by asking questions of those who ask to use public property. The complainants had been asked for plans, and what was presented was woefully inadequate for the harsh conditions on Dewey Hill. She thought the question as to sell the property to a private entity should go to the vote of the people.

Mr. David Davis, 1637 Grant, did not agree with the possibility of a permanent Coast Guard memorial as it was an environmental issue and asked that it be removed from the resolution.

Attachment D
Resolution Limiting Dewey Hill Access and
Removing It as a Public Forum

WHEREAS, Dewey Hill was identified in the City's February 2013 policy concerning "Access to and Use of

Public Property' as city property that could be open to non-commercial public use; and,

WHEREAS, Dewey Hill is designated as a critical dune for the purposes of the Michigan Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.101 et seq.; and,

WHEREAS, the City's Environment and Natural Resources Committee has reviewed the effect of current and potential future uses of Dewey Hill, and recommended a policy to limit intrusion on the dune, protect vegetation, limit erosion, reduce debris and litter, and generally to preserve the dune from adverse impacts; and,

WHEREAS, Dewey Hill is one of the most significant natural landmarks within the City, complementing the downtown and connecting the City aesthetically to the simple pristine beauty of the lakeshore environment; and,

WHEREAS, Dewey Hill has historically been a focal point for community-wide celebrations including display of the American Flag, regular performances of the musical fountain, and seasonal celebrations, such as, Independence Day and Coast Guard Festival celebrations; and,

WHEREAS, the City has received requests to site additional structures on Dewey Hill, or to substantially alter existing structures, which would require access for construction, erection, and repeatedly changing displays; and,

WHEREAS, the City legally cannot and should not selectively allow displays if that selection could even

be perceived as based on the content of the displays;
and,

WHEREAS, the City has cultivated a close friendship with the United States Coast Guard Service, and has been officially designated “Coast Guard City USA”;
and,

WHEREAS, the City seal and the United States Coast Guard seal both include an anchor, and so an anchor is symbolic of their close relationship.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. Commencing January 1, 2015, Dewey Hill shall no longer be available for any display except in accordance with this resolution.

2. The American flag shall continue to be displayed on Dewey Hill.

3. The City Council may each year adopt resolutions permitting fireworks displays and other displays in conjunction with the annual Independence Day holiday and Coast Guard Festival. Before adopting any such resolution, the City Council shall review past celebrations and their impact on the dune, consider measures to be employed to minimize the effects on the dune during the proposed upcoming celebration, consider any special weather or other conditions that may affect the fragility of the dune, and consider other factors the City Council deems to be important for its annual review and consideration.

4. The feature pole currently located on Dewey Hill shall be configured solely as an anchor and, as so configured, may be used in conjunction with musical fountain programs or when requested in conjunction with other community activities. Anyone requesting

use of the anchor display for purposes other than in conjunction with Independence Day celebration, the Coast Guard Festival, or a musical fountain program, shall pay a fee to the City that is determined to pay the cost to raise or lower the pole.

5. The Musical Fountain may continue to be used. Musical fountain operation, maintenance, repair, replacement, and improvement shall be undertaken in a manner to minimize impacts on the dune, considering any special weather or other conditions that may affect the fragility of the dune, and addressing any other factors the City Manager may from time to time determine should be considered.

6. In honor of the service and sacrifices of the men and women of the United States Coast Guard, and with the advice and consent of the Coast Guard, the City may choose to replace the feature pole anchor display by constructing a permanent memorial on Dewey Hill. Any such memorial shall be designed and constructed in close cooperation with the Coast Guard, in accordance with all applicable Coast Guard protocols, design elements, and standards; in a manner consistent with

MDEQ permit requirements, if any; in a manner which will have minimal environmental impact on the fragile dune; and shall be funded from private sources.

7. The City's February 2013 policy concerning "Access to and Use of Public Property" and any other City policies, practices, or procedures are, to the extent of any conflict with this policy, hereby amended. Accordingly, this resolution shall control over any inconsistency with any other City resolution or policy.

Certificate

I hereby certify that the foregoing is a true and complete copy of a Resolution adopted by the City Council of City of Grand Haven, County of Ottawa, Michigan, at a regular meeting held on January 5, 2015, and that public notice of the meeting was given pursuant to Act 267, Public Acts of Michigan, 1976, as amended.

IN WITNESS WHEREOF, I have hereto affixed my official signature on January 5, 2015.

/s/ Linda L. Browand
City Clerk
City of Grand Haven

ARTICLE FROM THE GRAND HAVEN NEWSPAPER
(JUNE 29, 2015)



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SPECIAL SECTIONS

Cross makes appearance at season's first Worship on the Waterfront

Marie Havenga Jun 29, 2015



Cross Makes Appearance at Season's First Worship on the Waterfront

Marie Havenga

Despite all the controversy in recent months, a cross still appeared on the opposite side of the river during Sunday's Worship on the Waterfront service, just as it has for the last half century.

The only difference was, the large white cross was aboard a pontoon that was nudged into the sand on the riverbank near Dewey Hill, not the 48-foot tall version that towered above the landmark sand dune for more than five decades.

Event organizers said they didn't know was responsible for displaying the cross on the pontoon, or who owned the boat. The pontoon motored off immediately after the service ended.

The cross atop Dewey Hill had been transformed into an anchor after months of controversy that surfaced in September when Norton Shores residents Mitch Kahle and Holly Hunter and Grand Haven Township residents Brian and Kathy Plescher requested that the city remove the cross.

The group, through attorneys with Washington, D.C. based Americans United, believed the cross defied the U.S. Constitution's establishment clause and the separation of church and state because the cross was displayed on city-owned property.

In January, City Council voted to transform the cross into an anchor.

That's apparently OK with Peter Manting, chairman of the Worship on the Waterfront committee. He

said he asked the city to erect the anchor prior to Sunday's first-of-the-season Worship on the Waterfront, which is nearing its 70th year.

Manting said the anchor was the first symbol of Christianity.

"We had them put the anchor up for us because the anchor was the symbol of Christianity for the first 300 years," Manting said.

Although they were disappointed about losing the cross, "we're excited that we can put the anchor up. We're not going to lose any sleep over it." He said.

"I thought that was great," Spring Lake Township resident Jennifer Wendt said of the cross on the pontoon.

Wendt said she didn't mind seeing the anchor while listening to Christian singer/songwriter Mark Shultz perform on the waterfront.

"It still look like a cross to me," Wendt said. "And that's a good thing."

The actual structure of the anchor is the original cross, just with added parts to make it look like an anchor.

"I don't like that it can't be a cross, but I guess the law is the law."

As Schultz serenaded the crowd of more than 2,500—both in the bleachers and along the waterfront—many raised their arms in the air in praise.

They swayed, they sang along and they prayed.

Grand Haven resident Tricia Taylor said the cross is just a symbol. And not displaying it did nothing to

conceal the true message of Christ that was on display in the people who attended Schultz's performance.

"The cross is a very significant symbol that represents the power of Jesus overcoming," Taylor said. "The truth is, whether the cross is there or not, what Jesus did is still true and powerful."

Taylor said she and a group of women visited the cross before it became a full-time anchor.

"We went up there and prayed for the community," Taylor said. "We had a powerful sense that the love of God that was going to bless the people of Grand Haven was not contained in the icon. We are the hands and feet. We are the living Christ."

Erica Hosley of Robinson Township said the cross was a powerful image that she recalls vividly from her younger years.

"But it's just a symbol," Hosley said. "The love of Christ is in our hearts."

Grand Haven resident Wilbur Cander said he misses the cross.

"I think the cross should still be there," Cander said. "It's been there for so many years, it's a shame they took it down."

Worship on the Waterfront volunteer Randy Swittney said he heard a lot of comments from crowd members about the cross.

"Everyone commented about the boat with the cross on it," Swittney said. "But they miss the (Dewey Hill) cross. It's not the same without the cross up there."

PHOTOS OF THE VENUE













