



Borough of Chambersburg

*A full service municipality in Franklin County
celebrating over 65 years of consumer owned natural gas service
over 120 years of community electric and
a regional wastewater, water, and municipal solid waste utility*

INTEROFFICE MEMORANDUM

TO: MAYOR AND TOWN COUNCIL
FROM: ALLEN COFFMAN, TOWN COUNCIL PRESIDENT *AC*
SUBJECT: REQUEST OF THE BOROUGH MANAGER
DATE: JUNE 16, 2017

For your information:

I have requested that the Borough Manager evaluate the request of Ms. Purdy and Mr. Mazzone to install public art on a wall along the Rail Trail in the vicinity of the Pump Track/Bike Park. I asked the Borough Manager, if Council wanted to approve this installation, how would such an approval work? The enclosed is his response to Town Council. I have asked him to release this memorandum in advance of the public discussion at the June 26 Regular Meeting of Town Council in order that everyone have an opportunity to familiarize themselves with the issues referenced in his memorandum

Thank you

Enc.



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INTEROFFICE MEMORANDUM

TO: MAYOR AND TOWN COUNCIL
FROM: JEFFREY STONEHILL, BOROUGH MANAGER JS
SUBJECT: PUBLIC ART INSTALLATIONS ON BOROUGH OWNED PROPERTY
DATE: JUNE 16, 2017

Question:

This memorandum will discuss the issue of whether the approval of a public art installation on a wall along the Borough's Rail Trail, which is property owned and under the supervision of the Borough of Chambersburg, will result in a precedent to approve future public art installations throughout Borough owned land.

Background:

On May 26, 2017, citizen Noel Purdy of W. Queen Street appeared before Town Council along with artist Peter Mazzone to request that a Borough-owned wall along the Rail-Trail north of King Street be used as the site for the installation of public art.

The Recreation Advisory Committee had recommended this project to Council. Noel Purdy and Peter Mazzone presented to Council a proposed location to place this artwork on the retaining wall along the Borough's Rail Trail adjacent to the Pump Track/Bike Park. They reviewed the design concept, mural maintenance (weekly for damage and thorough inspection two times per year); budget (no costs to the Borough) and timeline (installation = June-July 2017).

The applicants said that the mural project would be privately funded and would be put up and maintained at no cost to the Borough or its taxpayers. Ms. Purdy said, "I think it is important to find as many ways as possible to give citizens an opportunity to improve their neighborhoods and communities, this public art movement has given hundreds of people in our community the opportunity to improve it and to be a part of change."

On a motion by Councilman Dolaway, seconded by Councilman Elia, it was resolved by a vote of 8-2 (Councilmen Bigler and Cate were opposed) to table discussion on this item until the June 26, 2017 Council Meeting. Council asked Ms. Purdy to come back on June 26, 2017 with historical information on the retaining wall and community input regarding this location for the proposed mural project.

The Borough Manager agreed to obtain an inspection of the wall from a local stone mason used for projects by the Borough. Finally, the public was asked to share thoughts with Ms. Purdy and Mr. Mazzone, about the proposal.

Analysis:

I conducted extensive research on the request and will attempt to summarize a relatively complex issue for Council's consideration on June 26, 2017.

The contours and boundaries of the right to engage in expressive activity on government property have been shaped by the evolving public forum doctrine. The public forum doctrine consists of a two-step approach to the adjudication of attempts to regulate expressive activity on government property. If challenged in court, as is not uncommon in these situations, first, the court must determine the nature of the forum in question, i.e., whether it is a traditional public forum, limited public forum, or

nonpublic forum. Second, the court must examine the government's restriction on speech in light of the forum determination (NYU Law Review, May 1997).

Unlike standard requests for land use modifications on private property, a request to use government property is significantly more complex.

Courts have held that three distinct types of "public forums" exist. First, is the "traditional public forum", which includes streets and parks, as they have "immorially been held in trust for the use of the public for the purposes of assembly and the communications of thoughts between citizens (Hague v. Committee for Industrial Organization, United States Supreme Court, 1939). Regarding this forum, government may enforce a content based exclusion only if it narrowly drawn and serves a compelling government interest. (Carey v. Brown, United States Supreme Court, 1980).

Next are forums considered "public property that has been opened for use by the public as a place for expressive activity, also known as a "designated open public forum." The same standard that applies for "traditional public forums" for content based regulations applies to "designated open public forums." (Perry Education Association v. Perry Local Educators Association, United States Supreme Court, 1983).

If this were a government operated sculpture garden, for example, there would be no question as to whether that was a designated open public forum. This is however a retaining wall along an urban walking trail.

The final category is "non-public forums", which are defined as a public owned facility which has been dedicated to use for either communicative or non-communicative purposes but has never been designated for indiscriminate expressive activity by the public. (Gregoire v. Centennial School District, United States Third Circuit Court of Appeals, 1990). The test for this type of forum is that it can be regulated so long as reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. (United States v. Kokinda, United States Supreme Court, 1990).

Additionally, regardless of the forum, government is free to regulate artistic expression by placing reasonable restrictions on the time, place, and manner of the expression, provided the restrictions are: 1) justified without reference to the content of the regulated speech, 2) narrowly tailored to serve a significant government interest, and 3) allows for alternative channels for communication. (Clark v. Community for Creative Non-Violence, United States Supreme Court, 1984).

Adopting regulations for appropriate artistic expression on public property is significantly more complexing than having Council state their "opinion" of the artistic work being proposed.

When the government supports art, concerned audiences wonder not only what a given work means or how it makes them feel, but also whether it is appropriate for public spaces or deserves taxpayer support.

The wall in question is clearly owned by the Borough of Chambersburg and is clearly in a public venue, open and accessible to the public in dedicated recreation space. That being said, there exists no designated location for the public expression of artistic works on Borough-owned property.

A "neutral display analysis" is a legal terminology, which governs a less subjective evaluation of a proposal.

Under a proposed "neutral display" analysis, which would be appropriate in this case, government regulation of art in public spaces would be limited to legitimate determinations such as size, location, material, maintenance concerns, etc.; all appropriate considerations for Town Council to consider if Council desires to allow public property to serve as a canvas for artwork. All regulations concerning the artistic merit or quality of the art would trigger stronger protections under the First Amendment.

Protection of the First Amendment is very important.

When the government displays provocative paintings or sculpture, the possibility of conflict always exists. Even more than private artistic speech, public art has an uncommon ability to offend. Court cases in this area are complicated because courts must balance audience outrage against core First Amendment freedoms.

As long as the public forum doctrine relies on distinctions between political and nonpolitical, between content and viewpoint, it poses questions that Town Council must consider in regulating art speech.

In our circumstance, the Town Council has no tradition of designating public spaces for artistic expression, no rules for evaluation the appropriateness of proposed art and no system for public approval of art.

Once the government chooses to subsidize artistic expression, which includes hosting art upon a publicly owned wall, it is better insulated from any potential challenges if it makes determinations without any consideration of the artistic merit or quality.

Conclusion:

The wall along the Rail Trail is on public property, is open and accessible to the public, and is maintained by the Borough of Chambersburg. It is a public forum and Town Council has the right and responsibility to regulate its proper use as a place for the installation of public art.

Chambersburg Town Council should not say *no* to the proposed installation on the basis of its content or artistic merit, as it could possibly set a dangerous precedent where Council has to make future determinations about artistic quality or merit, which is an issue Council should avoid. Council must protect the First Amendment rights of the artist assuming the installation is approved.

In fact, much of the debate, on the quality or artistic merit of public art, should be irrelevant to any discussion. I strongly suggest the parties cease any discussion on whether this proposal is aesthetically appropriate or pleasing. Such a subjective determination has no place in this decision making process.

In addition, the proposed place of the planned installation is not an issue as long as the artist and his sponsors agree, in writing, to assume the liability and maintenance of the location. A maintenance agreement is required and is commonplace for private work on Borough-owned property. Nothing in the proposal so far would lead staff to conclude that Mr. Mazzone and his sponsor, Ms. Purdy, et al., would be opposed to executing a liability and maintenance agreement for the proposed location.

Public art has not yet ever been approved by Town Council for any location other than perhaps the originally construction of the Memorial Square Fountain itself. Town Council has not debated the merit of appropriate regulations on art which may be placed on Borough property. However, there is some similarity to the ribbon policy that Council considered for the Downtown. Under that scenario, it was not as simple as Council saying "yes" to ribbons, but rather Council had to develop regulations regarding where ribbons were appropriate, the type of ribbons that would be permitted, how the ribbons would be maintained, and who would be responsible for any liability from the ribbons. The public art discussion is just as complicated.

Town Council is in absolutely no position to approve this proposal yet.

Town Council, at least in modern times, has only ever through the delegated administrative authority of the land use permit approval process, authorized the installation of public art on *private property*. The murals downtown are on privately owned buildings. The student art hung around town are on privately owned (and County-owned) facades. The newest mural is on the Chambersburg Area Senior High School. Please note that Franklin County and the Chambersburg Area School District consented to these public art installations and these property owners are in no way connected to the Borough.

Staff is reasonably concerned with setting a precedent by this application. Per the public forum doctrine, giving approval for Mr. Mazzone to use the wall on the Rail Trail would possibly open up the Borough to losing the right to say *no* to any other public art display of artistic merit on any other similar wall or surface owned by the Borough.

As with previous discussions involving Memorial Square, installations of public expression can be problematic. There is no way to assume who might be the next sponsor and artist to suggest an installation on some other Borough-owned wall. The next artist may choose a "graffiti art" installation or a "suggestive art" or "political art" expression. If the Borough says yes to Mr. Mazzone, it may become more difficult to say *no* to anyone else.

As such, **it is the recommendation of staff that no installation be approved on any Borough-owned property anywhere at this point.** The complete prohibition of public art (unless on private property) is the only way to insure that there will be no future request that results in a test of these important legal principles in Chambersburg.

Please note that if Council does wish to allow Borough-owned property to be the canvas for art, Council should consider this issue in relation to the ribbon policy passed for the downtown area. A few questions Council should consider before determining that it wants to allow Borough property be the canvas for art are:

1. Where are the appropriate very specific locations for Borough property to serve as artistic canvas?
2. How long will the displays be allowed to stay, and who will maintain them?
3. What nature of display will be permitted (considering the restraints of appropriate manner and place regulations discussed above)?
4. Who will open these sites for artists to request their use? Did the Borough advertise the retaining wall along the Rail Trail for artists to submit their proposed art? How was this particular artist chosen?
5. Who is responsible for liability issues?

These are the types of questions Council should consider before determining that they wish to allow Borough-owned property to serve as the canvas for art. This discussion should be conducted in the context of a complete and comprehensive review of all Borough facilities and a thorough discussion of the goals and objectives to be achieved by the potential public art installations versus the potential liability and maintenance concerns of such installations. Again, once one display is allowed, it becomes more difficult to moderate any additional requests for displays on Borough property. For these reasons, it is critical that Town Council either maintain the blanket prohibition or come to a consensus about reasonable parameters for these displays.

If Town Council wants to seriously consider approving this request, they should form a public art sub-committee and work should begin promptly on developing a public art plan for Borough-owned facilities. It is estimated such a plan would take three to five months to complete given the aforementioned required criteria to avoid running afoul of the established law on public art on municipal public property.