No. 02-371

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

JOINT APPENDIX

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Certiorari Granted January 24, 2003

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731208

VIRGINIA UNIFORM SUMMONS

RICHMOND POLICE DEPARTMENT, RICHMOND, VA. 1606TNN

CASE NO. 99000869 R

ATTORNEYS PRESENT:

☐ PROSECUTING ATTORNEY (NAME) Heyman

☐ DEFENDANT'S ATTORNEY (NAME)
☐ NO ATTORNEY
☐ ATTORNEY WAIVED

THE ACCUSED WAS THIS DAY:
☐ TRIED IN ABSENCE
☒ PRESENT

THE ACCUSED PLEADED:
☒ NOT GUILTY
☐ NOLO CONTENDERE
☐ GUILTY ☐ PREPAYMENT

AND WAS TRIED AND FOUND BY ME:
☐ FINDING SUFFICIENT
DEFERRED §
☐ NOT GUILTY
☒ GUILTY AS CHARGED
☐ GUILTY OF

IN ADDITION I FIND THE ACCUSED WAS:
☐ DRIVING A COMMERCIAL MOTOR VEHICLE
☐ CARRYING HAZARDOUS MATERIALS

☐ I ORDER THE CHARGE DISMISSED

☐ I ORDER A NOLLE PROSEQUI ON COMMONWEALTH'S MOTION

I IMPOSE THE FOLLOWING SENTENCE:

☐ FINE ☐ CIVIL PENALTY OF $ _____ WITH $ _____ SUSPENDED.

☐ DRIVER'S LICENSE SUSPENDED EFFECTIVE IN TEN (10) DAYS IF FINES/COSTS NOT PAID IN TEN (10) DAYS, § 46.2-395.

☐ JAIL SENTENCE OF 12 WITH 12 SUSPENDED CONDITIONED UPON BEING OF GOOD BEHAVIOR AND KEEPING THE PEACE.

☐ ON PROBATION FOR _____

☐ DRIVER'S LICENSE SUSPENDED _____

☐ RESTITUTION OF _____ PAYABLE TO _____
BY _____ AS CONDITION OF SUSPENDED SENTENCE.

☐ OTHER _____

4/21/99 _____
DATE JUDGE

APPEAL BOND $ _____ ☐ APPEAL NOTED ON _____
☐ APPEAL WITHDRAWN _____

☐ PROSECUTING ATTORNEY (NAME) Heyman

☐ DEFENDANT'S ATTORNEY (NAME)
☐ NO ATTORNEY
☐ ATTORNEY WAIVED

YOU ARE SUMMONED TO APPEAR IN THE (CITY OF / COUNTY OF)

CITY OF RICHMOND

☐ GENERAL DISTRICT COURT (TRAFFIC)
( ) 400 N. NINTH STREET
( ) 905 DECATUR STREET
☒ GENERAL DISTRICT COURT (CRIMINAL)
(X) 501 N. NINTH STREET
( ) 905 DECATUR STREET
☐ JUVENILE & DOMESTIC RELATIONS DISTRICT COURT
( ) 1600 N. SEVENTEENTH STREET

ON Feb 1, 19 99 AT 9:30 ☒ A.M. ☐ P.M.

FOR VIOLATION OF ☐ STATE ☐ COUNTY ☒ CITY ☐ TOWN

LAW SECTION 18.2-119 DESCRIBE CHARGE:
Trespass on CCHA Property

☐ COMMERCIAL MOTOR VEHICLE ☐ HAZARDOUS MATERIALS

I PROMISE TO APPEAR AT THE TIME AND PLACE SHOWN ABOVE. SIGNING THIS SUMMONS IS NOT AN ADMISSION OF GUILT. I CERTIFY THAT MY CURRENT MAILING ADDRESS IS AS SHOWN BELOW.

Kevin Hicks
SIGNATURE

YOU MUST APPEAR AT TRIAL (JUVENILES MUST APPEAR WITH PARENT/ LEGAL GUARDIAN).

☐ YOU MAY AVOID COMING TO COURT ONLY IF THIS BLOCK IS CHECKED AND ALL INSTRUCTIONS ON DEFENDANT'S COPY ARE FOLLOWED

ONLY CALL _____ IF MORE HELP IS NEEDED.

MAILING ADDRESS: ☐ SAME AS ABOVE AT RIGHT ☐ CHANGE FROM D. L.
P. O. BOX/STREET 2699 CITY/TOWN Hope STATE 3-19-99 ZIP 23313

NAME: LAST	FIRST	MIDDLE	HEARING DATE AND TIME
Hicks	Kevin	Lamont	2/19/99

RES. ADDRESS: 3444 South Gate #A — RES. JURIS.

CITY/TOWN: Richmond — STATE: VA — ZIP

RACE	SEX	D.O.B. MO.	DAY	YR.	HT. FT.	IN.	WGT.	EYES	HAIR
B	M	1	21	76	5	8	150	Brn	Brn

DL / CDL # (IF CRIMINAL OFFENSE OR NO LICENSE, USE SSN): 227-29-3730 — STATE: VA

VEH	YEAR	MAKE	TYPE	LICENSE NO.	YEAR	STATE

JURISDICTION OF OFFENSE	DATE OF OFFENSE	DAY OF WEEK	TIME
120	01/20/99	Wed	8:52 A.M. / P.M.

DIRECTION	ACCIDENT YES	ACCIDENT NO	WEATHER	ROUTE NUMBER / STREET

LOCATION OF OFFENSE: 2348 Bethel St.

ARREST DATE	ARREST LOCATION
01/20/99	2348 Bethel St

OFFICER	CODE / BADGE NO.
James Laino	2066

110/201 FINE
114/129/237 CIVIL PENALTY
112
140 } PROCESSING FEE
143
229 CHMF
124 TIA FEE
132 CICF
120/217 CT. APPT. ATTY.
113 WITNESS FEE 10.17

TOTAL $

COURT COPY-PG. 1

ON THE DEFENDANT'S NAME WAS CALLED IN OPEN COURT AND THE DEFENDANT DID NOT RESPOND OR APPEAR. DAY OF Feb, 19 99, AT 5:46 AM/PM. JUDGE

109 INTEREST CHARGE
TOTAL WITH INTEREST $

DATE PAID _____ RECEIPT NO. _____

VUS REV. 7-1-93

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND
John Marshall Courts Building

COMMONWEALTH OF VIRGINIA

v.

KEVIN LAMONT HICKS

MOTION TO DISMISS

(Filed July 12, 1999)

The defendant, by counsel, moves this Honorable Court to dismiss the prosecution of all matters before this court, including charges of trespass and orders concerning the revocation of suspended sentences for conviction and instances of trespass. In support of this motion, the defendant states as follows:

1. In 1997, the City of Richmond, the Richmond Police Department, and the Richmond Redevelopment and Housing Authority (RRHA), a political subdivision of the Commonwealth of Virginia, developed a law enforcement strategy and trespass policy for use in various public housing communities.

2. The strategy was to take steps which would have the effect of broadening the scope and effect of the Virginia criminal trespassing statute (Va. Code §18.2-119) to deter and criminalize lawful conduct not otherwise reached by the statute.

3. A purpose of this strategy (which is referred to in this motion as "the trespass policy"), was to discourage the presence of guests in these communities.

4. Another purpose of this strategy was to regulate, deter, and criminalize the presence in the communities of a class of persons loosely defined as "unauthorized."

5. These purposes are achieved by permitting and causing the Richmond Police to detain, interrogate, and search any people within the community suspected of being nonresidents or "unauthorized."

6. These purposes are further achieved by threatening prosecution of all unauthorized people present in the community.

7. These purposes are further achieved by threatening eviction and loss of public housing for residents permitting or assisting the presence of unauthorized guests.

8. Part of the trespass policy involves the banning of people from the community for undefined reasons, and the prosecution of these people upon their reentry, for any reason, into the community. As part of the policy, once a person is banned from the community, that ban is permanent and irrevocable.

9. In order to accomplish these goals, and in furtherance of other ends of the strategy, the City passed ordinances closing designated streets within public housing communities and deeded by quitclaim its rights in the closed portions to RRHA.

10. The purpose for closing the streets was to enable the City to characterize an entire housing community as private property. Once accomplished, the City's strategy was to use the Richmond Police Department to enforce the trespassing statute to deter the association and presence of people in the community not conducting legitimate business or who were not otherwise "authorized" to be present. Although the

housing communities have been characterized as private property, this labeling is a pretext; the public housing communities are in fact public property in all essential respects.

11. Towards accomplishing the intended deterrent effect, the City and RRHA publishes and distributes pamphlets describing the program.

12. These pamphlets warn that "selected streets" are RRHA property, and that "unauthorized persons" will be considered trespassers and will be prosecuted. "Unauthorized persons" are described as "any person who had been barred by RRHA from the development, or cannot demonstrate that they are on the development visiting a lawfully residing resident, or on the development conducting legitimate business."

13. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, violate the First and Fourteenth Amendments to the United States Constitution and Article I, §12 of the Constitution of Virginia, by depriving the residents, their family, friends, and guests, of their fundamental rights to freedom of association, speech, and assembly, and by unconstitutionally suspending the First Amendment from applicability in these communities in violation of the Fourteenth Amendment and Article I, §7 of the Constitution of Virginia.

14. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution by depriving residents of public housing and their guests of basic liberty interests and privacy without due process of law and for no legitimate or rational purpose.

15. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, authorize, cause, and encourage the warrantless detention of persons in these communities without reasonable suspicion or probable cause to believe that any crime has been committed, and for the mere exercise of their constitutional rights to freedom of association, travel, and assembly in violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution.

16. The trespass policy developed and enforced by the parties, including the closing of the public streets and sidewalks, invests unbridled and unreviewable discretion in the police and RRHA, is unconstitutionally vague and overbroad, and permits and encourages arbitrary and capricious enforcement by the police, RRHA, and the City of Richmond.

17. The alleged banning of Kevin Hicks from public housing projects, his detention and interrogation by the police, and his arrests and convictions for trespassing, were the product of the unconstitutional trespassing policy and enforcement of Va. Code §18.2-119 described in this motion. For each and all of the reasons alleged herein, the matters pending before this court should be dismissed.

KEVIN LAMONT HICKS

By /s/ S.D.B.
Counsel

Steven D. Benjamin
BENJAMIN & DesPORTES, P.C.
P.O. BOX 2464
Richmond, Virginia 23218-2464
(804) 788-4444

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

COMMONWEALTH OF VIRGINIA,	
Vs.	(Filed Aug. 19, 1999)
KEVIN L. HICKS,	
defendant	

Complete transcript of the testimony and other matters, in the above motion, when heard on June 15, 1999, before the Honorable Thomas N. Nance, Judge.

CRANE-SNEAD & ASSOCIATES, INC.
4914 Fitzhugh Avenue – Suite 203
Richmond, Virginia 23230
Tel. No. (804) 355-4335

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City of Richmond
Richmond, Virginia
Counsel on behalf of the Commonwealth

Steven D. Benjamin, Esquire
Suite 210, 1001 East Broad Street
Richmond, Virginia 23219
Counsel retained on behalf of the defendant

* * *

[13] MR. BENJAMIN: Well, I think we still have some other matters to resolve before we get to the trial, if the Court please.

THE COURT: All right.

MR. BENJAMIN: We filed a motion, a request for the issuance of a subpoena duces tecum. The Commonwealth Attorney has moved to quash that. I think she would like to be heard on that.

THE COURT: What are you seeking, Mr. Benjamin?

MR. BENJAMIN: By written motion, we had set out the documents that we are seeking. That should be in the file. I don't know if you have it before you or not.

THE COURT: To Gloria Rogers?

MR. BENJAMIN: That's correct.

THE COURT: Who is she?

MR. BENJAMIN: She is present, Your Honor. I'd ask her to state her title for the record.

MS. ROGERS: I'm Housing Manager of the Housing Authority.

* * *

[14] MS. PARRISH: Judge, part of my basis for the Motion to Quash was that none of the addresses listed in Mr. Benjamin's [15] request were the address on which Mr. Hicks was actually arrested.

He was arrested at 2348 Bethel Street and the subpoena duces tecum requested leases for 2414 Carmine Street Virginia Hicks or 2428 Carmine Street and for 2369 Bethel Street. I don't know how they relate to this case.

MR. BENJAMIN: If we could excuse Ms. Nash? She may be called as a witness. If we could just ask her to step out in the Hall – Ms. Rogers. I'm sorry

(Ms. Rogers steps into the hall.)

MR. BENJAMIN: Your Honor, if the Court please, and there are only three leases sought, because it's my information that Virginia Hicks in fact resides at 2414 Carmine Street. I just wanted to double check that.

Virginia Hicks is Kevin Hicks' mother. She lives in Whitcomb Court. 2448 Carmine Street is the apartment leased to Pamela Brown who is Virginia Hicks' sister. [16] Kevin's aunt. And 2369 Bethel Street is the apartment leased by Maria Pryor, who is present, who is the mother of Kevin Hicks' child.

We would be seeking this as part of our defense that Kevin Hicks had a good faith belief in his right to be present on this property.

THE COURT: If the Commonwealth stipulates that they are leased to these folks, why do you need to –

MR. BENJAMIN: First, they haven't so stipulated. And secondly, it is usually the shoe is on the other foot and the Commonwealth insists that they don't have to be required to accept the stipulation. Then I would not want to. I would want to be in the position to prove with an actual physical lease that these people have a

lease-hold interest in this property and it is at the particular addresses.

I can say much more, but I won't be as long-winded as I usually am.

THE COURT: All right.

MR. BENJAMIN: With respect to [17] Request Number, I don't think there is any contest as to the materiality there.

What we are trying to demonstrate is that, and I tell you quite frankly, it is unclear to me whether, I think Kevin Hicks has been banned from that property, but I cannot define for the life of me why he has been banned from that property.

So any documents, any reports, I know that the project has been in the process of compiling, if they haven't already, a list of individuals who are banned. I think up to know [sic] it has all been in Ms. Rogers' head, I think.

But I think at this point, I believe that there is a document listing the individuals who have been banned.

I need to determine from these documents, I need to show from these documents that this individual has in fact been banned and that it has been for non-criminal activities, other than the prosecution of these trespassing laws.

* * *

[21] THE COURT: All right.

MR. BENJAMIN: And it's not just, as somebody recently accused me of some sort of, I forget the word, crusade. It's a practical problem, because Mr. Hicks, in particular, I don't think has ever been arrested for any criminal activity out there, selling drugs.

THE COURT: He has been arrested two or three times for trespass out there.

MR. BENJAMIN: That's it. It has all been trespassing. In each time it has been his effort, as I understand it, to go visit someone you would want to visit.

THE COURT: After being arrested and prosecuted –

MR. BENJAMIN: Absolutely. And he has built up all this suspended time.

The problem is, I don't know how in the world you can reasonably say to somebody, you can't go see your mom. So he continues to do that, despite my best advise that he is just making it worse because he wants to see his mom and his child. It is a practical matter.

[22] THE COURT: You might have just made yourself a witness.

MR. BENJAMIN: Well, no, because this is argument and not representation. I don't mean it as representation.

THE COURT: Oh.

MR. BENJAMIN: I'm just telling you that this is a problem that doesn't amount to a defense. It is not just a crusade.

THE COURT: Does your client have these things?

MR. JOHNSON BLANK: Judge, if I may, 18.2-119 is the trespass statute, and I think, Judge, you hit right on it. The trespass statute says that a landowner can ban anybody they want for whatever reason they want at anytime that they want to. And the Housing Authority objects to them having to produce documents in this case because they're irrelevant beyond the criminal statute.

If they banned him and there is a notification, I think if the defendant wants the form that says that you were [23] banned, we have the original of that and the original was hand-delivered to him in Court. I think that is part of the Commonwealth's case.

I'm not trying to step in, but insofar as the other documents, Judge, the Housing Authority would object to producing any of them because we don't think that they are relevant to this case and what it would tanenmount be doing is put the Housing Authority on trial.

THE COURT: Do you have any written guidelines or policies, statements or documents concerning who is to be banned and who is not?

MR. JOHNSON BLANK: There is a document, Judge, when someone is banned that –

THE COURT: I know, but do you have anything that says how they determine who is going to be banned?

MR. JOHNSON BLANK: No, sir. Not that I am aware of, Judge.

THE COURT: I know that I had one of these cases before and the procedures we [24] [sic] along the same lines. And what they did was finally indicated on the banning was the reason was the selling of drugs and hanging out with drug dealers which was relevant in the case.

Anyway, I want you to give a copy of the leases on 2414, 2428, 2369.

* * *

THE COURT: What else do you need, Mr. Benjamin?

MR. BENJAMIN: Any documents that [25] concern this particular defendant, Kevin Hicks.

THE COURT: Yeah. I just said that he's going to give you a copy of the one delivered to him in Court.

MR. BENJAMIN: I take it then that RRHA is representing that they have no documents that fall within Request Number 3, all written guidelines, policies, statements and documents concerning the enforcement of trespassing laws.

MR. JOHNSON BLANK: Judge, it's my understanding that those documents, there are no documents. I can double check on that.

THE COURT: All right. If you have them, deliver them.

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

COMMONWEALTH OF VIRGINIA	:	
vs	:	(Filed Aug. 19, 1999)
KEVIN LAMONT HICKS	:	

Complete transcript of testimony and other incidents in the above, when heard on July 13, 1999, before the Honorable Thomas N. Nance, Judge.

CRANE-SNEAD & ASSOCIATES, INC.
4914 Fitzhugh Avenue, Suite 203
Richmond, Virginia 23230
(804) 355-4335

* * *

[3] INDEX OF EXAMINATIONS

EXHIBITS

* * *

[13] WHEREUPON,

GLORIA STOKES ROGERS,

called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENJAMIN:

Q Would you state your name, please.

A Gloria Stokes Rogers.

Q And your occupation.

A Housing manager with Richmond Housing Authority.

Q You've been at that position approximately how long, Ms. Rogers?

A Housing manager, five years. With the Housing Authority, 23 years.

Q I'm handing you a document.

(Document proffered to the witness.)

Are you familar with the document you've been handed?

A Yes, I am.

[14] Q Is this a document prepared and distributed by Richmond Redevelopment Housing Authority?

A Yes, it was.

Q Does is [sic] it describe the street privatization and trespass policy in affect [sic] in the R.R.H.A. Properties?

A This is a copy of a flyer that was sent out to residents when we privatized our streets. Prior to having our streets privatized we wanted to be – council – we had a meeting of record and this flyer was passed out to the residents. At the meeting I explained to them what privatization was all about. This is not the policy. This is a brochure to explain about privatization of our streets, but it's not our policy.

Q Do you have any other written policy?

A Any other written policy?

Q Concerning street privatization or the trespass policy or the enforcement of trespass laws in the R.R.H.A. properties.

[15] A That was handle [sic] through City Council in an ordinance that spoke to some of that.

Q Uh-huh.

A But I don't have that policy per se. There is an order through council – the council handled – got permission to have our streets privatized.

Q You know of no written guidelines or policies concerning the enforcement of trespassing laws in the

public housing project other than the City ordinances; is that correct?

A I have a document here that gives – signed by Mr. Purdy, that gives policemen permission to enforce no trespassing on privatization streets.

Q May I see that, please?

A Yes.

(Document proffered to counsel.)

(Witness continues to peruse documents.)

[16] Q Let me – Are you still looking?

A And this is a copy of the policy for the City Council.

(Document proffered to counsel.)

(Counsel peruses document.)

Q You have handed me one document titled Deed, made this 25th day of July 1997, between the City of Richmond and R.R.H.A. That's one of the documents?

A That's correct.

MR. BENJAMIN: Your Honor, I'll introduce this as Defense Exhibit 1, the Deed.

(Defendant's Exhibit No. 1 entered into evidence.)

BY MR. BENJAMIN:

Q You have also handed me a [17] document captioned Authorization, which was signed on the 13th day of November, 1998.

A You have my originals so [sic].

Q I know.

MR. BENJAMIN: May I approach the bench?

BY MR. BENJAMIN:

Q Is that one of the documents you were –

A Yeah. This is the one by Tyrone Curtis authorizing the police department to enforce trespassing policy on our development.

MR. BENJAMIN: Your Honor, Defense Exhibit No. 2, please.

MS. REINER: No Objection, Judge.

(Defendant's Exhibit No. 2 entered into evidence.)

BY MR. BENJAMIN:

Q You've also handed me a 13 page document. The first page which is just a [18] fax transmission sheet. The second page of which is June 25, '97 letter to Tyrone Curtis; is that correct?

A Uh-huh.

MR. BENJAMIN: Defense No. 3, please.

(Defendant's Exhibit No. 3 entered into evidence.)

BY MR. BENJAMIN:

Q Beside those three documents, collectively introduced as Defendant's 1 through 3, are there any other written policies or guidelines concerning the enforcement –

MS. REINER: Before Mr. Benjamin goes on, I was just handed a 20 page document to review that I've never seen. If he could hold off, so I can review it?

MR. BENJAMIN: Sure.

(Pause in the proceedings.)

[19] BY MR. BENJAMIN:

Q Apart from the documents contained in Defense 1 through 3, are there any other written policies or guidelines describing or governing the enforcement of the trespass laws in public housing communities?

A I'm not sure. Not that I'm aware of.

Q You're not aware of any? Do you still have that document I handed you, the pamphlet?

A Correct.

Q Turn to page one of that.

A Page one?

Q Yes, ma'am. I see there that it says among other things, selected streets are now R.R.H.A. property; is that correct?

A Correct. That's what it says.

Q Now, this was – the streets were privatized, if you will, in mid 1997?

A The date's on that letter.

Q All right. These [20] pamphlets, are they still being distributed? Do you still have them in your office?

Let me ask this question: Do you still have pamphlets like these or flyers in your office?

A I have a copy of the pamphlet in our office, yeah.

Q If a resident or anybody has a question about street privatization or the trespass policy, can they receive one of these?

A I assume so.

Q Do you have some to give out or would you make copies if someone asked?

A I would like to know what they'd it want [sic] for. I'd question them first. This is not a document itself. This was used to answer some questions – when we privatized our streets, there was [sic] some questions by residents about what privatization of the streets would mean.

Q Okay.

A Would it, you know, mean we couldn't park here – This is not all inclusive. So the [sic] depending on the reason they would ask for it, would determine whether [21] I'd give it to them to answer their questions or not.

THE COURT: That was just to give them a chance to object to the privatization of the streets?

THE WITNESS: Yes. A lot of people were scared, but they were scared – could not come on their property. They were scared, you know, if their children were out how it would affect them.

Q Right.

THE WITNESS: And this pamphlet was only to let them know what it was what [sic] they're asking for,

for their safety, for their well-being. This is not an all-in-one inclusive policy. This is not sketched – not rules and regulations, just a general idea of what trespassing may or may not encompass.

THE COURT: Is there anything in there when they lease property now, that their [sic] notified of this situation, that it's private property and the trespass will be enforced?

THE WITNESS: When [22] they're at the office, I always tell them what – and we have a lease-read before they sign that lease. I explain to them in detail, Your Honor.

THE COURT: What's in that pamphlet?

THE WITNESS: Basically, what's in the pamphlet, that it's not – you know, if a person is on the property and they're there for the right reasons, they haven't been barred, there are no problems. That church members can come, family can come on the property. That is no problem.

A trespasser is a person that's been barred from the property, and there are certain reasons they have been barred and the trespass comes into enforcement at that time.

THE COURT: Is it the policy over there to notify the people that you don't want, before they're ever arrested?

THE WITNESS: Correct, Your Honor. Basically, the police department would notify them, I mean with some – and we send out mail to them and let them know. But, [23] basically, the police department are the ones that see them and give them the notice and give them the warning before it's known.

I know of no circumstances where the person was – the first time they were on the property and nothing illegal was going on, where they banned them. Police officers warn them first, and then if they continue to be on the property that's when they're barred.

THE COURT: Then they're barred or arrested?

THE WITNESS: Depending on what's what. If there's criminal activity going on, they can be arrested. If they – sometimes they bar them, sometimes they're arrested. I'm not sure of, you know, the police enforcement policy, so I don't want to comment on –

THE COURT: But they're warned before they're ever arrested?

THE WITNESS: Everyone is warned first, Your Honor. I can definitely say that.

THE COURT: And in this particular case, was this man warned that you [24] know of, not the police department?

THE WITNESS: Your Honor, I talked to Kevin Hicks in my office on more than one occasion. When we left Circuit Court, Officer Jones – I was in his presence, I filled out the papers and we handed them to Kevin Hicks in this hallway on April of 1998. I wrote the form out. It was my handwriting on the form, and Officer Jones delivered it do [sic] him in person.

So, yes, Your Honor, he was warned by myself, by the police department, and also in writing.

THE COURT: Okay. Go ahead, Mr. Benjamin.

BY MR. BENJAMIN:

Q The first contact that you or the police have with an individual who is a nonresident, that is when they receive the waning [sic] that you're describing?

A Yes.

Q And if they're not lawfully present – they're not present for the right reasons at the time of that first warning, are [25] they then banned?

A Again you're asking me questions how the police do their job. And I don't want them to say – I'm not sure. I can tell you basically, they will let them know what the policy is. They will let them know what's what and give them a warning.

MS. REINER: Judge, I think I need to object. She can't testify as to what happened with this specific individual in this case. She can only testify as to her interaction with the defendant. And I think that Mr. Benjamin needs to bring forward evidence as to what specifically happened with his client, in order to establish his standing to make an objection.

MR. BENJAMIN: No, sir. Actually, the First Amendment challenges – that's the one time when an individual can assert challenges vicariously. And this is a First Amendment exception. The case is Perkins versus Commonwealth, from the Richmond Circuit Court.

THE COURT: Sustained.

MS. REINER: Thank you.

[26] MR. BENJAMIN: Is it your position that I cannot ask questions –

THE COURT: You have to put on evidence pertaining to this case.

MR. BENJAMIN: Only to this case?

THE COURT: In the case, when – the way you filed your papers and the way I understand the challenge to be, can include general provisions. And that's fine, as long as she knows.

MR. BENJAMIN: Sure. The general policy.

THE COURT: And she just got through telling you what she knows, and she's told you, "I can't tell you what the police do."

MR. BENJAMIN: Sure. I just didn't want to cut her off.

THE COURT: All right.

MR. BENJAMIN: That's all. I didn't want to interrupt her while she was answering. I just wanted to certainly firm up the question.

[27] BY MR. BENJAMIN:

Q Who gets banned?

A Who –

Q What's the policy about banning?

A Basically, if a person is on our property with drugs or if our streets are privatized – Can I give you a little more history on –

THE COURT: I'd rather you not.

THE WITNESS: I mean, I don't know. If the lease – If you're on the property –

BY MR. BENJAMIN:

Q Let me try to focus you.

A Thank you.

Q Let's say that the police see somebody on the property who's not a resident, and they're not in the company of someone who is a resident.

A Okay.

Q What is the policy about that person?

[28] A Have they been barred? If they've been barred already –

Q The first time that they are there.

A The first time that they are there on the property, the police will ask them, you know, Are you a tenant here? Do you live here?

I'm not sure of their line of questioning. If they said they are a resident, they would come and confirm with the main office whether they are a tenant or not in that development.

Q Let me sop [sic] you there. If the person says to the police that they are a tenant, then at that point they and the police officer go to, I guess, your office or the housing manager's office to confirm whether or not they're a tenant?

A Correct.

Q What if they say they are not – well, stick with that. What if it turns out they're not a tenant?

A At that point, the officer knows that the person is no longer a tenant, [29] then the next time they see them – they would inform them of the policy and let them know, you know, what the policy is on trespass.

Q What if the police encounter someone who says, No, I'm not a tenant, you know, I thought this was public property or something like that?

A Again, I have to assume –

MS. REINER: Your Honor, I object.

MR. BENJAMIN: In this hypothetical.

THE COURT: No. Sustained.

BY MR. BENJAMIN:

Q All right. Tell us, if you would, what the policy is for how you treat someone who is a nonresident.

Or let me ask the question in this way: How does someone become banned for purposes of enforcing the trespass policy?

A When the police observe them, not with a tenant on the property and they cut through different areas and they [30] let them know the policy, as far as being a tenant or what have you, and they continue to be on the property, if they're charged with drugs or anything of that nature on our property, they are a harm to the neighborhood, then they're barred.

Q And it's any one of those reasons; is that right?

A Any one of those reasons. I also offered domestic violence.

Q And that's your own policy?

A I want to say it's not my own policy. The lease says –

MS. REINER: Your Honor, I object again.

THE COURT: Overruled. Go ahead.

BY MR. BENJAMIN:

Q Go ahead.

A The safety of the development and when a person presents a threat to the safety of the neighborhood, and if there's proof there or there's a liability there, then I say that's reason to be barred [31] from the property. They've been a threat to the neighborhood or, you know, the property or the people living there.

Q I guess I –

A And domestic violence does not necessarily fall under those rules.

Q And you have in your job, in your position, the right as you see it to make determinations like this? In other words, the housing manager for Creighton Court might not bar for domestic violence?

A You're asking me to assume something.

Q No. No. I'm just telling you – this is your own policy, it's been across the board or an H.H. [R.R.H.A.] policy, is it?

A I'm going to say it's R.H.H. [R.R.H.A.] policy, because HUD did say to us – we have rules for HUD and the – (Inaudible) – Act to react for the safety of the neighborhood and the safety of the residents. So I'm going to say according to HUD and landlord/tenant that is a right for all public housing managers.

Q Okay. On page one of this [32] document that you sent out, it describes unauthorized persons. Do you see that?

A Uh-huh.

Q And it describes unauthorized persons as first, being any person who has been banned. Do you see that?

A Uh-huh.

Q And that's still the case; is that correct? Someone who has been banned is unauthorized?

A Correct.

Q And it also describes unauthorized persons as any person who cannot demonstrate that they are visiting a lawfully residing resident or conducting legitimate business. Do you see that?

A Okay.

Q Do you see that there?

A I see that here.

Q Is that still accurate? Is that still part of the policy, as to who is an unauthorized person?

A Again, I'm going to say I assume – I assume – if a policeman stops you and you cannot prove to them that

you're [33] conducting legal business, you cannot prove that you are seeing a resident, and if you've been barred then – I'm not sure of your question.

Q Here's the question: if the policeman stopped you, is it your policy that when the police sees someone who cannot demonstrate that they are either visiting a lawful residing resident or conducting legitimate business, that that person is an unauthorized person?

A I would say so. Yes.

Q And an unauthorized person is someone who will be prosecuted for trespassing, according to R.R.H.A. policy.

THE COURT: That's not what she said, Mr. Benjamin. She said these people will be at that time formally barred and told that they should not come back, and if they do then they're arrested; is that correct?

THE WITNESS: You're right, Your Honor.

[34] BY MR. BENJAMIN:

Q Well, okay. Let's start over again. The R.R.H. [R.R.H.A.] pamphlet –

THE COURT: That's not a legal document. It's just something that they circulated before they privatized the streets to give the neighborhood some idea of what it was about, so they could object.

BY MR. BENJAMIN:

Q The definition of unauthorized person that appears in this pamphlet, is that still accurate as far as you're convened?

A You're asking for a definition. This is a couple of examples of what authorized persons may be. This is not a definition here, sir.

Q Well, let me ask you this: If a nonresident is on housing community property, and they can't demonstrate that they are visiting a lawfully residing resident, are they authorized to be there or unauthorized, as far as you're concerned?

A The question you ask is, if [35] a person is in back of some units or hanging with some guys and drinking on a corner and the police go up to them and ask them –

Q No. That's not my question. My questions is: If there is a person on housing community anywhere –

A Anywhere on the property?

Q Yes, ma'am.

A On privatized property?

Q That's right. On privatized property.

A On privatized streets. Okay.

Q And if that person cannot demonstrate that they are visiting a lawfully residing resident, they're unauthorized, aren't they?

THE COURT: Or live there.

THE WITNESS: They live there or conducting business there or taking a short cut or are they standing? You're asking me an absolute question that I don't think I can answer, sir.

[36] BY MR. BENJAMIN:

Q Well, then I'll – let me try again.

A Okay.

Q I'll get it. Let's say that somebody who is not a resident is seen on public housing property that had been privatized, are they considered an unauthorized person, if they are unable to demonstrate that they are not there – they are unable to demonstrate that they are visiting a lawfully residing resident?

THE COURT: Or conducting business.

MR. BENJAMIN: Well, there's others.

THE WITNESS: I don't think I can answer just one part of that, because there's a lot that goes through that definition, sir. There's a lot.

BY MR. BENJAMIN:

Q I'm going to include the Court's suggestion.

A Okay.

[37] Q Here with [sic] go again. I'm sorry. It's taking me a bit.

If a nonresident is seen on privatized public housing property and he cannot demonstrate that he is either visiting a lawfully residing resident or conducting legitimate business, is he an unauthorized person?

A Considered unauthorized? Yes.

Q What is – The policy of R.R.H.A. regarding the presence of unauthorized persons on privatized public housing property is to enforce the trespass laws?

A Repeat that again.

Q If you are an unauthorized person – an unauthorized, nonresident on the premises of privatized public housing property, the policy is that such unauthorized persons will be prosecuted for trespassing?

A I think the answer to your question is that, the police department can, number one, bar them or warn them; and the police department according to the rules and [38] regulations can follow through on that, sir.

Q Well then, as far as you know, can unauthorized persons lawfully be present on the Whitcomb Court property?

A Can they?

Q Yes.

A Like right now, if that person may be "unauthorized" it's very probable, sir.

Q So it is permissible for someone to be – as far as your concerned –

A Permissible? No. I'm not going to say it's permissible, sir. I'm not going to say that to you at all. Because the privatization and no trespassing rule was because the residents were tired of their safety being compromised by nonresidents.

Q I understand the "history."

A Okay.

Q You, as housing manager, gets to determine who is properly on that property or not. That's part of your job, isn't it?

A I would say yes.

[39] Q And if someone is not properly, legitimately on your property, then you can say so to the police that person is not authorized?

A Correct. And they're not tenants.

Q And the policy is at H.H.R.A. [R.R.H.A.] to enforce trespass laws against unauthorized people who are present on R.R.H.A. property?

A Correct.

Q Once somebody has been banned from R.R.H.A. property, what can they do to get off the list or to get permission to come back on the property?

A They can submit in writing a request to the director of housing operations.

Q Who is that person?

A Solomon Akinwande, he's the supervisor of all the housing managers.

Q It is possible to get off of that – to get an exception to having been banned?

A I've had persons to come in [40] and ask for a request that's been submitted to Mr. Akinwande.

Q Are their [sic] any public guidelines governing under what circumstance somebody can get off that list of people who have been banned?

MS. REINER: Your Honor, I object to the relevance.

MR. BENJAMIN: Goes to overbreadth, Your Honor, and vagueness.

THE COURT: Mr. Benjamin, your question here to my understanding, is whether or not this was private property.

MR. BENJAMIN: No, sir.

THE COURT: Oh, it's not?

MR. BENJAMIN: No.

THE COURT: Okay. Well, continue, please. Well, I'll tell you what, I'll give you 45 minutes to finish whatever it is you want to put on the record without any objection from anybody.

MR. BENJAMIN: Thank you.

THE COURT: All right?

MR. BENJAMIN: Yes, sir.

THE COURT: Put it on the [41] record.

MR. BENJAMIN: Yes, sir.

THE WITNESS: You asked me a question of what guidelines I would have to follow. I don't have a knowledge of those, sir. I do not know. I do not have any knowledge of what guidelines I may or may not follow.

BY MR. BENJAMIN:

Q Do you know of anybody ever having been taken – removed from banned status?

A No.

Q People have come to you asking for permission to visit people after they have been banned?

A Correct.

Q And you've never given anybody permission?

A I've explained to them the policy, they can request in writing, they make those requests to Mr. Akinwande for residents.

Q You've before never given anybody permission?

[42] A No.

Q If an organization wanted to use the privatized street or sidewalk in a housing community in order to hold some sort of demonstration, in order to walk back and forth with signs in support of some sort of political position, would they be permitted on the property if they were nonresidents?

A They could get permission first. And I would say, again, I need it in writing to see the nature or whatever. They need permission first to be on the property.

Q Are you in a position – does your position enable you to tell people – to give people permission to come on and picket or demonstrate on housing community property?

A I'm not sure what you're asking. To picket? I've had people to call to pass out flyers, and asked to have church services. And these are things I'm used to.

As far as picketing and stuff, I never had that so I'm not familiar with it.

Q Let's talk about what you're used to.

[43] A Okay.

Q With situations such as those, people wanting to pass out flyers for example, or hold church related meetings, do they have to come to you for permission?

A Yes.

Q Then do you give permission?

A Depending on the circumstances, sometimes it's granted, yes.

Q Sometimes you do and sometimes you don't?

A Correct.

Q Are there any particular guidelines, criteria that you refer to determine whether or not any group or type of religion will be allowed to circulate any of those things?

A Yes. I refer all those to community council and they meet with the board and the residents to decide, because there's so many residents and so many things, the City Council and housing management work out – we're not – we don't rely on – we don't mind a one time only religious – we don't want [44] every week or what have you. And they set up the guidelines on whether these services can take place.

As far as passing out flyers, you know, I was asked to grant and hopefully it's not solicitation or selling or those type things.

Q What flyers are permitted? Is somebody permitted to come in there and pass out flyers?

A Everyone who comes in to pass out flyers, do not come by me. So I see them if they come and ask permission, those are the type of things I look for.

Q If somebody comes to you and asks for permission to hand out flyers, do you give them permission?

A Once I look at the flyer and it's not – it's just church services or inviting to a community day or those type of things, you know, a flyer I'm used to seeing, I do not deny anyone permission to hand out flyers, the ones that I have seen.

Q In those situations, it is up to you; is that correct?

[45] A Only up to me – If it's something I'm uncomfortble with, I will refer it to Mr. Akinwande, if it's not routine that I'm used to seeing, I just kind of refer it to Mr. Akinwande to get approval at that point.

Q Who is that person?

A Assistant director of housing operations. He's my immediate supervisor.

Q When trespassing arrests are made, do the police advise you of who they have arrested for trespassing on public housing property?

A Yes.

Q Do they – in a situation where that person has claimed to be connected with a particular resident or particular apartment, do the police advise you of that?

A Yes.

Q Have the tenants been advised that if they acknowledge someone as their guest, they tell the police, oh,

yes, he's my guest or whatever, have the tenants been told in that situation that if that person isn't lawfully a guest, that's a [46] problem?

A If the police tell me that they have arrested somebody for trespassing or they are questioning somebody about being unlawfully on the property, and the person stated that they are a guest of a certain household, that have been barred from the property, at that time I call the resident and let them know this person has been barred and inform them of the policy at that time. And yes, I do let them know.

Q Do you let them know that if that sort of conduct continues, that they are jeopardizing their lease?

A Do I let the person know that if they allowed a barred person on the property, that they could be jeopardizing their lease? Yes, I do.

Q Once a person is banned, they're not permitted to go on the property; is that correct?

A I hear your question, but after Mr. Hicks had been here two – not with permission, he came to the talk, you know, twice after he was barred.

[47] Q Okay. I guess you're pointing out the distinction that even though – Well, when he came to talk to you, that was unauthorized?

A He was still unauthorized at that point.

Q That was an unauthorized presence; right?

A Uh-huh.

Q And you didn't have him arrested for trespassing on those two instances, did you?

A No.

Q But you could have?

A Right.

Q On both of the occasions that he came to talk to you, was he trying to get permission to come back onto the property?

A Yes, he was.

Q Did he explain to you that his mother resided on the property?

A Yes.

Q Did he explain to you that the mother of his children resided on the property?

[48] A Never. No.

Q No?

A Huh-uh.

Q Was he asking for permission to come visit his mother?

A There was a conversation I know when we were in this courtroom, him and – and I talked to her before, and I know he asked permission during the conversation, and I explained to him, he had been barred, you know, and I'm not granting that permission.

Q And he's not the first person, is he – Once people are banned, even though their parents or their children or

other family members live on the property, they still aren't permitted to come back onto the property?

A We advise them to see these persons outside of our property, sir. We do not come between families. We advise them to see them outside our premises.

Q Just so it's on the record that – that's correct that they cannot come back on the property; correct?

A Correct.

[49] Q Did you know of any formal trespassing policies for the police in their enforcement of trespassing laws –

A I cannot answer that question.

Q – on public housing property?

A I cannot answer what rules and regulations they follow. I'm not qualified to answer that.

MR. BENJAMIN: Your Honor, if you bear with me for a moment, I might be way short of your 45 minutes.

(Pause in the proceedings.)

BY MR. BENJAMIN:

Q If you get the feeling that you've already answered this, you may have. Once someone has been banned from the property, even if a resident invites them onto the property as an invited guest, they still aren't allowed to go on public housing property; is that right?

[50] A You're asking me a question – I think I hear what you're saying, and I'm not going do [sic] answer that

question. I don't think you're asking me something and I think it's a line there. Ask that question again, please.

Q Sure.

A Once they're barred from privatized property, and they're back on the streets or sidewalks, they are unauthorized. They're barred.

Q Period? It's not a trick question.

A Okay.

Q I'm just getting another example, if you will. So if a lawful resident of the public housing project invites someone who has been barred from the public housing property, even if they're invited, that's still not an authorized presence?

A That's correct.

Q And if they've been barred from the public housing project and they are back on the property for some other purpose that ordinarily would be considered [51] legitimate, that's still not an authorized presence; right?

A Once they've been barred and have been informed they're not to come back on the property, and they come back on our property, then they're not authorized to be on that property. I agree with you.

Q Okay. The only way – How does somebody demonstrate that they're visiting a lawfully residing resident?

A What the police would do, one of two things. The police actually knock on the door and ask the person in 2302 is the person your guest. They walk the person to the door and knock and ask them, is this person your guest

and whether you live here or not. The police will work with them to get to that point.

Q Have you had a problem where some of the residents have maybe harbored people who really weren't their guests? Who have said, you know, Oh, yes, he's my guest, when that really wasn't the case?

A Since the police department [52] do most of that, you'd have to ask them that. Because I'm not the fair one to answer that question. The police go there and do that check.

Q Are there any other ways that people who are on the property claiming to be visiting a resident, can demonstrate that they are actually doing that, visiting a resident?

A I think the main thing is, if they are visiting somebody they should be at home. If you live at 2302 Carmine Street, and the person comes out and says this is my guest, then I would assume that would be – I would assume that would be that person.

I don't know if that – they don't ask for a list of guests or that type of thing. I don't – I'm not sure what you're asking.

Q If somebody is just standing around on the street corner?

A Okay.

Q And they say they're visiting a resident, and that resident when they're asked vouches for them, oh, yes, that [53] person is visiting me; is that okay? Is that authorized?

A Has that person been barred?

Q No. Not barred. Just standing on the street corner.

A I have known police to walk them to the door of the person who has said, yes, that's my guest.

Q Then is it your position that if a resident of the housing community says that a person standing on the street corner is there [sic] guest, that it's authorized for that person to stand there on the street corner?

A No. The police – I'm hearing – We ask the police to do or we suggest that they do, if you're at 2302 Carmine Street, you should be at 2302 Carmine Street. And so we had asked residents to, you know, if guests are coming to see you they should be in your yard or be on your property area assigned to you. And so I don't think it's reasonable for your guests to be one place and you be somewhere else.

[54] Q I understand. And that's your position?

A Again, the police department enforces – you're asking me how I view it. I'm telling you how I think I view it. But they enforce it. They will walk up to the address or what have you. But a person standing at the corner of Belvidere and Forest visiting a person at 2302 Carmine Street.

Q What?

A Well, who are they visiting?

Q That person in that situation would not be able [sic] demonstrate that they were –

A But I told you the police would – I've known them to walk them to that address and a person said I just

stopped here and was visiting such and such. And so the police had asked them to explain to them the policy or what have you, explain to them about being on the property as a guest or what have you.

Q And the policy, if I understand –

[55] A And the police explain to them – like I say, I'm not sure which law they're following, I'm not a police officer. I don't know that part of it.

Q The policy is that, I guess, you ought to be at the place that they're visiting or on their way to and from?

A Well, that's right. I mean, that's reasonable.

THE COURT: Isn't the reason for most of this is the drug market that they had?

THE WITNESS: Yes, sir.

THE COURT: And regardless of whether the party has somebody that lives in there or not, do you allow them to be barred if they hang around the drug market?

THE WITNESS: The reason why we ask that they be identified as their guest, in the new lease that we did a while ago, we can hold tenants accountable for their guests' action. And so if the person on our property is dealing drugs and they are a guest of that person, then they can lose their apartment.

[56] So that's why the police would ask them are you a guest of this house or who you are going to see, because with the open-air drug market, we have people who out at the home site – we had – not one of ten were residents, but they were arrested on our property. Even now, eight of ten

persons are not residents. Our residents don't want them coming on our property doing that type of thing.

So we did the lease over a little while ago, we've made our tenants more accountable for their guests' actions. That's why the policemen ask them are you a guest, who are you visiting. And like I said, if the person is a guest on our property doing the wrong thing, they can be barred and/or arrested. But if that guest has drugs on our property, the family can also be held responsible for their guests' actions.

BY MR. BENJAMIN:

Q Do the police ever come to you asking for a policy about a particular person or –

[57] A Policy about a particular person? I'm not sure of your question, sir.

Q Do you ever communicate to the police your policy or the R.R.H.A. policy about authorized, unauthorized people on the premises?

A The only thing I can say to you is, that if they question me, Is MaryJo a tenant at 2302, I can confirm whether or not she is a tenant. They ask if John Doe is a tenant at 2523, and we saw John Doe again and asked if he lived at this address. Is that what you're asking? I'm not sure –

Q Well, let's say somebody is on the street passing out flyers, do the police come to you and ask you, is this person supposed to be here?

A I don't believe that's ever happened.

Q Do you have police assigned full time to –

A We have an R.R.H.A. squad who work all our communities, in addition to regular beat offices or what have you.

Q The streets – the privatized [58] streets are maintained by the City?

A Sir, that's all in that document. I do not know how to answer that question, because maintained – we clean the trash up. But as far as maintenance or whatever, all of that's in that document. And I do not know how to answer that question.

Q The last time we had any snow or ice, was it City machines that came and cleaned it?

A I don't recall. We didn't have any last year, remember?

Q It all fades into –

MR. BENJAMIN: Your Honor, I think that's it. I would introduce as Defense No. 4 the pamphlet that was distributed to –

THE COURT: Thank you, Ms. Rogers.

MR. BENJAMIN: Do you have that pamphlet?

(Document proffered to the Court.)

[59] (Defendant's Exhibit No. 4 entered into evidence.)

Your Honor. I have no further evidence.

* * *

[64] MR. BENJAMIN: Well, that's unconstitutional and not right. That's just not right.

That's my argument.

THE COURT: Okay.

MR. BENJAMIN: In addition to the law.

THE COURT: I deny your motion.

* * *

[1] VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

COMMONWEALTH OF VIRGINIA	:	CASE NOS.: M-99-1605 to 1609
vs	:	(Filed Sep. 24, 1999)
KEVIN LAMONT HICKS	:	

Complete transcript of testimony and other incidents in the above BENCH TRIAL AND REVOCATION HEARING, when heard on July 29, 1999, before the Honorable THOMAS N. NANCE, Judge.

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Counsel for the Defendant

Kevin Lamont Hicks,
the defendant herein,
present in person.

[3] INDEX

[4] NOTE: Court is reconvened at 1 p.m.; the court reporter having been duly sworn, the defendant being present, the hearing is had [sic] as follows:

MS. CLERK: Case of the Commonwealth versus Kevin Lamont Hicks.

The defendant is present in court, is represented by Steven Benjamin.

Counsel, are you prepared to proceed?

MR. BENJAMIN: Yes, ma'am.

MS. CLERK: Commonwealth is represented by Russell McGuire.

Counsel, are you prepared for the Commonwealth?

MR. MCGUIRE: Yes, ma'am.

MS. CLERK: We're proceeding on the trespassing and fail to appear first?

MR. BENJAMIN: Yes.

MS. CLERK: File M-99-1606. You stand charged in this summons that on or about January 20th, 1999, in the City of Richmond, you did unlawfully trespass on RRHA property.

[5] How do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

* * *

[6] MR. BENJAMIN: We'd move to exclude any witnesses, Your Honor. One of our witnesses, Maria Pryor, is in the hall already.

MR. MCGUIRE: We would have the same motion.

Commonwealth would call Officer Laino.

JAMES J. LAINO,

a witness called by the Commonwealth, first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MCGUIRE:

Q Sir, please introduce yourself to Judge Nance.

A Officer James J. Laino, L-A-I-N-O, Richmond Police Department.

Q Were you so employed on or about 1/20/1999?

[7] A Yes.

Q On that day in the city of Richmond, north of James, did you come in contact with the defendant seated next to defense counsel?

A Yes, sir, I did.

Q Is that the gentleman there?

A Yes, sir.

MR. MCGUIRE: Let the record reflect that the witness has identified the defendant.

BY MR. MCGUIRE: (Continuing)

Q Please let the Court know how you came into contact with him.

A I was driving, it would be eastbound on Bethel Street, 2300 block. I observed Mr. Hicks. He was walking westbound on Bethel Street, 2300 block. I stopped my police car. It was approximately in front of 2340 Bethel Street.

Q That's RRHA property?

A Yes.

MR. BENJAMIN: Objection to, this is RRHA property, and any hearsay on which it is based.

THE COURT: All right.

[8] MR. MCGUIRE: Would you like me to respond, Your Honor?

THE COURT: Well, continue or respond, either one.

MR. MCGUIRE: Well, I would just say that you can either take judicial notice of that or the officer can tell you how he knows. It's not hearsay. It's something that he knows as a police officer. It's capable of fast determination. I would ask that you take judicial notice.

THE COURT: You want to try to lay some foundation for it and then ask him some questions.

MR. MCGUIRE: Certainly. yes, sir.

BY MR. MCGUIRE: (Continuing)

Q How did you know that was RRHA property?

A I've been working first precinct for five years, over five-and-a-half years. Whitcomb is RRHA. At one time, I was assigned strictly to Richmond Redevelopment Housing Authority, and Whitcomb was my assignment for over [9] a year.

Q That's RRHA property?

A Yes, Whitcomb is part of RRHA property.

MR. BENJAMIN: May I voir dire?

THE COURT: Yes.

VOIR DIRE

BY MR. BENJAMIN:

Q Officer, what you're saying is that, that has always been considered and regarded by you and others as RRHA property. What is the basis of your belief that Bethel Street is part of RRHA property?

A Whitcomb Court is made up of Whitcomb Street DeForrest Street, Bethel Street, Carmine Street, Ambrose Street, Anniston Street, and part of Magnolia.

Q You saw the defendant on Bethel Street?

A Yes.

Q He was walking in Bethel Street?

A He was walking on the sidewalk, [10] yes, sir.

Q Now, you don't know, do you, whether that walk where you saw him belonged to RRHA or to the City of Richmond, do you?

A Yes, I do, sir.

Q What is the basis of that knowledge? How do you know that?

A I don't know the exact date, sir, but at one time they did privatize the streets, and everything from Whitcomb Street to Carmine Street is privatized.

Q How did you know that?

A I was told that. And, yes, it was presented to us in a packet. I don't have the packet with me, sir.

MR. BENJAMIN: All right, sir. Your Honor, I renew my objection that his statement as to ownership of the sidewalk where he saw the defendant is not only a legal conclusion, it's also premised upon hearsay. He knows it because of something that was told to him and he read.

THE COURT: I overrule your objection.

[11] MR. MCGUIRE: Thank you.

BY MR. MCGUIRE: (Continuing)

Q So it was RRHA property?

MR. BENJAMIN: Same objection.

THE COURT: Continue, please.

BY MR. MCGUIRE: (Continuing)

A Yes, sir.

Q And then what happened next?

A I stopped my police car and started to speak with Mr. Hicks. I said, I know you're not supposed to be out here. I forget his exact response. He said he was just getting pampers for his baby, at which time I wrote him a summons for trespassing.

Q All right. Is the property posted?

A Yes, on each building. The property's posted on each side of the building. So there's one on each side of the building, so there's four sides of each building. Then on the street, they have signs every say 100 feet, red and white, that say these streets are privatized and all the property is privatized, no trespass.

Q How big are the signs?

A The signs are –

[12] MR. BENJAMIN: Your Honor, maybe, for purposes of the record, the objection, sir, is if the signs are being introduced to prove ownership or the fact of privatization, then it's hearsay, and I object on that basis.

THE COURT: Overruled. Go ahead.

BY MR. MCGUIRE: (Continuing)

A The red and white signs, I would say approximately 18 inches to almost 24 inches by about 12 inches, and they're probably spaced about every hundred feet on each block.

Q Are they obstructed?

A No.

Q Was this in the day time or night time?

A This occurred at 8:52 in the evening time.

Q Do you know whether it's lit or dark?

A There are street lights out there at Whitcomb Court. So it's well-lit. I would consider well-lit.

MR. MCGUIRE: Please answer any [13] question Mr. Benjamin or the Court may have.

CROSS EXAMINATION

BY MR. BENJAMIN:

Q Did he explain to you that the mother of the baby lived there in Whitcomb Court?

MR. MCGUIRE: Objection to the hearsay, Your Honor.

THE COURT: Overruled.

BY MR. BENJAMIN:

Q Did he explain to you that the mother of the baby that he was getting the pampers for lived there?

A He stated he was bringing pampers to his baby.

Q Then did a female come out and join you all?

A Just about at the end, she did walk up.

Q Did she identify herself as the person he was visiting?

MR. MCGUIRE: Objection to the hearsay, Your Honor.

[14] THE COURT: Overruled. Go ahead.

BY MR. BENJAMIN: (Continuing)

A I don't recall the conversation between her. I don't even recall speaking with her. I'm not sure – I believe he motioned [sic] that, that's who I was visiting right there.

Q All right. Did you know her or recognize her to be a resident of Whitcomb Court?

A No, sir.

Q You don't know either way?

A Whether she's a resident, no, sir.

Q Were there other officers there?

A Myself and Officer Tovar.

Q Was Officer Hannah present?

A No.

MR. BENJAMIN: May I see the warrant, Your Honor?

THE COURT: The summons?

MR. BENJAMIN: Yes, sir.

THE COURT: Have you had contact with him before? You said you knew he wasn't supposed to be there.

[15] THE WITNESS: Yes, I've known Mr. Hicks probably three-and-a-half, four years.

THE COURT: Three-and-a-half, four years?

THE WITNESS: I've known him for a while, yes.

THE COURT: Have you arrested him for trespass?

THE WITNESS: I don't remember if I've actually arrested him, but he's been arrested before for trespassing out there and I've been present.

MR. BENJAMIN: Your Honor, I would have to object to this on undue process grounds and hearsay grounds and relevance grounds.

THE COURT: All right. But you've been there when he was arrested for trespass?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. BENJAMIN: Same objection. I'd ask you not to consider any of that.

THE COURT: All right.

[16] MR. BENJAMIN: Could I have a ruling?

THE COURT: Your objection is –your request is denied. I will consider it.

MR. BENJAMIN: All right, sir. Thank you. I don't have any further questions for the officer.

THE COURT: All right.

MR. MCGUIRE: That's all from the Commonwealth.

WITNESS STOOD ASIDE

MR. MCGUIRE: The Commonwealth would call Gloria Rogers.

[17] GLORIA ROGERS,

a witness called by the Commonwealth, first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MCGUIRE:

Q Ma'am, please introduce yourself to Judge Nance.

A Gloria Rogers, housing manager at Whitcomb Court, Richmond Housing Authority.

Q And, ma'am, were you so employed in the year of '98 and 1999?

A Yes.

Q Ma'am, taking your time back. Have you ever come into contact with the defendant, Kevin Hicks, before?

A Yes.

Q All right. Please tell the Court, has he come and have you banned him from the property?

A Yes.

Q All right. Please tell the Court how that came about?

A It came about in two respects. Number one –

[18] MR. BENJAMIN: Objection to relevance.

THE COURT: Overruled.

BY MR. MCGUIRE: (Continuing)

A Number one, when the police see a person in the development and they say that they live someplace, they confirm with the office. And Kevin Hicks, they quite often saw him in the development and he gave them an address and I would pull the file and confirm he didn't live there.

Secondly, because of the domestic violence in the development.

MR. BENJAMIN: I'm not sure where the Commonwealth is going with this, but there's also a hearsay objection.

THE COURT: I know. Ma'am, have you told him to stay off the property before?

THE WITNESS: Yes.

THE COURT: How many times?

THE WITNESS: I talked to Kevin Hicks in person twice.

THE COURT: And he's been arrested for this in the past?

[19] THE WITNESS: Yes.

THE COURT: Did you go to court with it?

THE WITNESS: Yes, I was in this same courtroom with him before and we gave him the paper barring him from our property.

THE COURT: You gave him a paper?

THE WITNESS: Yes.

THE COURT: Telling him not to come back?

THE WITNESS: Yes.

BY MR. MCGUIRE: (Continuing)

Q Did he sign that at as well?

A Yes.

Q Do you have that with you?

A (Witness complies.)

Q And do you keep that record, ma'am?

A Yes.

Q And in the course of your business as housing –

MR. BENJAMIN: Hold on just a second. Before this is admitted, may I [20] voir dire?

THE COURT: Sure.

VOIR DIRE

BY MR. BENJAMIN:

Q Ms. Rogers, the paper that you handed to the Commonwealth attorney, did you see the individual sign it?

A Yes.

Q In your presence?

A Yes, right outside this courtroom.

Q Was it the same individual here?

A Yes.

Q And it was this courtroom?

A It was on this floor.

Q I understand.

A It was on this floor. It was in the Circuit Court.

MR. BENJAMIN: Thank you.

[21] DIRECT EXAMINATION

BY MR. MCGUIRE: (Continuing)

Q And, ma'am, was that on 4/14/1998?

A The date on the paper, yes.

MR. MCGUIRE: Okay. I'd move to introduce this at this time, Your Honor.

MR. BENJAMIN: Objection to the hearsay as to the date, Your Honor, if the writing is being used to establish the date of the notice. That is hearsay.

THE COURT: Well, ask the lady.

MR. MCGUIRE: Was the –

THE COURT: Did you date it on the date he signed it?

THE WITNESS: Yes. It was in the court as he walked out. We did it that same day and got him to sign it.

THE COURT: On the 14th?

THE WITNESS: Whatever date was on there. Hand delivered in court 4/14/98. That's my handwriting. I put that on there. That's the date. The officer signed and he also signed it the [22] same day. And all three dates are the same, Your Honor.

THE COURT: Right.

MR. MCGUIRE: At this point, we would introduce this document.

MR. BENJAMIN: And our objection to that is that it does not fall within a hearsay exception, Your Honor. It's still hearsay.

THE COURT: Objection denied.

NOTE: The above-referred-to document was marked and filed as Commonwealth's Exhibit No. 1.

THE COURT: Go ahead.

BY MR. MCGUIRE: (Continuing)

Q And, ma'am, have you also given the police department, the Richmond Police Department authority to arrest people trespassing on your property?

A Yes, it has been done.

MR. BENJAMIN: Objection to that. That's hearsay and also a legal conclusion.

[23] THE COURT: Continue.

BY MR. MCGUIRE: (Continuing)

Q Do you keep records of whether or not authorizations are made to the police department?

MR. BENJAMIN: I'm sorry. But I do need a ruling.

THE COURT: What was your objection?

MR. BENJAMIN: The objection was to whether or not the police force has received authority to act as agents, essentially, for RRHA.

THE COURT: From her?

MR. BENJAMIN: She says it has been done. My objection is –

THE COURT: From you, ma'am?

THE WITNESS: They have been done by – I know the Housing Authority has given the police department authority to make arrests. And here's a copy of the paper from the Housing Authority. So I'm not sure –

THE COURT: That's all right. Don't worry about the legal aspect. Just [24] answer the question. The objection is overruled. Go ahead.

MR. MCGUIRE: Thank you, sir.

BY MR. MCGUIRE: (Continuing)

Q The authority has been given to the police and you have that document with you. Is that an accurate reflection of the authority that has been granted?

A Correct.

Q Okay. May I see that?

A (Witness complies.)

MR. BENJAMIN: My objections to testimony based upon this document and to your receiving this document into evidence are as follows: Number one, best evidence objection. This is, obviously, a fax from somebody. Secondly, any testimony based upon this document calls for a legal conclusion, which this witness is not qualified to give. And, thirdly, that any testimony based upon this document and this document itself is hearsay. Those are my objections.

THE COURT: Objections [25] overruled.

MR. MCGUIRE: Move to introduce, Your Honor.

NOTE: The above-referenced-to document was marked and filed as Commonwealth's Exhibit No. 2.

* * *

[29] THE COURT: Is that the Commonwealth's case?

MR. MCGUIRE: That would be the Commonwealth's case, Your Honor.

THE COURT: All right. Grant your motion on fail to appear.

MR. BENJAMIN: Yes, sir. Let me take just a second.

We have no evidence, Your [30] Honor. Defense rests.

* * *

[32] THE COURT: I find him guilty of trespassing.

MR. BENJAMIN: All right, sir.

THE COURT: What kind of record does he have? What have you all agreed on?

MR. BENJAMIN: I think what you have before you, you have two summonses or warrants reflecting criminal convictions, both of them for trespass. One was a conviction dated February '98 with an offense date of November 12, '97. [33] The other is a conviction date of June '98 with an offense date of April 20, '98. And those two I will submit to the Court. I agree to those.

You also have an NCIC printout. And I've found such inaccurate information on those in the past, Judge, that I never trust them. So I'll submit it to you for whatever – I'm objecting to you even considering it, because those printouts contain all kinds of stuff.

THE COURT: I'm not going to consider that in this case.

MR. BENJAMIN: Yes, sir.

MR. MCGUIRE: Your Honor, I would also ask that you then take in mind the matters that are being show caused as well as the prior record.

THE COURT: Well, these are not those?

MR. MCGUIRE: I am not sure 100 percent, Your Honor. I apologize. But I believe there's more than two show causes.

THE COURT: Now, see, he has [34] three show causes?

MS. CLERK: Yes, sir.

THE COURT: This one is February 10, '98. This is an April 27th case. And this one is June 26, '98. So it's one additional case.

MR. BENJAMIN: Right.

THE COURT: Which was April 27th, '98. All right.

Care to be heard on punishment?

MR. BENJAMIN: I'd like you to hear from Mr. Hicks.

THE COURT: All right.

THE DEFENDANT: Judge, I'd like to say, prior to all the trespassing charges that I have, it was all due to the fact of me trying my best to take care of my children and make sure that my girl get everything that she needed. I know by me catching trespassing charge, I did wrong, but all I can say is I just did it for my kids. And if I can get any kind of slack off this right now, I promise you I will never trespass on RRHA property again, because right

now, I have [35] an 8-month-year-old girl and a 4-year-old son that I'm really trying to be with.

THE COURT: Son, don't you recognize that by doing this is the worse thing you could do for your child?

THE DEFENDANT: Yes, sir.

THE COURT: I mean, you're going away. I'm going to tell you now. Don't you realize what you're doing to the baby, the baby's mama, your own mama? How many times you been convicted over there? I'm looking at four. You know, probably more.

THE DEFENDANT: Your Honor, I never got into no kind of trouble. Never. Every time it seems like as far as the trespassing charge, it always be because my kid. I mean, she don't have no phone, so I be back and forth to the house just making sure she have everything.

THE COURT: On this current case, I sentence you to 12 months in jail and pay $1,000 fine. I suspend that time and the fine on the condition you keep [36] the peace, be of good behavior, not violate any laws for the next five years. Pay the costs.

THE DEFENDANT: Thank you.

THE COURT: Now he has a revocation hearing.

MS. CLERK: Your Honor, we have before the Court three abuse of discretions. Do you want each one read?

THE COURT: Yes.

MS. CLERK: File M-99-1605. You stand charged in this show cause summons that you previously were

charged with trespassing, the conditions of the suspended sentence were violated.

How do you plead, guilty or not guilty?

THE COURT: Conditions of suspended sentence of what date?

MS. CLERK: I'm sorry, Your Honor. Of June 26th, 1998.

Do you plead guilty or not guilty?

THE DEFENDANT: Not guilty.

MS. CLERK: File M-99-1607. [37] You stand charged in this show cause summons that you were previously charged with a trespassing and you violated the terms of the suspended sentence. And, Your Honor, this was suspended on April 27, 1998.

How do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

MS. CLERK: File M-99-1609. You stand charged in this show cause summons that you were previously charged with trespassing and violated the conditions of the suspended sentence. And the date of the conviction, Your Honor, is February 10, 1998.

How do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

THE COURT: Mr. Benjamin, do you want to accept the evidence as heard in the previous case?

MR. BENJAMIN: Yes, sir, with the same objections.

THE COURT: All right. That's [38] in the trial of the case and the previous hearing?

MR. BENJAMIN: Yes, sir. Same objections.

THE COURT: All right. I'll be glad to hear you or hear any evidence you have as to why the Court should find that the district judge abused its discretion.

MR. BENJAMIN: Yes, sir. Also when I say same objections, please understand that I also mean I object to the enforcement of the trespassing policy as has been described in the previous hearing, be it use of the revocation proceedings as part of that. I think – I'd also ask you to accept the transcript that had been tendered in the earlier hearing of the proceedings before the Richmond General District Court.

The objection that we have placed before you at an earlier time was that Mr. Hicks was denied his right to due process by the participation of the trial court judge a prosecutor and advocate in that proceeding. We'd ask [39] the Court to remand the matter for the trial in the General District Court which Mr. Hicks was entitled, and the Court ruled that it did not have the authority to do that. We renew our objection and submit that you do have the authority to do that.

I would submit the transcript from General District court as evidence of the abuse of discretion. I think what it speaks to, I think, is the embodiment of the court, the judge acting outside the proper exercise of discretion during that hearing.

The only other thing I would say is that Mr. Hicks's mother and his aunt and the mother of his two infant children live in Whitcomb Court. And although he has

been told – the evidence you have heard is that he's been told not to come onto that property, he keeps coming. I think that, that is a compulsion, an instinct, and a longing that is inherent in all of us. And I think that when the City of Richmond and [40] the Housing Authority take it upon themselves to decide that the answer to solving the crime or drug problems is to keep family members apart, that you're just – that's an abomination. And maybe I'm doing more preaching than I should.

THE COURT: Well, you know, don't forget the testimony, Mr. Benjamin, about drug dealing out there and him hanging out on the corner.

MR. BENJAMIN: Not by him. There has been no testimony that he was hanging on the corner, that he had any connection with any type of drug activity out there. I am fully aware that, that neighborhood has experienced problems with drugs.

THE COURT: That's probably the reason that they did what they did to set it up in a private situation where they could declare private property in order to try to control the crime. I don't know that your client is involved. He seems like a nice young man to me. But I know one thing, he's my number one [41] candidate for the award for hard-headedness. Keep going back time and time again. He's a Coolhand Luke of the projects over there. And he's just got himself in such a bad situation, I can't get him out of it.

MR. BENJAMIN: Well, you can. You can. And that's what I'm asking you to do and I –

THE COURT: Unless I totally abandon my oath.

MR. BENJAMIN: No, you know I disagree with you there. Because this would be different if, you know, on any one of these occasions, if they had caught him with crack in his pocket, you know, I'd have a little bit harder time making this pitch.

And you know that part of the reason, part of the – one of the reasons this policy works so well is that it permits officers to stop and detain somebody and investigate whether they are violating the trespass laws. And a lot is accomplished by the ability then of [42] the officers to either do a patdown or if they are trespassing, to do is [sic] full search. It is a very efficient way of finding drugs. So you know if he had, had drugs on him, they would have found them and this would have been a totally different case. This is a situation where the absence of evidence is the best thing I've got.

THE COURT: Does he have any other record?

MR. BENJAMIN: I think there was some discussion of a property damage. There are no drug offenses. He has got nothing to do with drugs. And that's what I keep returning to, because I think it's the most compelling argument. He is maybe hard-headed, but a hard-headed kid, nevertheless, who just kept wanting to see his mother and his babies.

THE COURT: I don't buy that. Anything further?

MR. BENJAMIN: No, sir.

THE COURT: I find on the evidence, not based on the conviction in [43] the other case itself, but on the evidence, that he has violated the terms of the previously suspended sentence. I sentence him on 1605 to 12 months

in jail; 1609, 12 months in jail; and 1607, to 6 months in jail to run concurrently.

Mr. Hicks, I cut your sentence in about a third or by a third. But if I see you again, son, in the next five years, I'm going to give you the 12 months and I'm going to try to see that you have to do it all.

If he has a job, Mr. Benjamin, I will consider work release. But you'll have to get that together and bring it to me.

MR. BENJAMIN: Yes, sir, he does have employment.

THE COURT: He'll have to get with his employer, get a statement from him, the hours he works, somebody who will be willing to work with the police department. Call my secretary and put it back on the docket.

MR. BENJAMIN: Yes, sir.

[44] THE COURT: That's all.

MR. BENJAMIN: May he say one further thing?

THE COURT: Yes.

THE DEFENDANT: Your Honor, I'm really trying to be with my kids, Your Honor. I have a 4-year-old son.

THE COURT: Mr. Hicks, you need to understand, the world doesn't revolve around you.

THE DEFENDANT: I know that. I know that. But all I'm saying is if you can cut me any kind of slack to where I can get no jail time so I can be with my kids.

THE COURT: That will never happen, son.

(Whereupon the proceedings ended.)

AN ORDINANCE No. 97-181-197

[OFFERED MAY 27, 1997]

[ADOPTED JUNE 23, 1997]

To close to public use and travel Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street, in Whitcomb Court, as shown hatched on a plan prepared by the Department of Public works, and designated as DPW Drawing No. P-23116, dated February 18, 1997 (Project #E12-195-SC), entitled: "Proposed Closing of Carmine St., Bethel St., Ambrose St., Deforrest St., Sussex St. & Magnolia St. (Retaining as a Full Width Utility Easement) in Whitcomb Court (Richmond Redevelopment & Housing Authority)", upon certain terms and conditions.

Patron – City Manager (*By Request*)

Approved as to form and legality
by the City Attorney

PUBLIC HEARING JUNE 23, 1997 AT 8 P.M.

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street, in Whitcomb Court, as shown hatched on a plan prepared by the Department of Public works, and designated as DPW Drawing P-23116, dated February 18, 1997 (Project # E12-195-SC), entitled: "Proposed Closing of Carmine St.,

Bethel St., Ambrose St., Deforrest St., Sussex St. & Magnolia St. (Retaining as a Full Width Utility Easement) in Whitcomb Court. (Richmond Redevelopment & Housing Authority)", a copy of said drawing being attached to this ordinance, be and are hereby closed to public use and travel and abandoned as streets of the City of Richmond, such streets being no longer needed for the public convenience.

§ 2. This ordinance, as to the closing of the streets identified above, shall be in force as provided in Section 4.09 of the Charter of the City of Richmond and shall become effective when, within twelve months from the day this ordinance is in force (a) consent to the closing is obtained from each of the owners of land, buildings or structures from whom consent is required under Section 25-132 of the Code of the City of Richmond, 1993, which consents shall be in writing, approved as to form by the City Attorney, and filed in the office of the City Clerk; (b) the applicant makes arrangements satisfactory to public and/or private utilities or public service corporations whose properties or facilities are in said streets for either the removal, relocation or abandonment thereof or for the construction, reconstruction, maintenance and repair thereof, evidence of which shall be in writing, approved as to form by the City Attorney, and filed in the office of the City Clerk; (c) applicant bears all cost involved, including, but not limited to, removal, relocation and/or realignment of utilities, installment of new utilities, new or revised street name signs, etc. as directed by City Agencies, and agrees in writing with the City that for itself, its successors and assigns, it will indemnify, reimburse, keep and hold the City free and harmless from liability on account of injury or damage to persons, firms or corporations or

property which may result directly or indirectly from the closing of the streets to public use and travel by this ordinance and the construction or interference with the flow or overflow of surface or subsurface water resulting directly or indirectly therefrom; and in the event that any suit or proceeding is brought against the city at law or in equity, either independently or jointly with the owner or owners of all the property abutting the aforesaid streets, or any of them, on account thereof, to defend the city in any such suit or proceeding at its costs; and in the event of a final judgment or decree being obtained against the City, either independently or jointly with the property owner or owners granting consent for the aforesaid streets to be closed to public use and travel, or any of them, to pay such judgment or comply with such decree including payment of all costs and expenses of whatsoever nature and hold the City harmless therefrom; (d) that eighteen foot fire lanes shall be maintained in the closed street for fire and emergency vehicle access; (e) that applicant shall make provisions to give the appearance that the closed street, particularly at the entrances, are no longer public streets and that they are in fact private streets.

§ 3. The City shall retain a full width utility easement in the streets proposed to be closed by this ordinance as shown hatched on the Department of Public Works Drawing No. P-23116, attached hereto.

§ 4. The City shall retain a full width right of way maintenance easement in the streets proposed to be closed by this ordinance.

§ 5. That the aforesaid closed street shall be designated as public highways for law enforcement purposes in accordance with Virginia Code § 46.2-1307.

§ 6. That Richmond Redevelopment & Housing Authority, as applicant, shall be responsible for satisfying all terms and conditions requisite for the closing of the streets and shall provide the Department of Community Development, Division of Permits and Services, the Law Department, and the City Clerk's office with written evidence that all conditions of this ordinance have been satisfied.

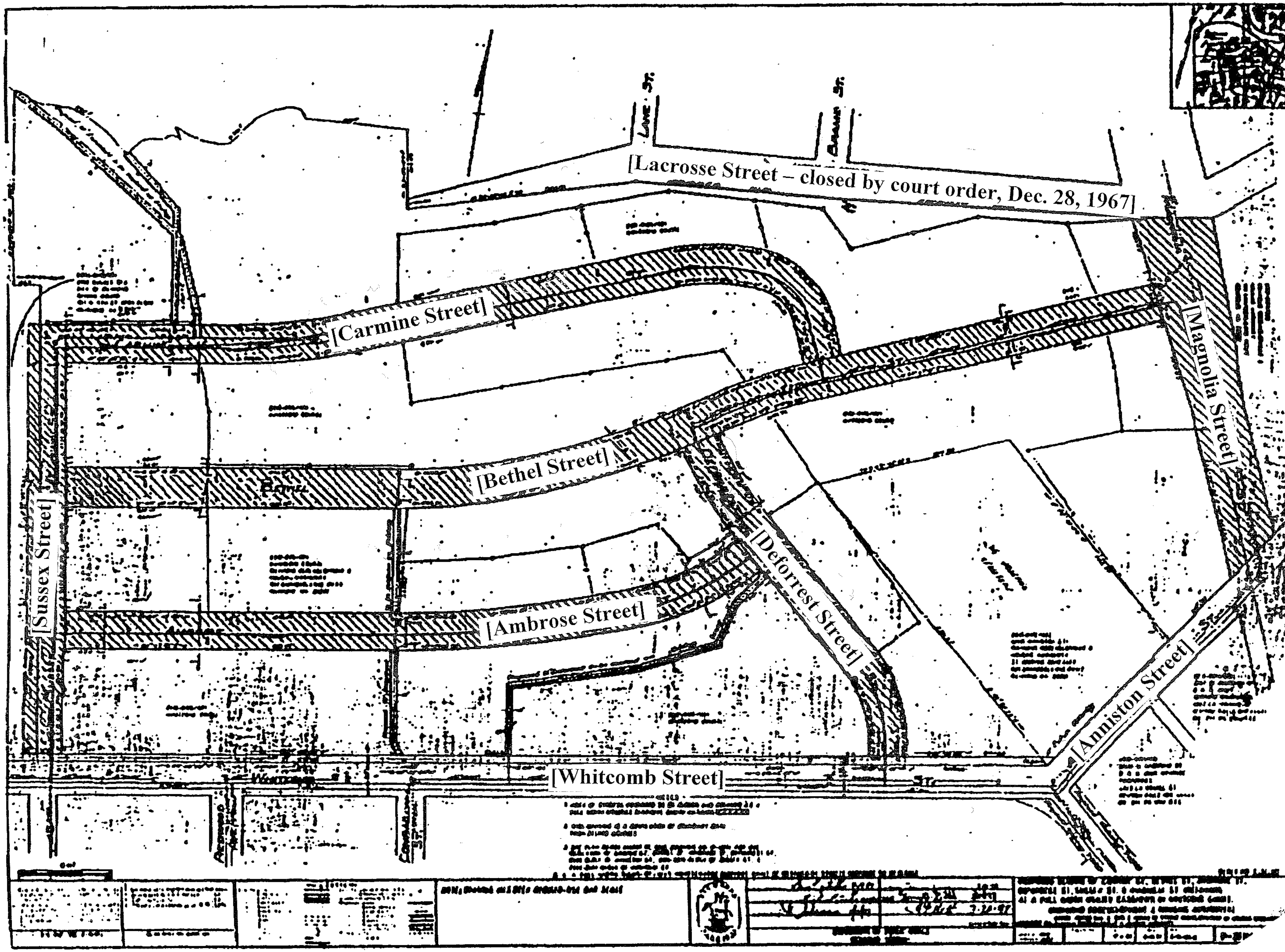
§ 7. At such time as this ordinance becomes effective the City shall have no further right, title and interest in said streets other than expressly retained under provisions of this ordinance or as shown on the attached drawing or granted to satisfy terms and conditions set out in this ordinance.

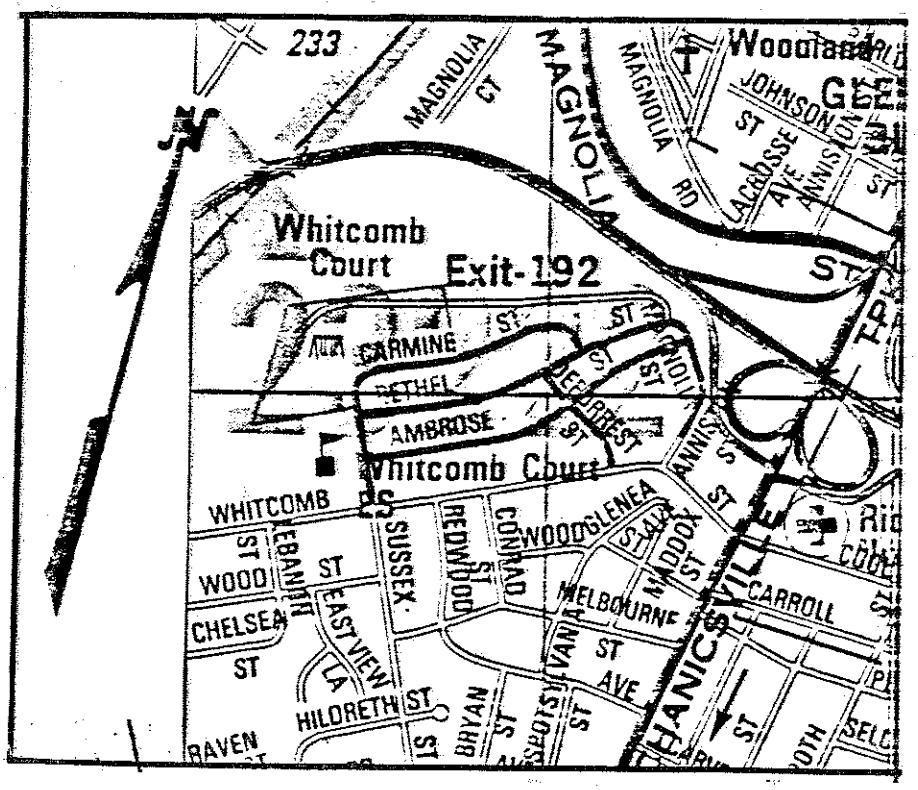
§ 8. This ordinance shall be in force and effect upon satisfaction of the terms and supersede Ordinance No. 97-143-124, adopted May 12, 1997.

THE CITY OF RICHMOND HEREBY FURTHER ORDAINS:

§ 9. That the aforesaid closed streets are hereby designated as highways for law-enforcement purposes in accordance with Virginia Code § 46.2-1307.

A TRUE COPY:
TESTE:
/s/ Edna Keys-Chavis
CITY CLERK


[Lacrosse Street – closed by court order, Dec. 28, 1967]
[Carmine Street]
[Bethel Street]
[Magnolia Street]
[Sussex Street]
[Deforrest Street]
[Ambrose Street]
[Anniston Street]
[Whitcomb Street]
60000



[Enlargement of Inset Map from Plan of Whitcomb Court, Attached to City of Richmond Ordinance No. 97-181-197]

97-16975

THIS DEED, made this 25 day of July, 1997, by and between the City of Richmond, a municipal corporation of the Commonwealth of Virginia ("Grantor") and Richmond Redevelopment & Housing Authority ("Grantee").

RECITAL

This conveyance is exempt from Virginia Grantor's tax pursuant to Section 58.1-811 (C)(3) of the Code of Virginia (1950), as amended.

WITNESSETH

WHEREAS, on June 23, 1997, the City Counsel of the City of Richmond adopted Ordinance NO. 97-181-197 authorizing the closing of Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 block of Sussex Street and the 2700-2800 block of Magnolia Street in Whitcomb Court, as shown cross-hatched on a plan prepared by the Department of Public Works dated February 18, 1997, designated DPW Drawing No.: P-23116 (Project No.: E12-195-SC); upon satisfaction of all terms and conditions of such ordinance; and

WHEREAS, the terms and conditions of Ordinance NO. 97-181-197 having been fully satisfied, the Grantor desires and intends to quitclaim its rights in the closed portion of the streets to Grantee;

NOW, THEREFORE, in consideration of the foregoing and the parties mutual best interests, the Grantor hereby remises, releases and forever quitclaims to Grantee all right, title and interest in the following described property:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF

PROVIDED, HOWEVER, that the Grantor retains a full width utility easement in the entire parcel conveyed herein; and that the aforesaid closed streets shall be designated as public highways for law enforcement purposes in accordance with Virginia Code Section 46.2-1307; and that eighteen foot fire lanes shall be maintained in the closed streets for fire and emergency vehicle access; and that applicant shall make provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets and that they are in fact private streets; and that the City shall retain a full width right of way maintenance easement in the streets closed by ordinance No. 97-180-197.

This conveyance is made subject to easements, conditions and restrictions of record, as the same may lawfully apply to the Property herein conveyed.

IN WITNESS WHEREOF, the Grantor has caused this Deed to be executed on its behalf by its duly authorized representative.

CITY OF RICHMOND

BY /s/ Robert C. Bobb
Robert C. Bobb
City Manager

Approved as to form:

/s/ Jan T. Reid
Jan T. Reid
Assistant City Attorney

COMMONWEALTH OF VIRGINIA
CITY OF RICHMOND, to-wit:

The foregoing Deed was acknowledged before me on this 25th day of July, 1997, by Robert C. Bobb, City Manager of the City of Richmond, on behalf of the Grantor.

/s/ Daphine Stephenson
Notary Public

My commission expires: 8/31/99

GRANTEE'S ADDRESS:

Richmond Redevelopment and
Housing Authority
901 Chamberlayne Parkway
Richmond, VA 23220

[**Plan Attached to Deed Is Identical to Plan Attached to Ordinance. See J.A. 79 and 80**]

AUTHORIZATION

Richmond Redevelopment and Housing Authority hereby authorizes each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia as stated in Virginia Code § 18.2-119 upon Richmond Redevelopment and Housing Authority public housing property. Said property is that property located at and commonly known as: Gilpin Court, Fairfield Court, Whitcomb Court, Creighton Court, Mosby Court, Blackwell Scattered Sites, Hillside Court, Fulton (a.k.a. Rainbow Village), Dove Court, Afton Apartments, Fay Towers, Randolph Place, 1920 Stonewall Avenue, 1200 Decatur Avenue, 3900 Old Brook Circle, 18-A W. 27th Street, 2700 Ildewood Avenue, 700 S. Lombardy Street, 1611 Fourth Avenue.

Richmond Redevelopment and Housing Authority further authorizes each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon

or returns to Richmond Redevelopment and Housing Authority property.

RICHMOND REDEVELOPMENT AND
HOUSING AUTHORITY:

By: /s/ T.P. Curtis
T.P. Curtis, Director of Housing Operations

[Notarial Certificate Omitted In Printing]

[Information Provided to Residents Concerning Street Privatization and the No-Trespass Policy]

Richmond Redevelopment and Housing Authority

What you should know

about

Street Privatization

Some answers to most often asked questions.

[LOGO]
REDEVELOPMENT
& HOUSING AUTHORITY

RRHA, through an initiative sponsored by the city administration and with the approval of the Richmond City Council, is privatizing streets in public housing communities. ***THIS MEANS:***

- ✓ ***Selected streets are now RRHA property.***
- ✓ ***Unauthorized persons (any person who has been barred by RRHA from the development, or cannot demonstrate that they are on the development visiting a lawfully residing resident, or on the development conducting legitimate business, will be considered unauthorized) are considered trespassers and will be prosecuted as such.***
- ✓ ***Police and the housing authority can now take action against unauthorized persons who in the past would step off of the curb to prevent arrest for trespassing.***

The goal of street privatization is:

- To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents.
- To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity.
- To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.
- To hold households who knowingly harbor persons who engage in criminal activity accountable.

[2]

What street privatization DOES NOT MEAN:

- Physical barriers blocking street access. The only markers will be signs at entry points, and throughout the development.
- Disruption to the flow of traffic or services. School buses, delivery trucks, and city service vehicles will be able to drive into the development. RRHA and residents will decide on the need to decal cars on a development by development basis.
- Residents and their legitimate guests are subject to harassment or intimidation.
- RRHA properties are under the control of the federal government.
- Legitimate guests are prohibited from visiting residents.

- Disruption to the normal activity of most residents.
- Drug dealers and buyers can step off the street to prevent police arrest.
- Any change in the enforcement of laws by the police. Reports of violations of the law will continue to be handled in the same manner.

[3]

How can I help?

- Support and explain the idea to your neighbors. Remind relatives, neighbors, and guests that we all must help in making our communities safer. Let them know that privatizing the streets is just one tool to promote safer communities.
- Be willing to accept the minor inconvenience of you and/or your guest ***POSSIBLY*** being questioned by police enforcing the law. Since police are not always able to determine who is a resident, they may, from time to time, have to stop and ask questions. Resident cooperation with the police will help in making the community safer for all residents.
- Work with your tenant council to develop other crime prevention and safety initiatives which support the street privatization effort.
- Provide feedback to housing management and resident services staff on how the effort is going.

[4]

If you have questions, comments, or concerns about privatization or wish to find out further how you can help in this effort, please

Call your
HOUSING MANAGER.

[5]

[LOGO]
REDEVELOPMENT
& HOUSING AUTHORITY

Kevin Hicks
Dear Mr. Hicks:

Re: Trespassing on RRHA property
Kevin Hicks
DOB Jan 26, 1976
SSN 227-29-3730

This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police.

A copy of this notice is on file and another copy will be provided to the Richmond Police Department for their record.

Virginia Code, Section 18.2-119

Trespass After Having Been Forbidden to do So

"If any person without authority of law goes upon or remains upon the lands, buildings, or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing by the owner, lessee, custodian, or other person lawfully in charge thereof, or after having [sic] forbidden to do so by a sign or signs posted . . . on such lands, buildings, premises or portion of area thereof at a place or places where it may be reasonably

seen . . . he and/or she shall be guilty of a Class I Misdemeanor."

Thank you for your cooperation.

Sincerely,

/s/ Gloria S. Rogers
Housing Manager

Whitcomb
Development

[Hand notation]

Hand Delivered
in Court
4/14/98

I, the undersigned, acknowledge receipt of this notice.

/s/ Kevin Hicks	4-14-98
Signature	Date received
/s/ Alfonzo Joyner	4-14-98
Witnessing Officer	Date

[Trial Court's Sentencing Order on Trespass Conviction]

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

July 29, 1999

COMMONWEALTH

vs. Appeal for Trespassing M-99-1606
Appeal for Failing To Appear M-99-1608

KEVIN LAMONT HICKS, Defendant.

The defendant this day appeared and was set to the bar in the custody of the Sheriff of this City. He was represented by Attorney Steven Benjamin, retained counsel; and the Commonwealth was represented by Russell McGuire. The defendant consented to having these cases tried simultaneously.

Being arraigned, the defendant pleaded not guilty to trespassing, as charged in Appeal M-99-1606; and he pleaded not guilty to failing to appear in the General District Court, as charged in Appeal M-99-1608, after consultation with counsel. With the consent of the accused, given in person, after consultation with counsel, and the concurrence of the Court and the Attorney representing the Commonwealth, the Court proceeded to hear and determine these cases without a Jury. The witnesses having been sworn, and the Court having heard the evidence for the Commonwealth, the defendant, by counsel, moved the Court to strike the evidence of the Commonwealth as being insufficient for the finding of a judgment of guilty, which motion the Court granted in the case of M-99-1608, and the case of M-99-1608 is hereby dismissed. The

Court having heard the arguments of counsel, finds the defendant guilty as charged in the case of M-99-1606, and ascertains his term of confinement in Jail at Twelve Months.

Whereupon it is the judgment of this Court that the said Kevin Lamont Hicks be confined in Jail for a term of Twelve Months; and that he pay and satisfy a fine of $1,000.00 in the case of M-99-1606. The execution of the said Jail sentence is suspended during the defendant's good behavior for five years; and the payment of said fine is suspended during the defendant's good behavior for five years. The defendant is to pay his costs of Court in the case of M-99-1606.

The defendant was remanded to Jail on another charge.

DOB: 1/21/76

July 29, 1999 ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

Virginia:

In the Circuit Court of the City of Richmond,
John Marshall Courts Building

SENTENCING ORDER

Federal Information Processing
Standards Code: 760

Hearing Date: July 29, 1999
Judge: Thomas N. Nance

COMMONWEALTH OF VIRGINIA

v.

KEVIN LAMONT HICKS, DEFENDANT.

The defendant was this day led to the bar in the custody of the Sheriff of this City. He was represented by **Steven Benjamin,** retained counsel; and the Commonwealth was represented by **Russell McGuire**. The defendant consented to having these cases tried simultaneously.

Being arraigned, the defendant pleaded not guilty to violating the terms of a suspended sentence previously imposed in each case by the General District Court, after consultation with counsel. The defendant waived trial by Jury, and the evidence in each case was previously adopted from the motions hearing held on July 13, 1999. The Court finds that the judge of the General District Court did not abuse his discretion in revoking each of the suspended sentences in the following cases:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
M-99-1605	**Abuse of Discretion**	**2/3/99**	**19.2-306**
M-99-1607	**Abuse of Discretion**	**2/3/99**	**19.2-306**
M-99-1609	**Abuse of Discretion**	**2/3/99**	**19.2-306**

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the City Jail for the term of: Twelve Months in the case of M-99-1605; Six Months in the case of M-99-1607; and Twelve Months in the case of M-99-1609. The total sentence imposed is **Thirty Months**.

The Court orders that said sentences run **concurrently** upon the following conditions:

Good behavior. The defendant shall keep the peace and be of good behavior.

Costs. The defendant shall pay his costs of Court in these cases.

The defendant was remanded to Jail.

July 29, 1999 ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

DEFENDANT IDENTIFICATION:

Alias: None
SSN: 227-29-3730 DOB: 1/21/76 Sex: Male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Thirty Months

TOTAL SENTENCE SUSPENDED: Sentences to run concurrently

[Questions Presented by the Defendant in His Brief on Appeal to the Court of Appeals of Virginia.]

QUESTIONS PRESENTED

1. Did the circuit court err in denying the defendant's motion to remand his cases to the general district court for prosecution by a Commonwealth's Attorney before a different judge or to dismiss the charges against him?

2. Did the trial court err in denying the defendant's motion to dismiss the prosecution against him for violations of the right to due process and the rights to freedom of association, speech, and assembly?

[Errors Assigned by the Commonwealth in Its Petition for Appeal to the Supreme Court of Virginia.]

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS ERRED BY HOLDING THAT HICKS, WHO FAILED TO DIRECTLY CHALLENGE HIS BARMENT BY RRHA, HAD TIMELY RAISED THE ISSUE OF THE CONSTITUTIONALITY OF THE BARMENT TRESPASS PROCEDURE WHEN HE RAISED IT AS A DEFENSE IN HIS CRIMINAL CASE.

II. THE COURT OF APPEALS ERRED BY HOLDING THAT THE PRIVATIZED STREETS AND SIDEWALKS IN WHITCOMB COURT CONSTITUTED A PUBLIC FORUM, SUBJECT TO STRICT SCRUTINY FOR CONSTITUTIONAL ANALYSIS.

III. THE COURT OF APPEALS ERRED BY HOLDING THAT THE TRESPASS POLICY OF RRHA VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

KEVIN LAMONT HICKS v.
COMMONWEALTH OF VIRGINIA

Record No. 1895-99-2

COURT OF APPEALS OF VIRGINIA

33 Va. App. 561; 535 S.E.2d 678

October 17, 2000

Steven D. Benjamin (Betty Layne DesPortes; Benjamin & DesPortes, P.C., on briefs), Richmond, for appellant.

Virginia B. Theisen, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: COLEMAN and HUMPHREYS JJ., and OVERTON, Senior Judge.

HUMPHREYS, Judge.

Kevin Lamont Hicks appeals his conviction in a trial de novo appeal to the circuit court (trial court) for trespass. Hicks complains that 1) the trial court erred in denying his motion to remand the case to the general district court with instructions for the matter to be tried before a different judge of that court and for the Commonwealth's Attorney to prosecute the case in that forum; 2) the trial court erred in denying his motion to dismiss the prosecution on the grounds that his due process and First Amendment rights were violated; and 3) the trespassing statute is unconstitutionally vague and overbroad. We disagree and for the reasons that follow, affirm his conviction.

I. Background

Previous to January 20, 1999, Hicks had been convicted of trespassing on the property of Whitcomb Court on February 10, 1998, and June 26, 1998, respectively, and of damaging property there on April 27, 1998.

Whitcomb Court is a housing project owned by the Richmond Redevelopment and Housing Authority ("Authority"). The City of Richmond, by ordinance, deeded certain city streets including the 2300 block of Bethel Street, to the Authority for the express purpose of privatizing and closing them to traffic by non-residents. "No Trespassing" signs were placed at intervals on the privatized streets. The Authority authorized the Richmond Police Department to enforce the trespass statute on its property, including Whitcomb Court. On April 14, 1998, Mrs. Gloria Rogers, housing manager at Whitcomb Court, personally served a written notice on Hicks advising him that he was banned from the Whitcomb Court property. This notice specifically advised Hicks that if he were "seen or caught on the premises, [he would] be subject to arrest by police." Hicks acknowledged receipt by signing a copy of the notice. On two occasions after receiving the notice, Hicks went to Mrs. Rogers and sought permission to come back on the property. He told Mrs. Rogers that his mother lived there. His barment from the property was not lifted.

On January 20, 1999, Officer James Laino observed Hicks walking in the 2300 block of Bethel Street. Officer Laino had personal knowledge that Hicks was barred from the property and had arrested him previously for trespassing. Hicks told Laino that he was there "to bring pampers for his baby." Laino issued Hicks a summons for trespassing.

Hicks was tried in general district court on the trespassing summons on April 21, 1999. Hicks was represented by counsel. No prosecutor was present on behalf of the Commonwealth.

Officer Laino testified and responded to questions by the court and was cross-examined by counsel for Hicks.[1] Hicks then testified on his own behalf. Following direct examination, the court propounded several questions to which counsel for Hicks objected. Counsel for Hicks moved to strike Hicks' "testimony in totality." The court granted this motion. The defendant was convicted in general district court and noted his appeal to the circuit court.

Prior to trial in the circuit court, Hicks filed a motion asking the circuit court to remand the case for a new trial in the general district court before a different judge and with direction to the Commonwealth's Attorney that his office represent the Commonwealth in the new trial. At the hearing on his motion, Hicks asked that, in the alternative to granting his motion to remand, the case be dismissed. The circuit court denied the motion on the grounds that it lacked any authority to grant it.

Also prior to trial, Hicks moved to dismiss the charge on the ground that the Authority's trespass policy violates the federal and state constitutions. At a hearing on this motion, Mrs. Rogers testified as to the trespass policy at

[1] The transcript of the trial in the general district court identifies the witness as "Officer James Hannah." Although the discrepancy is not fully explained in the record, it appears that this witness was actually the same Officer James Laino who issued the summons and testified in the circuit court.

Whitcomb Court. Through Rogers, a flyer was introduced into evidence which the Authority gave to residents and which described the privatization of the streets in the housing complex. This flyer stated and Rogers confirmed in her testimony that non-residents who have not been barred from the property and who can demonstrate that they have been invited by a resident are not affected by the trespassing policy. Rogers also testified that the open-air drug market in the area was the reason for much of the policy toward trespassers and that it is usually a member of the police department who gives the notice and warning. Mrs. Rogers testified that criminal acts on the premises, including those involving drugs or domestic violence, were grounds for barment. She further testified that the police were authorized to warn non-residents to leave the property if they could not demonstrate that they were invited by a resident and to bar them from returning. Additionally, Mrs. Rogers indicated there was a process for having a barment lifted by submitting a written request through the Authority's director of housing operations. She also testified that any organization that seeks to use a privatized street must get permission first and requests to hold functions or pass out materials on the privatized streets are referred to a "community council." She testified that she had not denied permission to anyone who had sought to pass out flyers on the complex property.

The motion to dismiss on constitutional grounds was denied, and Hicks was subsequently tried de novo in a bench trial and convicted of trespassing.

II. Motion for Remand

Hicks first argues that he was entitled to have his case remanded to the general district court for a new trial before another judge because the judge of that court who presided over the initial trial improperly assumed the role of a prosecutor by "cross-examining" him.

The Supreme Court of Virginia has long held that there is no inherent damage to a fair trial when a judge asks questions of a witness.

> [A] trial judge [may] ask questions of a witness either on his examination in chief or on cross-examination. The practice is common and perfectly permissible. Indeed, there are times when it is his duty to do so. He is not to sit there and see a failure of justice on account of omissions to prove facts plainly within the knowledge of a witness, but the character of his questions should not be such as to disclose bias on his part, or to discredit the truthfulness of the witness. "For the purpose of eliciting evidence which has not otherwise been brought out, it is proper for the judge to put the questions to a witness either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness."

Mazer v. Commonwealth, 142 Va. 649, 655, 128 S.E. 514, 516 (1925) (citations omitted).

In addition, we have held that "the trial court, in the exercise of its sound discretion, may permit jurors to submit written questions to be asked of a witness." *Williams v. Commonwealth*, 24 Va. App. 577, 582, 484 S.E.2d 153, 155 (1997). We also noted in *Williams* that "[t]he function of a jury is to assure a fair and equitable resolution of

all factual issues. The jury serves as the final arbiter of the facts, 'charged with weighing the evidence, judging the credibility of the witnesses, and reaching a verdict' in the case." *Id.* at 582, 484 S.E.2d at 155. This function belongs no less to the court when serving as the fact finder. We need not determine here whether the general district court judge's questions demonstrated an inappropriate bias or prejudice because the court granted Hicks' motion to strike the questions as well as his answers.

In addition, the remedy provided to any defendant in a criminal case who perceives error on the part of a trial court is to exercise the right to appeal the matter to a higher tribunal. In the context of misdemeanors tried in the district courts, the General Assembly has established a right to a trial *de novo* in the circuit court.[2] A *de novo* hearing means a trial anew. On appeal, a conviction in the district court is annulled, and a new trial is held in the circuit court. *See Ledbetter v. Commonwealth,* 18 Va. App. 805, 447 S.E.2d 250 (1994).

While it would clearly be preferable for the Commonwealth to be represented by counsel in every case in which it is a party, the General Assembly has declined to mandate such representation. Code § 15.2-1627(B) recites the duties of Commonwealth's Attorneys and their assistants.[3]

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[2] Code § 16.1-136 provides in pertinent part: "Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court."

[3] Code § 15.2-1627(B) provides in pertinent part: "The attorney for the Commonwealth . . . shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants,

(Continued on following page)

This statute only requires Commonwealth's Attorneys to prosecute felonies and provides that a prosecutor "may in his discretion, prosecute Class 1, 2 and 3 misdemeanors." Clearly, the General Assembly decided as a matter of policy to place the discretion for the representation of the Commonwealth in misdemeanor cases in the hands of the executive branch rather than the judicial branch of government.

Hicks relies on the decision of the Supreme Court of the United States in *Ward v. Village of Monroeville,* 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), as authority for his argument that a trial *de novo* does not cure errors committed in a lower court. We find his reliance on *Ward* is misplaced. In *Ward*, the Supreme Court addressed a systemic problem of bias inherent in the infrastructure of local mayors' courts. There, mayors of villages sat as judges in the courts, and a major portion of village income was derived from the collection of these fines. In finding that such a scheme violates the due process rights of criminal defendants in the mayors' courts, Justice Brennan noted that the constitutional infirmity was grounded in the separation of powers doctrine.

> Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a

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indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $ 500 or more, or both . . . "

> judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.

Id. at 60, 93 S.Ct. at 83 (citations omitted).

Hicks does not allege, nor do we find, such systemic bias in the procedural structure of the district courts in the Commonwealth. Thus, assuming without deciding that the questions propounded by the general district court judge constituted error, we find that the trial de novo in the circuit court provided an adequate remedy.

III. First Amendment

Hicks asserts that the Authority's trespass policies violate his First Amendment right to freedom of association under the constitutions of the United States and the Commonwealth of Virginia.

Hicks was charged with violating Code § 18.2-119, which provides in pertinent part that "[i]f any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so . . . [or] after having been forbidden to do so by a sign or signs posted . . . shall be guilty of a Class 1 misdemeanor."

Hicks concedes that he had been forbidden to come onto the Whitcomb Court property and admits he did so notwithstanding his barment. Furthermore, he apparently took no steps to appeal his barment through official

channels of the Authority or the courts. Instead, Hicks argues that, notwithstanding the privatization of the street where he was cited, it was public property constituting a "public forum" under the holding of *Marsh v. Alabama,* 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). We disagree. First, the Supreme Court of Virginia has specifically held that the trespass statute applies to publicly owned property. *See*, *e.g.*, *Johnson v. Commonwealth,* 212 Va. 579, 186 S.E.2d 53 (1972); *Jordan v. Commonwealth,* 207 Va. 591, 151 S.E.2d 390 (1966); *Miller v. Harless,* 153 Va. 228, 149 S.E. 619 (1929). In addition, we have held that an alleyway, which has been vacated by municipal ordinance and marked with "No Trespassing" signs, is not "intended for public use." *Miller v. Commonwealth,* 10 Va. App. 472, 475, 393 S.E.2d 431, 433 (1990).

"[T]he extent to which the Government can control access depends on the nature of the relevant forum." *United States v. Kokinda,* 497 U.S. 720, 726, 110 S. Ct. 3115, 3119, 111 L. Ed. 2d 571 (1990). Regulation of a nonpublic forum requires only reasonableness and "not an effort to suppress expression merely because public officials oppose the speaker's view. Indeed, control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 730, 110 S.Ct. at 3121-22 (citations omitted).

The Attorney General cites *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132, 115 S. Ct. 2557, 132 L. Ed. 2d 811 (1995). The *Daniel* court considered the constitutionality of a Florida trespass-after-warning statute in the context of the property of the Tampa Housing Authority. There, as here, the stated

rationale for the trespassing enforcement effort was to "provide a safe environment for citizens" in a place often used to sell drugs. *Id.* at 548.

In concluding that the Tampa Housing Authority property was a non-public forum, the *Daniel* court found that the restriction on access was content neutral and reasonable and that Florida's trespass statute was not vague or overbroad. We find the *Daniel* analysis, applying *Kokinda*, to be persuasive. The Authority's trespass policy serves a reasonable purpose and is content neutral. Once a person is barred, the person is subject to arrest if he or she returns to the property. We have previously upheld the delegation of authority by a public housing complex to police officers to bar unauthorized individuals from the property for the purpose of preventing crime, protecting property and preserving the peace. *See Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998).

Hicks also argues that the street privatization and trespassing enforcement policy infringes on his freedom to associate. We have previously noted that, although the First Amendment does not explicitly protect a "right of association," the Supreme Court of the United States has recognized such a right in two circumstances, "intimate association" and "expressive association." *See Collins v. Commonwealth,* 30 Va. App. 443, 517 S.E.2d 277 (1999). Hicks asserts that his right to intimate human relationships is infringed by the Authority's policy. In *Collins*, we held that "the liberty interest in intimate association is rooted in the necessity of affording 'certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.'" *Id.* at 452, 517 S.E.2d at 281 (quoting *Roberts v. United States Jaycees*,

468 U.S. 609, 618-19, 104 S. Ct. 3244, 3250, 82 L. Ed. 2d 462 (1984)) (emphasis added).

The only evidence in the record of Hicks' "intimate associations" in Whitcomb Court are his statement to Officer Laino that he was "bring[ing] pampers to his baby" and his statement to Mrs. Rogers that his mother lived there. Assuming without deciding that this evidence constitutes a sufficient showing that Hicks' right to association is implicated by the Authority's trespassing policy, we consider whether the policy constitutes an unjustified interference with such intimate familial associations.

As already noted, the policy serves a reasonable public safety purpose. Hicks was not a resident of Whitcomb Court. There is no evidence before us that Hicks was invited to the complex. The trespassing policy contains procedures for a resident to secure permission for a guest to come onto the Authority's property but the record is silent as to any efforts to comply with such procedure. Hicks was previously convicted of repeated criminal acts committed on the property. Any interference in Hicks' right to intimately associate with residents of Whitcomb Court caused by his barment is limited to Authority property which, as already stated, though publicly owned, constitutes a "non-public forum" for First Amendment purposes. We find on these facts that to the extent Hicks' barment from the property interfered with his right to "intimate association" with residents of Whitcomb Court, such interference was reasonable, limited and justified.

IV. Trespass Statute

Finally, Hicks challenges the trespassing statute as unconstitutionally vague and further, that it is unconstitutionally overbroad. We note, however, that while he attacks the statute on these dual grounds, his arguments focus instead on the Authority's policies.

"A penal statute is unconstitutionally void-for-vagueness if it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Santillo v. Commonwealth*, 30 Va. App. 470, 482, 517 S.E.2d 733, 739 (1999) (citation omitted).

Code § 18.2-119 is by no means complex or difficult for one of ordinary intelligence to comprehend. It punishes those who enter upon or remain upon the property of another after having been forbidden to do so by posted sign or personal admonishment. We do not find this statute unconstitutionally vague, either on its face or as applied to Hicks.

We turn now to Hicks' argument that the trespassing statute is unconstitutionally overbroad.

> A statute may be overbroad if it "is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." Overbreadth is a doctrine whose reach dissipates when a statute proscribes primarily conduct and not speech. If a penal statute proscribes both conduct and speech, "the overbreadth of the statute must . . .

> be substantial . . . in relation to the statute's plainly legitimate sweep."

Parker v. Commonwealth, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997) (citations omitted).

"[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for [the statute] to be facially challenged on overbreadth grounds." *Id.* (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 2126, 80 L. Ed. 2d 772 (1984) (citation omitted) (footnote omitted)).

We do not find Code § 18.2-119 to be overbroad. The legitimate purpose of the statute is to punish conduct, not protected speech. It applies only on private or non-public property. The statute requires prior notice be given to those implicated by its reach. We do not find that the statute imposes a substantial burden on constitutionally protected conduct nor do we find any realistic danger that the First Amendment rights of parties not before the court will be significantly compromised.

For all of these reasons, we affirm the decision of the trial court.

Affirmed.

COLEMAN, Judge, concurring, in part, and dissenting, in part.

I concur with Part II of the majority opinion which holds that the circuit court did not err by refusing to remand the case to the general district court. However, I disagree with the majority's holdings that Richmond Redevelopment and Housing Authority's (RRHA's) barment

proceeding and "trespass policy" do not violate the First Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution.

I disagree with the majority's conclusion that the barment procedure and trespass statute, as applied in this case, restrict conduct in a "non-public forum," which consists of private streets and sidewalks of a public housing development. In my opinion, the streets and sidewalks of Whitcomb Court are public property open to travel by the public at large and, as such, are a "traditional public forum." Accordingly, any effort by the City of Richmond to control constitutionally protected conduct in a traditional public forum must pass a strict scrutiny test. In my opinion, because the barment procedure and trespass statute infringed on Hicks' right to move freely and to be present in a "traditional public forum," the barment-trespass proceeding violates the First and Fourteenth Amendments. Accordingly, I dissent from those holdings.

The City of Richmond, in an effort to make certain of its streets "private" property, passed an ordinance which authorized deeding those streets to RRHA. After the streets were deeded to RRHA, "No Trespass" signs were posted throughout Whitcomb Court, stating that the property and streets are private property. However, the streets are not gated, barricaded, or otherwise closed or restricted only to Whitcomb Court traffic. The streets remain open to vehicular traffic and the sidewalks are open to access by the public. RRHA's stated goal for "privatization" of the streets was to make the community safer by removing persons from the housing development who commit unlawful acts, particularly involving drugs and firearms; to provide a better opportunity for residents of the community to develop safety initiatives, such as

resident patrols and neighborhood watch; and to hold residents accountable for knowingly harboring criminals.

Although the Richmond City ordinance and deed conveying the streets and sidewalks to RRHA purport to make them private property, both documents specifically provide that the streets "shall be designated as public highways for law enforcement purposes in accordance with Virginia Code Section 46.2-1307 . . . and that the City shall retain a full width right of way maintenance easement in the streets." After the City executed the "privatization" deed, RRHA's Director of Housing signed a written "authorization" implementing the barment proceedings. The authorization provided that "each and every Richmond Police Department officer [was authorized] to serve notice, either orally or in writing," forbidding any person from returning to the property if such person could not demonstrate that he or she was a resident or employee, or that he or she was there for a legitimate business or social purpose. According to a printed brochure issued by RRHA to the Whitcomb Court residents, "unauthorized persons," who are subject to the barment proceedings, are all nonresidents who cannot demonstrate that they are on the premises "visiting a lawfully residing resident, or on the development conducting legitimate business."

The police officer, who decides whether the person is to be barred, determines whether the person is a tenant or is there at the invitation of a tenant, or whether the reason for being there is legitimate. Thereafter, once a person is barred, he or she is subject to being prosecuted for trespass for being on the streets or sidewalks in Whitcomb Court even if the person is subsequently there at the invitation of a tenant or there on legitimate business. Thus, to be barred from Whitcomb Court, one does

not have to be guilty of a crime in Whitcomb Court or to have done anything wrong, but rather, one simply has to fail to fit within the category of people who RRHA has deemed entitled to be on the streets and sidewalks in the public housing development. Once barred, the person who returns is a trespasser without regard to whether, on that subsequent occasion, he or she is there on legitimate business or at the invitation of a Whitcomb Court tenant.

The City is entitled, and is in fact required within constitutional limits, to control its streets and sidewalks so as to make them safe and to control crime thereon. However, it may not, in its endeavor to control crime on the streets, sweep so broadly that it unduly restricts or criminalizes innocent or protected behavior. Because the police officers have such broad discretion in determining whether a person, who was on the streets and sidewalks of the housing development, was there at the invitation of a tenant or was there for a "legitimate" purpose, the officers could, as they did here, bar a person from public property for exercising a constitutionally protected right. Once barred, the person continues to be barred and subject to a trespass conviction, as with Hicks, even though he or she may subsequently be there at the invitation of a tenant or for legitimate purposes. *See generally NAACP v. Alabama*, 377 U.S. 288, 307, 84 S. Ct. 1302, 1313, 12 L. Ed. 2d 325 (1964). The evidence does not indicate that Hicks was initially barred because he had committed any unlawful act in Whitcomb Court.[4] According to the unrefuted avowal

[4] As the majority notes, Hicks was convicted of destroying private property in Whitcomb Court after he had been barred for being there not as a tenant or at the express invitation of a tenant. However, the

(Continued on following page)

of defense counsel, Hicks was barred from Whitcomb Court because he repeatedly returned there to visit his mother, his aunt, and the mother of his two infant children who live in Whitcomb Court. After being barred, Hicks was given written notice of his barment, for which he signed, from housing manager Gloria Rogers. On the occasion for which Hicks was subsequently charged with the trespass that is the subject of this appeal, he was walking on the sidewalk of the 2300 block of Bethel Street in Whitcomb Court and was purportedly there to see that his child, who lived there with its mother, received diapers.

The question presented in this appeal is whether the barment proceeding adopted by RRHA, which authorizes Richmond City police officers to banish people who do not fit within a narrowly defined group from coming upon the streets and sidewalks in Whitcomb Court, and the trespass statute as used to enforce the barment proceeding, violate the First and Fourteenth Amendments. The critical issue in answering that question is whether the streets and sidewalks are public and, as such, are a "traditional public forum," or whether they are "private" and, thereby, a "non-public forum."

> The constitutionality of government regulation of its own property depends upon the character of the property at issue. For purposes of First Amendment analysis, the Supreme Court has identified three types of government-owned property: the traditional public forum, the designated forum, and the nonpublic forum. A traditional

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conviction for destroying private property was irrelevant to the barment proceeding or to Hicks' trespass conviction.

> public forum, such as a street or park, is one that has as "a principal purpose . . . the free exchange of ideas." A designated forum is one which the government intentionally opens to the public for expressive activity.
>
> Government limitations on expressive activity in traditional public fora and designated public fora are subject to strict scrutiny; they must be narrowly tailored to serve a compelling state interest. By contrast "[a] nonpublic forum is 'public property which is not by tradition or designation a forum for public communication,'" and limits on access to such need only be reasonable. . . .

Daniel v. City of Tampa, 38 F.3d 546, 549 (11th Cir. 1994) (citations omitted).

Although the grounds and buildings of a public housing development are a "non-public forum" designed to provide safe housing for its residents, *see id.* at 550, the public streets and sidewalks in Whitcomb Court are not private and do not lose their character as a "traditional public forum" merely because the City passes an ordinance and executes a deed declaring them to be private property. The streets and sidewalks have not been gated, barricaded, or closed in a manner restricting public travel. Although the "No Trespassing" street signs declare that the streets are for the exclusive use of the tenants and those there on legitimate business, the streets and sidewalks continue to serve the same function as before and are equally accessible to the travelling public.

We have previously approved a process by which police officers may be designated as agents of a housing authority to serve barment notices on persons trespassing on housing authority property, *see Collins v. Commonwealth*, 30

Va. App. 443, 449, 517 S.E.2d 277, 280 (1999); *Holland v. Commonwealth*, 28 Va. App. 67, 70-76, 502 S.E.2d 145, 146-49 (1998). In *Collins*, we further held that the barment notices prohibiting non-residents from coming upon housing authority property do not violate the "right of association" protected by the First Amendment or the due process clause of the Fourteenth Amendment. *See Collins*, 30 Va. App. at 450-53, 517 S.E.2d at 280-82. However, what distinguishes this case from those, in my opinion, is that Hicks was found guilty of trespass for having gone upon Bethel Street and the adjacent sidewalk, whereas in both *Holland* and *Collins*, the defendants were on the non-public grounds and in the buildings of the housing authority.

The majority relies upon the holding in *Daniel*, 38 F.3d 546, for its conclusion that the "trespass after warning" restriction the housing authority had placed upon access to a "non-public forum" was reasonable. In my opinion, Richmond City Ordinance No. 97-181-197, which authorizes deeding certain city streets to RRHA in an effort to "privatize" the streets in Whitcomb Court and make them subject to the Commonwealth's trespass statute, Code § 18.2-119, did not make the street any less a public street or thoroughfare and did not make it a "non-public forum," as was the situation in *Daniel*. The Eleventh Circuit held in *Daniel* that the mission of the housing authority was to provide safe housing for residents, not to provide non-residents "a place to disseminate ideas." Thus, the buildings and grounds were considered a non-public forum for purposes of determining the extent to which the government could, consistent with the First Amendment, regulate the public's activity on the property. *See* 38 F.3d at 550. However, the *Daniel* court was careful to point out

that the Tampa "trespass after warning" ordinance did not apply to persons on the "streets and sidewalks surrounding and intersecting" the housing authority property. *See id.* at 548 n.3, 550 n.9.

"A traditional public forum, such as a street or park, is one that has as 'a principal purpose . . . the free exchange of ideas.'" *Id.* at 549 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985)). Bethel Street is a public street that was built and maintained with public funds to provide access by the public to that part of Richmond. As with all public streets and thoroughfares, historically and traditionally public streets have served as a locale for the free exchange and dissemination of ideas and have served as an area that citizens can freely and lawfully congregate or move about and exchange discourse.

The fact that legal title to the streets is transferred from a municipal government to a government agency which owns and operates a public housing development in no way changes the public nature and character of the streets and sidewalks which provide access to the public to this part of the City. *See Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946) (holding that privately owned streets and sidewalks in a company-owned town which are open to public access are traditional public forums that are circumscribed by First Amendment constitutional guarantees). The City cannot transform the public streets in Whitcomb Court into private or non-public streets by declaring them closed by ordinance and conveying them to another governmental entity when they continue to serve the same public purpose as before.

Thus, the City's and RRHA's effort to control conduct or the lawful freedom of movement on a city street, which is a "traditional public forum," by "privatizing" the street and prohibiting citizens from using the streets and sidewalks must pass a strict scrutiny test. In order for the barment-trespass policy to satisfy the strict scrutiny test, the enforcement procedure must be narrowly tailored to serve a compelling state interest, providing safe housing to the development residents. In my view, the RRHA's privatization effort and barment procedure does not satisfy the requirement that the barment-trespass procedure be narrowly tailored because the procedure (1) infringes on the constitutionally protected right of a person's freedom to "remove from one place to another according to inclination," *Williams v. Fears*, 179 U.S. 270, 274, 21 S. Ct. 128, 129, 45 L. Ed. 186 (1900), and to move freely in a traditional public forum, *see City of Chicago v. Morales*, 527 U.S. 41, 54, 119 S. Ct. 1849, 1858, 144 L. Ed. 2d 67 (1999) (holding "it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage'"), and (2) is not limited to apply only to those persons whose conduct the procedure was intended to curtail. In other words, the sweep of the barment-trespass proceeding is so broad that citizens who do not infringe upon the privacy rights of the residents of Whitcomb Court are deemed guilty of criminal conduct for engaging in constitutionally protected public behavior by merely being upon the public street or sidewalk.

Perhaps, had Bethel Street been gated, barricaded, or physically restricted to traffic where the public was not free to travel, as with gated communities, the street would be considered non-public and not a "traditional public

forum." But, in my opinion, the City can no more "close" the streets in Whitcomb Court and leave them open to the public, thereby purporting to make them a "non-public forum," than it could declare "closed" all streets in Richmond's troubled neighborhoods and residential areas, thereby denying access to all citizens except the residents and their invitees and those having legitimate business in the neighborhoods. Neighborhood streets, such as those in Whitcomb Court, are public streets, paid for and maintained with public funds, for the use and benefit of the public.

While a public entity can restrict the use of public property or buildings to those who are using the property for its intended "non-public" purpose, such as an office building, it cannot restrict public property that is considered a "traditional public forum," such as a street or sidewalk, that is being used in a lawful way and for a lawful purpose that is constitutionally protected. *See United States v. Kokinda*, 497 U.S. 720, 727, 110 S. Ct. 3115, 3120, 111 L. Ed. 2d 571 (1990) (holding that sidewalk in front of post office "constructed solely to provide for the passage of individuals engaged in postal business" is a non-public forum). Here, in effect, the City and RRHA, by attempting to convert the streets and sidewalks to private property, are attempting to confer upon RRHA the same rights as a private property owner who may restrict everyone from coming upon the private property owner's property except the owner's tenants and the tenants' invitees, regardless of whether the invitees had done anything unlawful. In fact, the City's attempt to control access to the streets and sidewalks through the barment-trespass proceeding exceeds the right of a private landowner because under the barment proceeding, once

barred, an invitee of a tenant can no longer lawfully come upon the property.

Accordingly, I would reverse Hicks' trespass conviction, because Richmond's barment-trespass procedure, in an effort to control drugs and criminal activity in and around a public housing development, unconstitutionally infringes upon a citizen's First and Fourteenth Amendment rights to lawfully congregate in a public place.[5]

[5] Because I would reverse on the failure of the City to establish that the barment-trespass procedure meets the strict scrutiny requirements, I do not address whether the barment-trespass procedure, including notice, opportunity to be heard, and an administrative appeals procedure, satisfies the procedural due process requirements of the Fourteenth Amendment. Because the majority only addresses the vague and overbroad issue as they relate to the trespass statute procedure, I decline to address whether the barment-trespass procedure is vague or overbroad.

KEVIN LAMONT HICKS v.
COMMONWEALTH OF VIRGINIA

Record No. 1895-99-2

COURT OF APPEALS OF VIRGINIA
36 Va. App. 49; 548 S.E.2d 249

July 3, 2001

Steven D. Benjamin (Betty Layne DesPortes; Benjamin & DesPortes, P.C., on briefs), for appellant.

Virginia B. Theisen, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Amicus Curiae: American Civil Liberties Union of Virginia Foundation, Inc. (Rebecca K. Glenberg, on brief), for appellant.

Present: FITZPATRICK, C.J., and BENTON, WILLIS, ELDER, BRAY, ANNUNZIATA, BUMGARDNER, FRANK, HUMPHREYS, CLEMENTS, and AGEE, JJ.

FITZPATRICK, Chief Judge.

On October 17, 2000, a panel of this Court affirmed the trespass conviction of Kevin Lamont Hicks (appellant). *See Hicks v. Commonwealth*, 33 Va. App. 561, 535 S.E.2d 678 (2000). Appellant's petition for rehearing en banc was granted and the mandate of the October 17, 2000 opinion was stayed. *See Hicks v. Commonwealth*, 34 Va. App. 42, 537 S.E.2d 616 (2000). Appellant contends the trial court erred in (1) denying his motion to dismiss the prosecution on the grounds that the barment-trespass procedure violated his First and Fourteenth Amendment rights and (2) denying his motion to remand the case to the general district court for trial before a different judge of that court and require the Commonwealth's Attorney to prosecute

the case. Upon rehearing en banc, we hold that the barment-trespass procedure employed by the City of Richmond in the instant case violates the First and Fourteenth Amendments to the United States Constitution and, thus, we reverse and dismiss the trial court's conviction of appellant. The mandate of the October 17, 2000 opinion is hereby vacated.

I.

Whitcomb Court is a housing project owned by the Richmond Redevelopment and Housing Authority (RRHA). RRHA sought to "privatize" the streets surrounding and adjacent to the Whitcomb Court housing project in an effort to make the community safer.[1] On June 23, 1997 the City of Richmond adopted ordinance No. 97-181-197 deeding the streets surrounding Whitcomb Court to RRHA. The ordinance provided:

> § 1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of

[1] RRHA issued a brochure to the residents explaining the goals of street privatization:

> To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents
>
> To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity. To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.
>
> To hold households who knowingly harbor persons who engage in criminal activity accountable.

> Sussex Street and the 2700-2800 Block of Magnolia Street in Whitcomb Court . . . be and are hereby closed to public use and travel and abandoned as streets of the City of Richmond.
>
> * * *
>
> § 3. The City shall retain a full width utility easement in the streets proposed to be closed by this ordinance . . . .
>
> § 4. The City shall retain a full width right of way maintenance easement in the streets proposed to be closed by this ordinance.
>
> § 5. That the aforesaid streets shall be designated as public highways for law enforcement purposes . . . .

The streets deeded to Whitcomb Court at issue here were those streets surrounding and adjacent to the property owned by RRHA, not those contained within Whitcomb Court. Prior to "privatization," these streets were similar to all other streets in Richmond. After the streets were deeded to RRHA, red and white "private property, no trespass" signs were posted throughout Whitcomb Court and every "hundred feet on each block," informing the public that "these streets are privatized and all the property is privatized, no trespass." The signs were "approximately 18 inches to almost 24 inches by about 12 inches." However, the streets were not gated, barricaded, or otherwise closed or restricted only to Whitcomb Court traffic. The streets remained open to vehicular traffic, and the sidewalks were open to access by the public.

After the streets were deeded to RRHA, RRHA adopted a barment-trespass procedure to prevent any "unauthorized persons" from entering the property. On

November 13, 1998 the RRHA's Director of Housing Operations authorized

> each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia . . . [upon RRHA property known as] Whitcomb Court. . . . [E]ach and every Richmond Police Department officer [is authorized] to serve notice, either orally or in writing, to any person [found on RRHA property] when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises.

According to a printed brochure issued by RRHA to the Whitcomb Court residents, "unauthorized persons," who are subject to the barment proceedings, are all non-residents who cannot demonstrate that they are on the premises "visiting a lawfully residing resident, or on the development conducting legitimate business."

The police officer makes the determination whether a person is to be barred, determines whether the person is a tenant or is there at the invitation of a tenant, or whether there is a legitimate reason for being on the property. A person simply has to fail to fit within the category of people whom RRHA has deemed entitled to be on the streets and sidewalks adjacent to the public housing development to be barred. Once barred, the person who returns is a trespasser without regard to whether, on that subsequent occasion, he or she is there on legitimate business or at the invitation of a Whitcomb Court tenant.

Hicks was convicted of trespassing on the property of Whitcomb Court on February 10, 1998 and June 26, 1998, respectively, and of damaging property in Whitcomb Court

on April 27, 1998.[2] On April 14, 1998, Mrs. Gloria Rogers, the housing manager at Whitcomb Court, served a written notice on Hicks advising him that he was banned from the Whitcomb Court property. He was "not to trespass on RRHA property," and if he was "seen or caught on the premises, [he would] be subject to arrest by the police." Hicks' mother, his baby, and his baby's mother live at Whitcomb Court. After receiving the notice, Hicks twice returned to Whitcomb Court to speak with Mrs. Rogers to seek permission to come back on the property. His requests were denied. On January 20, 1999, Officer James Laino (Laino) observed Hicks walking westbound in the 2300 block of Bethel Street, one of the "privatized" streets adjacent to Whitcomb Court. Laino knew that Hicks was barred from the property. Hicks explained to Laino that he was on the property "bringing pampers to his baby." During the conversation, a female came out and approached Laino and Hicks. Hicks indicated he was visiting her. Laino issued Hicks a summons for trespassing.

Hicks was tried in the general district court without the presence of a Commonwealth's attorney. The district court judge conducted the questioning of Hicks. Hicks objected to this procedure. The judge struck Hicks' testimony at the end of the trial and convicted him. Hicks noted an appeal to the circuit court.

Prior to trial in the circuit court, Hicks filed a motion requesting a remand to the general district court for a new trial and an order requiring a Commonwealth's attorney to

[2] Appellant's barment from Whitcomb Court is not related to his damaging property at Whitcomb Court.

be present and to represent the Commonwealth at this new general district court trial. The circuit court denied the motion on the ground that it lacked authority to remand the trial. Hicks also moved to dismiss the charge of trespass on the ground that the RRHA's trespass policy violated the First and Fourteenth Amendments to the United States Constitution. The circuit court denied his motion to dismiss and found Hicks guilty of trespass.

II. CONSTITUTIONALITY OF RICHMOND ORDINANCE

Appellant argues that Richmond City Ordinance No. 97-181-197 and the RRHA barment-trespass procedure violate the First and Fourteenth Amendments of the United States Constitution.[3] Thus, we must determine whether the First and Fourteenth Amendments are violated by the trespass statute as enforced under authority granted by RRHA to Richmond City police officers to bar people on the streets surrounding and adjacent to

[3] The Commonwealth argues that appellant is barred from contesting the validity of the barment-trespass procedure because he did not present a defense to his presence on RRHA property or challenge his original barment notice or the barment-trespass procedure itself prior to being charged with trespass on January 20, 1999. Therefore the Commonwealth argues that he is improperly collaterally attacking his conviction. We disagree. Prior to his trial for this trespass charge, appellant challenged the barment-trespass procedure as unconstitutional. At trial, appellant's defense to the trespass charge was that the barment-trespass procedure violated his constitutional rights and, thus, he could not be guilty of trespass because he had a constitutional right to be walking on Bethel Street. Thus, we find that appellant timely raised the issue of the validity of the barment-trespass procedure.

Whitcomb Court and who do not fit within a narrowly defined group of people. The critical issue is whether the "privatized" streets and sidewalks are public and as such are a "traditional public forum," or whether they are "private" and, thereby, a "nonpublic forum." If they are "traditional public forum," then the barment-trespass procedure must satisfy the strict scrutiny requirement that the procedure be narrowly tailored to serve a compelling state interest. *See Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994).

A. "PUBLIC FORUM"

The constitutionality of government regulation of First Amendment rights is analyzed under a public fora analysis. *See Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999).

> The public forum analysis was created to recognize that the government must be able to limit the use of its property to the intended purpose for which the property was created and to limit access to those rightfully conducting business there. Toward that end, the Court has identified at least three types of fora for First Amendment purposes, each subject to a different regime of constitutional scrutiny: the traditional public forum, the designated public forum, and the nonpublic forum. The Court distinguishes between these fora based upon the physical characteristics of the property, including its location, the objective use and purposes of the property and government intent and policy with respect to the property, which may be evidenced by its historic and traditional treatment.

Id. at 190-91 (internal citations omitted). Public streets and sidewalks are repeatedly referred to as the archetype of a traditional public forum because they "are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace,* 461 U.S. 171, 179, 103 S. Ct. 1702, 1708, 75 L. Ed. 2d 736 (1983).

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Committee for Industrial Organization, 307 U.S. 496, 515-16, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939).

"Ownership [of streets and sidewalks] does not always mean absolute dominion." *Marsh v. Alabama*, 326 U.S. 501, 506, 66 S.Ct. 276, 278, 90 L. Ed. 265 (1946) (holding that privately owned streets and sidewalks in a company owned town which are built and operated primarily to benefit the public are traditional public forums that are

protected by First Amendment constitutional guarantees). In *Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736, the United States Supreme Court addressed the ability of the government to redefine certain public sidewalks in front of the United States Supreme Court Building as a non-public forum. There was no separation, fence or any other indication to persons entering the sidewalks that served as the perimeter of the Court grounds that they entered a non-public forum. "The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington D.C., and . . . [there is] no reason why they should be treated any differently." *Id.* at 179, 103 S.Ct. at 1702. The Court held that:

> "Congress[, no more than a suburban township,] may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums. . . . " The inclusion of the public sidewalks within the scope of § 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.

Id. at 180 (quoting *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 133, 101 S. Ct. 2676, 2687, 69 L. Ed. 2d 517 (1981) (quotation altered to reflect original wording).

As in *Grace*, the streets surrounding Whitcomb Court deeded to RRHA were not separated in any manner from the other streets and sidewalks in the area. The sole indication to the public that they have entered a "private" street are "red and white signs . . . approximately 18 inches to almost 24 inches by about 12 inches . . . spaced about every hundred feet on each block" and on each building indicating that "these streets are privatized and all the property is privatized, no trespass." There is no indication to the public until after they enter onto the "privatized" streets that the streets are any different from the rest of the streets in the city and are now private property. Some of the "privatized" streets are "private" for only a couple of blocks and are public on both ends of the "privatized" blocks. Thus, although the street signs declare the streets "private" and for the exclusive use of residents and those persons there on legitimate business, the streets and sidewalks continue to serve the same functions and are equally accessible to the public as before the City of Richmond passed the ordinance "privatizing" the streets.

Once a person has entered a "privatized" street he or she is subject to the barment-trespass procedure. A trespasser who receives a warning is informed that he or she is "not to trespass upon RRHA property" or "Whitcomb Court." However, the warning does not inform the person that the streets and sidewalks surrounding the complex are a part of RRHA property.

Because the streets appear no different from other streets in Richmond and serve the same function they did prior to "privatization," "we can discern no reason why they should be treated any differently" from any other street or sidewalk. *Grace*, 461 U.S. at 179, 103 S.Ct. 1708. The City of Richmond is not permitted to transform the

public streets and sidewalks in Whitcomb Court into private, non-public property simply by passing an ordinance declaring them closed, conveying them to another governmental entity, the RRHA, and placing signs along the streets. *See Marsh*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265; *Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736. Thus, the streets and sidewalks surrounding Whitcomb Court did not lose their public forum status when the City of Richmond deeded them to the RRHA and put some signs on the street indicating they were now private property. Hence, the barment-trespass procedure must satisfy the rigors of strict scrutiny to pass constitutional muster.

The Commonwealth argues that our prior decisions in *Collins v. Commonwealth*, 30 Va. App. 443, 517 S.E.2d 277 (1999), and *Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998), allow housing authorities to restrict access to their property and designate police officers to serve barment notices and arrest persons trespassing on housing authority property. We have previously approved a process by which police officers may be designated as agents of a housing authority to serve barment notices on persons trespassing on housing authority property, *see Collins*, 30 Va. App. at 449, 517 S.E.2d at 280; *Holland*, 28 Va. App. at 70-76, 502 S.E.2d at 146-49. However, what distinguishes this case from those is that Hicks was found guilty of trespass for having gone upon Bethel Street and the adjacent sidewalk, whereas in both *Holland* and *Collins*, the defendants were on the non-public grounds and in the buildings of the housing authority.

The Commonwealth also contends that we should follow the Eleventh Circuit's decision in *Daniel*, 38 F.3d 546. The *Daniel* court authorized a housing authority to

enforce a no trespassing policy identical to the one at issue in the instant case. However, unlike the instant case, in *Daniel*, "the City-owned streets and sidewalks surrounding and intersecting with the Housing Authority property [were] open to the public" and *Daniel* had "unlimited access to the City-owned streets and sidewalks adjacent to the housing complex." *Id.* at 548 n.3 & 550; *see also Walker v. Georgetown Hous. Auth.*, 424 Mass. 671, 677 N.E.2d 1125, 1128 (Mass. 1997) (calling into question the reasoning of the *Daniel* court and the applicability of the ruling to streets and sidewalks that were kept "open to the public"). Thus, in *Daniel*, the no trespassing policy was limited to the non-public forum consisting of the housing authority's buildings and grounds and did not include the adjacent streets and sidewalks as the RRHA policy does in the instant case. Bethel Street is a public street that was built and maintained with public funds to provide access by the public to that part of Richmond. As with all public streets and thoroughfares, historically and traditionally public streets have served as a locale for the free exchange and dissemination of ideas and have served as an area where citizens can freely and lawfully congregate or move about and exchange discourse.

The fact that legal title to the streets is transferred from a municipal government to a government agency which owns and operates a public housing development does not change the public nature and character of the streets and sidewalks which provide access to the public to this part of the City. *See Marsh*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265. The City cannot transform the public streets surrounding Whitcomb Court into non-public streets by declaring them closed by ordinance and conveying them

to another governmental entity when they continue to serve the same public purpose as before.

B. "STRICT SCRUTINY"

Therefore, the City of Richmond's and RRHA's attempt to control access to and movement upon the streets and sidewalks of the city is "subject to strict scrutiny; [it] must be narrowly tailored to serve [the] compelling state interest" of providing safe housing to the development's residents. *Daniel*, 38 F.3d at 549. The stated goal of the RRHA barment-trespass procedure is to ensure a safe environment free from criminal activity for the residents of Whitcomb Court. We agree that the City of Richmond has a compelling interest in protecting its citizens and preventing criminal activity. However, it may not, in its endeavor to control crime, pass and enforce a regulation so broad in scope that it unduly restricts or criminalizes innocent constitutionally protected behavior.

The barment-trespass procedure used in this case inhibits a person's constitutionally protected "'right to remove from one place to another according to inclination'" and the person's right to "remain in a public place of his choice." *Chicago v. Morales*, 527 U.S. 41, 53, 54, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (quoting *Williams v. Fears*, 179 U.S. 270, 274, 21 S. Ct 128, 129, 45 L. Ed. 186 (1900)). In *Morales*, the United States Supreme Court held that a city ordinance designed to reduce crime by criminalizing "loitering" violates the Constitution. The Court stated that "it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage' or the right to move 'to

whatsoever place one's own inclination may direct'" and the ordinance "broadly covers a significant amount" of activity that is constitutionally protected. *Id*. at 53-54, 119 S. Ct. at 1849 (internal citations omitted). The City of Richmond and RRHA barment-trespass procedure also prevents a person from standing upon the streets surrounding Whitcomb Court without a "legitimate reason." Thus, it implicates the same concerns addressed in *Morales*.

The barment-trespass procedure is not limited so as to encompass only those persons whose conduct the City and RRHA were seeking to curtail. The procedure is so broad that citizens who merely drive or walk upon one of the "privatized" streets fall within the defined group of people not authorized by the barment procedure to be upon the streets and sidewalks and, thus, may be deemed guilty of criminal conduct. A citizen need not commit a crime, intend to commit a crime or infringe upon the privacy of the residents of Whitcomb Court to be in violation of the barment-trespass statute and ordinance. The Commonwealth presented no evidence that appellant did anything other than exercise his constitutionally protected right to walk upon the streets and sidewalks of the City of Richmond. Perhaps, had Bethel Street been gated, barricaded, or physically restricted to traffic where the public was not free to travel, as with gated communities, the street could be considered non-public and not a "traditional public forum." But the City can no more "close" the streets in Whitcomb Court and leave them open to the public, thereby purporting to make them a "non-public forum," than it could declare "closed" all streets in Richmond's troubled neighborhoods and residential areas, thereby denying access to all citizens except the residents and

their invitees and others specifically approved. Neighborhood streets, such as those in Whitcomb Court, are public streets, paid for and maintained with public funds, for the use and benefit of the public.

While a public entity can restrict the use of public property or buildings to those who are using the property for its intended "non-public" purpose, such as an office building, it cannot restrict public property that is considered a "traditional public forum," such as a street or sidewalk, that is being used in a lawful way and for a lawful purpose that is constitutionally protected. *See United States v. Kokinda*, 497 U.S. 720, 727, 110 S. Ct. 3115, 3120, 111 L. Ed. 2d 571 (1990) (holding that sidewalk in front of a post office "constructed solely to provide for the passage of individuals engaged in postal business" is a non-public forum). Here, in effect, the City and RRHA, by converting the streets and sidewalks to private property, attempted to confer upon RRHA the same rights as a private property owner who may restrict everyone from coming upon the private property owner's property except the owner's tenants and the tenants' invitees, regardless of whether the invitees had done anything unlawful. However, the United States Supreme Court has held that even a private entity which owns the entire town cannot close the streets to deny the public their constitutional rights. *See Marsh,* 326 U.S. at 506, 66 S. Ct. at 276. Therefore, the barment-trespass procedure at issue here is not narrowly tailored to encompass only those activities the RRHA sought to exclude from their property.

III. CONCLUSION

Thus, we hold that Richmond's barment-trespass procedure, when strictly scrutinized, is not narrowly tailored to serve the government's compelling interest, the standard that must be met when the government attempts to regulate activity in a "traditional public forum."[4] The RRHA's privatization effort unconstitutionally infringes upon a citizen's First and Fourteenth Amendment rights to lawfully be present in a public place. Accordingly, we hold that city ordinance No. 91-181-197 [sic] as enforced through the barment-trespass procedure is unconstitutional and we reverse and dismiss appellant's conviction.[5]

Reversed and dismissed in part, reversed and remanded in part.

HUMPHREYS, Judge, with whom WILLIS, BRAY, BUMGARDNER and AGEE, JJ., join, dissenting.

I. Constitutional Issues

I must respectfully dissent from the majority opinion, which holds that the Richmond Redevelopment and

[4] In his petition for appeal, appellant also requested this Court to set aside the order revoking his suspended sentences on his two prior convictions for trespassing at Whitcomb Court and his prior conviction for damaging property at Whitcomb Court. However, appellant did not pursue this on brief or in oral argument. Therefore, we remand this case to the circuit court to reconsider the revocation of his suspended sentences in light of our holding in this opinion.

[5] Because we reverse on the failure of the City of Richmond to establish the constitutionality of the barment-trespass procedure, we do not address appellant's arguments regarding errors in the general district court proceedings or whether the barment-trespass procedure violated the procedural due process requirements of the Fourteenth Amendment.

Housing Authority's (RRHA) barment proceeding and trespass policy violate the First and Fourteenth Amendments of the United States Constitution.

First, I do not agree that Hicks properly raised his objections to RRHA's barment procedures. Hicks concedes that the RRHA provided him with a barment notice on April 14, 1998. This barment notice was issued to Hicks pursuant to a valid ordinance adopted by the City of Richmond, both requiring and authorizing RRHA to take any necessary steps to "give the appearance that the closed streets . . . are no longer public streets and that they are in fact private streets." The notice, which Hicks signed in acknowledgment of its receipt, specifically prohibited Hicks from entering onto RRHA premises for any reason.

Subsequently, on at least one occasion, Hicks approached the housing manager for the Whitcomb Court property, Gloria Rogers, to request that he be able to visit his mother, a resident of that property. Rogers denied his request and again informed him that he was barred from entering the property pursuant to the barment notice. However, other than speaking to Rogers, Hicks took no steps to appeal his barment through official channels of the Authority or the courts. Instead, he ignored the barment and was arrested and convicted for trespassing, as well as for damaging property in Whitcomb Court, prior to his arrest for the incident of January 20, 1999. In addition, for this prior trespass conviction, Hicks received a suspended sentence on the court-ordered condition that he

keep the peace and be of good behavior for three years. However, Hicks continued to ignore the barment notice, as well as the court order, and trespassed again on January 20, 1999. Now, for the first time, in connection with his conviction for the January 20, 1999 trespass, Hicks argues that the barment violated his constitutional rights under the First and Fourteenth Amendments.

Hicks' arguments in this regard represent an untimely and improper collateral attack on his barment status. We have held, in the context of an habitual offender adjudication, that where a defendant has knowledge of an underlying order, never appeals the order, and subsequently violates the order, he cannot attack the underlying order in the new proceeding. *See Morgan v. Commonwealth*, 28 Va. App. 645, 507 S.E.2d 665 (1998). We based our decision in *Morgan* on *Mays v. Harris*, 523 F.2d 1258 (4th Cir. 1975), wherein the Fourth Circuit Court of Appeals held that an habitual offender who failed to appeal the underlying conviction, could not, with impunity, choose to ignore the adjudication and resulting injunction "for, . . . 'in the fair administration of justice, no man can be judge in his own case.'" *Id.* at 1259 (quoting *Walker v. Birmingham*, 388 U.S. 307, 321, 87 S. Ct. 1824, 1832, 18 L. Ed. 2d 1210 (1967) (holding that a party can be held in contempt of court for violating an injunction, even if the injunction was invalid under the Federal Constitution)).

I believe the principle advanced in *Walker, Mays* and *Morgan* is equally applicable to this case. Here, Hicks was barred from the property pursuant to authority granted RRHA by ordinance which, in turn, provided an administrative procedure for contesting such barment. Hicks had knowledge of his barment from the property, he had been previously convicted of trespassing on the property prior to

his trial for the trespassing incident of January 20, 1999, and in conjunction with that conviction, he had been ordered by the court to maintain good behavior for three years. Despite the opportunity presented by the prior court proceedings, as well as the availability of an administrative appellate procedure, Hicks raised no objection to the propriety of the barment until his trial for the January 20, 1999 incident. Pursuant to the principles set forth in the above-cited cases, I do not believe Hicks should be allowed to have bypassed "orderly judicial review of [the barment and his prior trespassing convictions] before disobeying [them]." *Walker*, 388 U.S. at 320, 87 S. Ct. at 1824.

I would also reject Hicks' challenges to the constitutionality of RRHA's policy. "In assessing the constitutionality of a statute or ordinance, courts must presume that the legislative action is valid. Consequently, the burden is on the challenger to demonstrate the constitutional defect." *Coleman v. City of Richmond*, 5 Va. App. 459, 462, 364 S.E.2d 239, 241 (1988). I would hold that Hicks failed to meet this burden.

Hicks essentially argues, on brief and orally, that because the streets of Whitcomb Court were once public streets and sidewalks owned by the City of Richmond, any statute restricting his presence thereon is unconstitutionally overbroad or vague. Hicks further alleges that because the policy is overbroad and vague, it impinges upon his First Amendment guarantees of free speech and implied guarantee of free association, as well as his Fourteenth Amendment due process protections.

"[G]enerally, a litigant may challenge the constitutionality of a law only as it applies to him or her." *Id.* at

463, 364 S.E.2d at 241. "The traditional rule is that a person to whom a [policy] may be constitutionally applied may not challenge that [policy] on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113, (1982). Yet,

> [w]hat has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by weighty countervailing policies. The doctrine is predicated on the sensitive nature of protected expression . . . [and] [i]t is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.

Id. The United States Supreme Court has also allowed a facial attack on the grounds of vagueness even though the litigant's own speech was unprotected. *See Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

Nevertheless, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the [policy's] plainly legitimate sweep." *Ferber*, 458 U.S. at 770, 102 S. Ct. at 3348. This distinction is ignored by the majority. "We have never held that a [policy] should be invalid on its face merely because it is possible to conceive of a single impermissible application . . . ." *Id.* at 771, 102 S. Ct. at 3348. Instead, "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is

to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Houston v. Hill*, 482 U.S. 451, 458, 107 S. Ct. 2502, 2508, 96 L. Ed. 2d 398 (1987).

A policy will be deemed unconstitutionally overbroad if it is "one that is designed to burden or punish activities which are not constitutionally protected, but the [policy] includes within its scope activities which are protected by the First Amendment." *Parker v. Commonwealth*, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997). A policy will be deemed unconstitutionally vague if "it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Santillo v. Commonwealth*, 30 Va. App. 470, 482, 517 S.E.2d 733, 739 (1999) (citation omitted).

It is axiomatic that in making such a determination, an appellate court should refrain from speculation outside of the record before it. Here, contrary to Hicks' argument, the policy clearly does not bar individuals from freely associating with their friends or loved ones living on RRHA property, nor does it prohibit persons from exercising free expression. Further, the policy does not automatically delineate every non-resident who uses a sidewalk owned by RRHA to be a trespasser, as suggested by the majority. Instead, it merely authorizes the Richmond police, as agents of the RRHA, to ban persons from the property who enter upon the property without permission

from a resident or the RRHA. Significantly, any unauthorized individuals are not automatically arrested, but they are warned that they are not to enter the property in the future.[6] Further, those who have been formally banned from the property are not without recourse and can request, through the proper RRHA channels, to have the ban removed.

Thus, I would consider this policy as a "paradigmatic case of [one] whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. Under these circumstances, I would find that the policy is not "substantially overbroad" and/or vague and that "whatever overbreadth [or vagueness] may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16, 93 S. Ct. 2908, 2918, 37 L. Ed. 2d 830 (1973).

The majority has found that the Whitcomb Court property is a traditional public forum simply because the property in question is a sidewalk adjoining a street constructed and once owned by the City of Richmond. However, neither the evidence in this record nor the precedents of the United States Supreme Court compel such a finding. I agree that "the Supreme Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of

[6] Contrary to the majority's statement otherwise, Hicks presented no evidence suggesting that the warning does not inform persons that the streets and sidewalks surrounding the complex are part of RRHA property.

those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Paff v. Kaltenbach*, 204 F.3d 425, 431 (3rd Cir. 2000) (citing *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985)). However, "when the relevant public property is determined to be a 'non-public forum,' rather than an 'open forum' or a 'designated forum,' the government has greater freedom to restrict speech." *Id.*

A traditional public forum is property which has the physical characteristics of a public thoroughfare, which has the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, and by which history and tradition has been used for expressive conduct. *See Warren v. Fairfax County*, 169 F.3d 190, 198 (4th Cir. 1999) (Murnaghan, J., dissenting), *adopted and incorporated by reference by the majority in Warren v. Fairfax County*, 196 F.3d 186, 191 (4th Cir. 1999) (*en banc*). As the majority also correctly points out, a sidewalk adjoining a public street will generally fall into this category. *See Frisby v. Schultz*, 487 U.S. 474, 481, 108 S. Ct. 2495, 2500-01 (1988). However, the sidewalk at issue here is not the "quintessential" public sidewalk which has been "immemorially held in trust for the use of the public," or which has been traditionally "used for public assembly and debate, the hallmarks of a traditional public forum." *See Frisby*, 487 U.S. at 480-81; *see also United States v. Grace*, 461 U.S. 171, 179-80, 103 S. Ct. 1702, 1709, 75 L. Ed. 2d 736 (1983) (instructing that it is incorrect to assert that every "public sidewalk" is a public forum).

While it is true that the City of Richmond cannot transform public streets and sidewalks into private, non-public property simply by passing an ordinance declaring them private or closed property, this is but one factor to consider in determining the nature of the sidewalks at issue. *See Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); *see also United States v. Kokinda*, 497 U.S. 720, 727, 110 S. Ct. 3115, 3120, 111 L. Ed. 2d 571 (1990). Moreover, contrary to the majority's conclusion, "[t]he mere physical characteristics of the property cannot dictate forum analysis." *Kokinda*, 497 U.S. at 727, 110 S. Ct. at 3115. Instead, we must also consider the location and purpose of the sidewalk, in order to determine its character as public or private. *See id.* at 728-29, 110 S. Ct. at 3115.

I agree with the majority that a "critical issue" is also whether the privatized streets continue in their previous character as a traditional public forum. However, contrary to the majority, I would find that neither the purpose, the treatment, nor the physical characteristics of the Whitcomb Court sidewalks support the majority's conclusion that they fall within the parameters of a traditional public forum.

First, the Whitcomb Court property, including its streets and sidewalks, has been deeded from the City to the RRHA. Although ignored by the majority, a condition for the closure of the streets by the City required RRHA to "make provisions to give the appearance that the closed streets, particularly at the entrances, [were] no longer public streets and that they [were] in fact, private streets." In order to meet this requirement, although the streets and sidewalks of the development were not physically barricaded, RRHA posted red and white signs, "approximately 18 inches

to almost 24 inches by about 12 inches" in size, on each side of the buildings, as well as on the streets of the property, on each block, about every 100 feet. These signs clearly indicated that the streets and sidewalks had been privatized and that trespassing was prohibited.[7] The record further indicates that RRHA held meetings with residents and provided pamphlets explaining the privatization. The pamphlet encouraged residents to explain the privatization to their neighbors and guests in order to facilitate the change. Finally, for at least a year prior to Hicks' present arrest, RRHA and the Richmond police treated the property as private property by determining whether visitors were authorized and by banning unauthorized persons from the property.

In concluding that "there is no indication to the public until after they enter onto the 'privatized' streets that [they] are any different from the rest of the streets in the city," the majority both improperly assumes a fact-finding function outside the record in this case and improperly shifts the burden of proof concerning the character of the forum away from Hicks. A review of the character of the "privatized" streets and sidewalks, restricted to the record of the trial court, reveals that other than exceptions for school buses, delivery trucks, city service vehicles and law enforcement, there is absolutely no evidence that the streets and/or sidewalks of the Whitcomb Court property remained open to a public flow of traffic, as the majority

[7] Officer Llaino [sic] testified to the size, number and location of the signs and that the substance of the message on the signs was that "all the property had been privatized and that trespass[ing was] prohibited." This evidence was uncontradicted.

suggests. Furthermore, even though sidewalks "may be open to the public, [that] fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment." *Kokinda*, 497 U.S. at 729, 110 S. Ct. at 3115.

Thus, given the clear intent by the City of Richmond to remove the streets of Whitcomb Court from the category of thoroughfares available for use by the general public and given the notice to the residents and the public at large in the form of repeated and obvious signage that the streets and sidewalks were no longer "public" in character, I would hold that the restrictions imposed by RRHA must be analyzed under the test for non-public property: they must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 730 (citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983)).

There is no dispute here that the stated purpose for RRHA's trespassing enforcement effort, which was to "provide a safe environment for citizens in a place often used to sell drugs," is reasonable and legitimate. In fact, we have previously upheld the delegation of authority by a public housing complex to police officers to bar unauthorized individuals from the property for the purpose of preventing crime, protecting property and preserving the peace. *See Holland v. Commonwealth*, 28 Va. App. 67, 502 S.E.2d 145 (1998).

Moreover, as stated above, the record is clear that a person is not considered "unauthorized" until he or she has entered the property without the permission of either

a resident or an RRHA official. Even then, and notwithstanding numerous and obvious signs that acquaint anyone able to read that the character of the property is private and not public, unless the individual is engaged in some type of criminal activity, that individual is not formally barred from the property until after he or she has been warned not to enter the property without permission. Once an individual is barred from the property, a procedure is available to request removal of the barment. Further, Hicks produced no evidence that either RRHA or the Richmond police have ever banned any form of expression based on its content.

Based on this record, I would find that any potential interference with an individual's right of expression and/or intimate association with residents of Whitcomb Court, or to "loiter" on the property, which, although publicly owned, in my judgment constitutes a "non-public forum" for First Amendment purposes, is reasonable, limited and justified to achieve the legitimate purpose of protecting these residents from crime. Therefore, I would hold that Hicks' conduct at the time of his arrest - namely, knowingly trespassing on private property - was not constitutionally protected.

II. Motion to Remand

Because I would hold that RRHA's barment proceeding and trespass policy with respect to Hicks do not violate the First and Fourteenth Amendments, I would address the remaining assignment of error.

Hicks argues that he was entitled to have his case remanded to the general district court for a new trial before another judge because the judge of that court who

presided over the initial trial improperly assumed the role of a prosecutor by "cross-examining" him.

The Supreme Court of Virginia has long held that there is no inherent damage to a fair trial when a judge asks questions of a witness.

> [A] trial judge [may] ask questions of a witness either on his examination in chief or on cross-examination. The practice is common and perfectly permissible. Indeed, there are times when it is his duty to do so. He is not to sit there and see a failure of justice on account of omissions to prove facts plainly within the knowledge of a witness, but the character of his questions should not be such as to disclose bias on his part, or to discredit the truthfulness of the witness. "For the purpose of eliciting evidence which has not otherwise been brought out, it is proper for the judge to put the questions to a witness either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness."

Mazer v. Commonwealth, 142 Va. 649, 655, 128 S.E. 514, 516 (1925) (citations omitted).

In addition, we have held that "the trial court, in the exercise of its sound discretion, may permit jurors to submit written questions to be asked of a witness." *Williams v. Commonwealth*, 24 Va. App. 577, 582, 484 S.E.2d 153, 155 (1997). We also noted in *Williams* that "the function of a jury is to assure a fair and equitable resolution of all factual issues. The jury serves as the final arbiter of the facts, 'charged with weighing the evidence, judging the credibility of the witnesses, and reaching a verdict' in the case." *Id.* at 582, 484 S.E.2d at 155. This

function belongs no less to the court when serving as the fact finder. We need not determine here whether the general district court judge's questions demonstrated an inappropriate bias or prejudice because the court granted Hicks' motion to strike the questions as well as his answers.

In addition, the remedy provided to any defendant in a criminal case who perceives error on the part of a trial court is to exercise the right to appeal the matter to a higher tribunal. In the context of misdemeanors tried in the district courts, the General Assembly has established a right to a trial de novo in the circuit court.[8] A de novo hearing means a trial anew. On appeal, a conviction in the district court is annulled, and a new trial is held in the circuit court. *See Ledbetter v. Commonwealth*, 18 Va. App. 805, 447 S.E.2d 250 (1994).

While it would clearly be preferable and in its interest for the Commonwealth to be represented by counsel in every case in which it is a party, the General Assembly has declined to mandate such representation. Code § 15.2-1627(B) recites the duties of Commonwealth's Attorneys and their assistants.[9] This statute only requires Commonwealth's

[8] Code § 16.1-136 provides in pertinent part: "Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court."

[9] Code § 15.2-1627(B) provides in pertinent part: "The attorney for the Commonwealth . . . shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other

(Continued on following page)

Attorneys to prosecute felonies and provides that a prosecutor "may in his discretion, prosecute Class 1, 2 and 3 misdemeanors." Thus, the General Assembly decided as a matter of policy to place the discretion for the representation of the Commonwealth in misdemeanor cases in the hands of the executive branch rather than the judicial branch of government.

Hicks relies on the decision of the Supreme Court of the United States in *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), as authority for his argument that a trial de novo does not cure errors committed in a lower court. I find his reliance on *Ward* is misplaced. In *Ward*, the Supreme Court addressed a systemic problem of bias inherent in the infrastructure of local mayors' courts. There, mayors of villages sat as judges in the courts, and a major portion of village income was derived from the collection of these fines. In finding that such a scheme violates the due process rights of criminal defendants in the mayors' courts, Justice Brennan noted that the constitutional infirmity was grounded in the separation of powers doctrine.

> Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him

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violation, the conviction of which carries a penalty of confinement in jail, or a fine of $ 500 or more, or both . . . ."

> not to hold the balance nice, clear and true between the State and the accused." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.

Id. at 60, 93 S. Ct. at 80 (citations omitted).

Hicks does not allege, nor do I find, such systemic bias in the procedural structure of the district courts in the Commonwealth. Thus, assuming without deciding that the questions propounded by the general district court judge constituted error, I would hold that the trial de novo in the circuit court provided an adequate remedy.

For all of these reasons, I dissent and would affirm the judgment of the trial court.

COMMONWEALTH OF VIRGINIA
v.
KEVIN LAMONT HICKS

Record No. 011728

SUPREME COURT OF VIRGINIA

264 Va. 48; 563 S.E.2d 674

June 7, 2002

Present: All the Justices

Virginia B. Theisen, Assistant Attorney General (Randolph A. Beales/*Jerry W. Kilgore, Attorney General*, on briefs), for appellant.

Steven D. Benjamin (Betty Layne DesPortes; Benjamin & DesPortes, on brief), for appellee.

Amicus Curiae: City of Richmond and Richmond Redevelopment and Housing Authority (John A. Rupp, City Attorney; Norman B. Sales, Senior Assistant City Attorney; William G. Broaddus; Johnathan T. Blank; William H. Baxter, II; Godfrey T. Pinn, Jr.; McGuireWoods, on brief), in support of appellant.

Amicus Curiae: American Civil Liberties Union of Virginia, Inc. (Rebecca K. Glenberg, on brief), in support of appellee.

JUSTICE HASSELL delivered the opinion of the Court.

The narrow issue that we consider in this appeal is whether a redevelopment and housing authority's trespass policy is overly broad and thereby violates the First and Fourteenth Amendments to the Constitution of the United States.

I.

Kevin Lamont Hicks was charged with trespass in violation of Code § 18.2-119 and three violations of the conditions of suspended sentences imposed upon him for prior trespass convictions. He was tried and convicted in the City of Richmond General District Court.

Hicks appealed the convictions to the Circuit Court of the City of Richmond, and he filed a motion to dismiss the charges against him on the basis that a redevelopment and housing authority's trespass policy contravened the First and Fourteenth Amendments to the Constitution of the United States. The circuit court denied the motion. At the conclusion of a bench trial, Hicks was convicted of trespass and sentenced to 12 months in jail, which was suspended. The circuit court also revoked Hicks' prior suspended sentences.

Hicks appealed the judgment to the Court of Appeals. A panel of the Court of Appeals affirmed the judgment, *Hicks v. Commonwealth,* 33 Va. App. 561, 535 S.E.2d 678 (2000), but the Court of Appeals *en banc* disagreed with the panel and vacated Hicks' conviction because the redevelopment and housing authority's trespass policy contravened the First and Fourteenth Amendments to the Constitution of the United States. *Hicks v. Commonwealth*, 36 Va. App. 49, 52, 548 S.E.2d 249, 251 (2001). The Commonwealth appeals.

II.

The Richmond Redevelopment and Housing Authority (Housing Authority) is a political subdivision of the Commonwealth of Virginia. The Housing Authority owns and operates a housing development in the City of Richmond

for low income residents known as Whitcomb Court. The City of Richmond owned the streets located within Whitcomb Court.

In an effort to eradicate illegal drug activity in Whitcomb Court, which was described as an "open-air drug market," the Housing Authority sought to deny access to its property to persons who did not have legitimate reasons to visit the housing development. The majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not reside there.

The Richmond City Council enacted an ordinance that "closed to public use and travel and abandoned as streets of the City of Richmond," streets in Whitcomb Court because those streets were "no longer needed for the public convenience." The City conveyed the streets by a recorded deed to the Housing Authority.

The deed required that the Housing Authority "make provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets and that they are in fact private streets." The Housing Authority's employees affixed red and white signs to each apartment building in Whitcomb Court. The signs are also located "every 100 feet" along the streets in Whitcomb Court and are "approximately 18 inches to almost 24 inches by about 12 inches" in size. The signs state:

"NO TRESPASSING

"PRIVATE PROPERTY

"YOU ARE NOW ENTERING
PRIVATE PROPERTY AND
STREETS OWNED
BY RRHA.

"UNAUTHORIZED PERSONS
WILL BE SUBJECT TO
ARREST AND PROSECUTION.

"UNAUTHORIZED
VEHICLES WILL BE TOWED
AT OWNERS EXPENSE."

The Housing Authority, in its capacity as owner of the private streets, authorized

> "each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property."

As a part of the Housing Authority's unwritten policies, Gloria S. Rogers, the Housing Authority's housing manager for Whitcomb Court, was required to determine whether a person can demonstrate a legitimate business or social purpose to use the Housing Authority's property. Pursuant to these policies, individuals who sought access to the Housing Authority's property, including the streets,

needed to obtain Rogers' permission for such access. Rogers stated that if a person desired to disseminate materials or participate in an activity on the property, that person must obtain her authorization. Sometimes, she referred such request to a "community council" which met with "the Board and the residents." She also testified that if an individual submitted a request to distribute flyers and the request was not "routine," she referred that request to the Housing Authority's director of housing operations for resolution. The Housing Authority, however, has not promulgated any written policies or procedures that govern decisions regarding who may distribute materials or participate in activities on the Housing Authority's property.

Pursuant to the Housing Authority's unwritten policies, an individual who is not authorized to use the Housing Authority's property and does so is warned by the Richmond Police Department. The Housing Authority forwards a letter to that individual informing him that he may not lawfully return to the property.

On January 20, 1999, Richmond police officer James J. Laino, who was driving a police car on Bethel Street, observed Hicks, who was walking on a sidewalk on that street. Bethel Street is one of the streets that the City conveyed to the Housing Authority and that street is located entirely within Whitcomb Court.

Laino, who had known Hicks for about four years, approached him. Laino knew that Hicks had been notified that he was barred from the Housing Authority's property. Laino informed Hicks that he was "not supposed to be out here," and Laino issued a summons to Hicks for trespass.

Rogers had also spoken with Hicks on two prior occasions and told him that he could not appear on the Housing Authority's property. Hicks had been arrested on two prior occasions for trespass on the Housing Authority's property. On April 14, 1998, Hicks signed a letter that was hand delivered to him by Rogers. The letter, which the parties describe as a barment notice, states in part:

> "This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police."

III.

A.

The Commonwealth argues that Hicks is not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the criminal prosecution for trespass. The Commonwealth contends that Hicks instead was required to challenge the barment notice he received from the Housing Authority or the Housing Authority's policies and practices, presumably in a separate proceeding. We disagree.

In this case, Hicks has asserted a constitutional challenge to a conviction. Hicks pled in a written pretrial motion that the Housing Authority's trespass procedures and policy violated the First Amendment. At trial, Hicks

argued that the Housing Authority's trespass procedures and policy were unconstitutional.

Contrary to the Commonwealth's assertions, Hicks was not required to file a civil proceeding to challenge the Housing Authority's trespass policies and practices. Rather, this defendant was entitled to challenge the validity of his conviction on the basis that the Housing Authority's practices and procedures contravened his constitutional rights. We observe that in other contexts, we have permitted defendants to assert constitutional challenges to convictions in criminal prosecutions, *see, e.g.*, *Remington v. Commonwealth*, 262 Va. 333, 344-45, 551 S.E.2d 620, 628 (2001); *McCain v. Commonwealth*, 261 Va. 483, 489-90, 545 S.E.2d 541, 544-45 (2001); *Lenz v. Commonwealth*, 261 Va. 451, 460-62, 544 S.E.2d 299, 304-05 (2001); *Burns v. Commonwealth*, 261 Va. 307, 321-23, 541 S.E.2d 872, 882-83 (2001)*; Pitt v. Commonwealth*, 260 Va. 692, 695-96, 539 S.E.2d 77, 78-79 (2000). We also note that the Supreme Court has permitted criminal defendants to assert constitutional challenges to various ordinances in criminal prosecutions. *See, e.g.*, *Lovell v. City of Griffin,* 303 U.S. 444, 452 (1938).

B.

Hicks argued in the Court of Appeals, and he argues here, that the Housing Authority's trespass procedures are overly broad and, therefore, violate fundamental constitutional rights to freedom of speech guaranteed by the First Amendment to the Constitution of the United States. Responding, the Commonwealth contends that the Housing Authority's trespass policy is not overly broad. The Commonwealth also asserts that a defendant who raises a

facial constitutional challenge must demonstrate a substantial risk that the application of the challenged policy will result in suppression of protected speech.

The First Amendment states in part that "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court has stated that this "freedom is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action; and municipal ordinances adopted under state authority constitute state action." *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958); *accord Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

The Supreme Court has held that in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible. For example, the Supreme Court stated in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 38 (1999):

> "The traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.' *New York v. Ferber*, 458 U.S. 747, 767 (1982) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).
>
> "Prototypical exceptions to this traditional rule are First Amendment challenges to statutes

> based on First Amendment overbreadth. 'At least when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."' *Gooding v. Wilson*, 405 U.S. 518, 520-521 (1972) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). 'This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression.' *Gooding v. Wilson*, [405 U.S.] at 520-521. See also *Thornhill v. Alabama*, 310 U.S. 88 (1940)."

The Supreme Court has also pointed out that the overbreadth doctrine is "strong medicine" and this doctrine should be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613.

The Supreme Court has consistently and repeatedly invalidated government policies that facially vested officials with broad and unfettered discretion to regulate speech. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (invalidating ordinance requiring marchers to seek permission from mayor); *Kunz v. New York*, 340 U.S. 290, 293-94, 95 L. Ed. 280, 71 S. Ct. 312 (1951) (invalidating ordinance prohibiting public worship without a permit from police commissioner); *Saia v. New York*, 334 U.S. 558, 559-61 (1948) (invalidating ordinance that required operators of sound trucks to obtain permission from police chief).

The Supreme Court stated in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64 (1988):

> "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. We have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker. *E.g.*, *Cox v. Louisiana*, 379 U.S. [536], 557 [(1965)]; *Staub*, 355 U.S. at 322. Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion. It bears repeating that '[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether . . . his conduct could be proscribed by a properly drawn statute, and whether . . . he applied for a license.' *Freedman [v. Maryland]*, 380 U.S. [51], 56 [(1965)]."

In *Lakewood*, the Supreme Court applied these principles and invalidated a city ordinance that permitted a mayor to grant or deny a permit to a publisher who desired to place a news rack on a sidewalk. The ordinance placed no limits on the mayor's discretion to grant or deny

the requested permit. The Supreme Court stated that this lack of limitations upon an official's discretion "renders the guarantee against censorship little more than a high sounding ideal." 486 U.S. at 769-70.

In *Staub, supra,* the Supreme Court invalidated an ordinance that permitted a mayor and a city council to grant or deny a permit to a labor union allowing it to solicit members based upon the "effects upon the general welfare of citizens of the City of Baxley." The Court stated:

> "These criteria are without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit. Cf. *Niemotko v. Maryland*, 340 U.S. 268, 271-273 [(1951)]. It is thus plain that they act in this respect in their uncontrolled discretion.
>
> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

355 U.S. at 322. And, in *Schneider v. State*, 308 U.S. 147, 163-64 (1939), the Supreme Court invalidated a city ordinance that banned "communication of any views or the advocacy of any cause from door to door" without a written permit from the chief of police. The Court held that the ordinance was a restraint upon First Amendment rights and stated that the ordinance "strikes at the very heart of the constitutional guarantees." *Id.* at 164.

We also observe that in *Lovell*, *supra*, the Supreme Court invalidated a city ordinance that prohibited the distribution of circulars, handbooks, advertising, or literature of any kind without first obtaining written permission from the city manager of the City of Griffin. Alma Lovell, who was convicted for violation of this criminal ordinance and sentenced to imprisonment, asserted that the ordinance was facially invalid. The Court observed:

> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. . . . Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form."

303 U.S. at 451-52 (footnote omitted).

Applying the principles established by the Supreme Court, we hold that the Housing Authority's trespass policy is invalid because it is overly broad and it infringes upon First Amendment protections. Even though the

Housing Authority's trespass policy, which is written in part and unwritten in part, is designed to punish activities that are not protected by the First Amendment, the policy also prohibits speech and conduct that are clearly protected by the First Amendment. Also we note that Hicks is entitled to assert a facial constitutional challenge to the Housing Authority's trespass policy even though a portion of that policy is unwritten. To hold otherwise would permit the government to violate a citizen's First Amendment protections by simply refusing to memorialize unconstitutional policies in a written document. We observe that the United States Supreme Court and the various United States Courts of Appeals have permitted litigants to assert First Amendment facial challenges to unwritten government policies. *See Niemotko v. Maryland*, 340 U.S. at 271-73 (unwritten practice of issuance of licenses to use a public park for meetings); *Wells v. City & County of Denver*, 257 F.3d 1132, 1150-51 (10th Cir.); *cert. denied*, ___ U.S. ___, 122 S. Ct. 469 (2001) (unwritten policy that banned unattended holiday displays); *Lebron v. AMTRAK*, 69 F.3d 650, 659, *amended by* 89 F.3d 39, 39 (2d Cir. 1995) (unwritten policy that banned political advertisements); *Tipton v. University of Hawaii*, 15 F.3d 922, 927-28 (9th Cir. 1994) (unwritten policy "as manifested in the University's application of its written policy"); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1197-99 (11th Cir. 1991) (unwritten scheme for regulating the placement of newspaper racks).

Rogers, the Housing Authority's housing manager for Whitcomb Court, testified that the Housing Authority has not implemented written procedures or guidelines concerning the enforcement of the trespass policy. The Housing Authority has not implemented any guidelines that

delineate how an individual may obtain permission to use the property. Even though "authorized" persons may use the Housing Authority's property, Rogers, in the exercise of her unfettered discretion, is the government official who determines whether an individual is authorized.

Rogers also has unfettered discretion to determine who can distribute literature at the Whitcomb Court housing development and, pursuant to the Housing Authority's unwritten trespass policy, a non-resident of Whitcomb Court can only distribute such literature if that non-resident obtains authorization from Rogers. Rogers testified that she will permit non-residents to distribute material only if she is "used to seeing" the material. Rogers testified as follows:

> "Question: If an organization wanted to use the privatized street or sidewalk in a housing community in order to hold some sort of demonstration, in order to walk back and forth with signs in support of some sort of political position, would they be permitted on the property if they were nonresidents?
>
> "Answer: They could get permission first. And I would say, again, I need it in writing to see the nature or whatever. They need permission first to be on the property.
>
> "Question: Are you in a position – does your position enable you to tell people – to give people permission to come on and picket or demonstrate on housing community property?
>
> "Answer: I'm not sure what you're asking. To picket? I've had people to call to pass out flyers, and asked to have church services. And these are things I'm used to.

"As far as picketing and stuff, I never had that so I'm not familiar with it.

"Question: Let's talk about what you're used to.

"Answer: Okay.

"Question: With situations such as those, people wanting to pass out flyers for example, or hold church related meetings, do they have to come to you for permission?

"Answer: Yes.

"Question: Then do you give permission?

"Answer: Depending on the circumstances, sometimes it's granted, yes.

"Question: Sometimes you do and sometimes you don't?

"Answer: Correct."

Based upon the record before this Court, Rogers has the unfettered discretion to determine not only who has a right to speak on the Housing Authority's property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. She may even prohibit speech that is political or religious in nature. However, a citizen's First Amendment rights cannot be predicated upon the unfettered discretion of a government official.

We recognize that the Court of Appeals decided this case on the basis that the Housing Authority's private streets constitute a public forum and that the Housing Authority's efforts to regulate speech in that forum contravene the First Amendment. In view of our limited

holding, we need not resolve this issue and, thus, we will vacate that portion of the judgment of the Court of Appeals, and we will reserve consideration of this issue for another day. Also, we need not, and we do not, express any views regarding the litigants' remaining contentions.

IV.

We will affirm the judgment of the Court of Appeals on the narrow basis that the Housing Authority's trespass policy is overly broad and that Hicks may assert this issue in this criminal prosecution.

Affirmed in part,
vacated in part,
and final judgment.

JUSTICE KINSER, with whom JUSTICE LEMONS joins, concurring in part and dissenting in part.

Today, the majority holds that the trespass policy of the Richmond Redevelopment and Housing Authority (the Authority) is "overly broad and . . . infringes upon First Amendment protections" because the Authority's housing manager, according to the majority, has "unfettered discretion" to determine whether an individual is authorized to be on the Authority's property. The majority reaches this issue by allowing the defendant to make a facial challenge to the Authority's trespass policy. I do not believe that such a challenge is permissible in this case.

A facial challenge to a statute, or in this case, to the trespass policy, can proceed under two different doctrines. "First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law

are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Under the second doctrine, even if a statute is not overbroad (i.e., it "does not reach a substantial amount of constitutionally protected conduct"), "it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

The majority utilizes the overbreadth doctrine to find the trespass policy unconstitutional on its face. Explaining the defendant's standing, the majority states that, "in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible." The majority intertwines its examination of the standing issue and its substantive analysis of the trespass policy, and in doing so, uses its view that the trespass policy grants unfettered discretion to the housing manager to decide who can come onto the Authority's property to support its conclusion that the defendant has standing to make a facial challenge. In other words, the majority does not separate the question of standing from its substantive First Amendment ruling.

To support this finding of unfettered discretion and thus standing, the majority relies upon a line of cases involving prior restraints upon the exercise of First Amendment rights. Each of the cases cited by the majority addressed a statute requiring a license or permit to engage in First Amendment activity. *See, e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769 (1988)

(invalidating ordinance requiring publishers to obtain permit from mayor for placing newsracks on sidewalk); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (invalidating ordinance requiring marchers to seek permission from city commission); *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958) (invalidating ordinance requiring labor unions to seek permit from mayor and city council for solicitation of members); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (invalidating ordinance prohibiting public worship without permit from police commissioner); *Saia v. New York*, 334 U.S. 558, 560-61 (1948) (invalidating ordinance that required operators of loud-speakers and amplifiers to obtain permission from police chief); *Schneider v. State*, 308 U.S. 147, 162-64 (1939) (invalidating ordinance that banned distribution of literature without written permit from chief of police); *Lovell v. City of Griffin*, 303 U.S. 444, 450-51 (1938) (invalidating ordinance prohibiting distribution of literature without first obtaining written permission from city manager).

Because the Authority's trespass policy does not directly regulate activity protected by the First Amendment, but instead limits access to government property, I conclude that these cases are not persuasive authority to justify the defendant's facial challenge to the trespass policy. In using these cases, the majority also assumes that the trespass policy regulates pure speech instead of conduct. This approach allows a facial challenge in this case without directly addressing the admonition of the Supreme Court of the United States that "overbreadth scrutiny has been limited with respect to conduct-related regulation." *New York v. Ferber*, 458 U.S. 747, 766 (1982) (citing *Broadrick*, 413 U.S. 601).

"The traditional rule is that a person to whom a [policy] may constitutionally be applied may not challenge that [policy] on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Id.* at 767 (citing *Broadrick*, 413 U.S. at 610). One exception to this principle is in the arena of First Amendment overbreadth. *Id.* at 768. However, "[b]ecause of the wide-reaching effects of striking down a statute[, or trespass policy as in this case,] on its face at the request of one whose own conduct may be punished despite the First Amendment," the First Amendment overbreadth doctrine has been recognized as "strong medicine" and is employed "with hesitation, and then 'only as a last resort.'" *Id.* at 769 (quoting *Broadrick*, 413 U.S. at 613). As explained in *Broadrick*:

> facial overbreadth adjudication is an exception to [the] traditional rules of practice and . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

413 U.S. at 615. Thus, the Court has held that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770 (quotation marks omitted).

The Authority's trespass policy is found in the "Authorization" given to the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia upon the Authority's public housing property. An individual may be banned from the Authority's property if that individual "is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises." After receiving either written or oral notice that he or she cannot return to the Authority's property, that person may then be arrested for trespass if he or she "either stays upon or returns" to the Authority's property.

By its terms, this policy is directed at conduct, namely trespassing, and not pure speech. *Cf. Cox v. Louisiana*, 379 U.S. 559, 581 (1965) (Black, J., concurring in part and dissenting in part) ("Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited."); *Local 391 v. City of Rocky Mount*, 672 F.2d 376, 379 (4th Cir. 1982) (picketing is a hybrid of speech and conduct). The policy is not aimed at censoring particular groups or viewpoints, or prohibiting individuals from distributing leaflets on the property. Nor is it intended to prevent individuals from associating with friends or family who live in Whitcomb Court. Instead, it seeks to regulate the criminal act of trespassing that violates Code § 18.2-119. In other words, the policy's legitimate sweep prohibits trespassing, an activity that is not protected by the First Amendment.

Because the trespass policy regulates conduct and not pure speech, I conclude that it must be "substantially overbroad" before it can be attacked through a facial challenge, and that whatever overbreadth may exist in the

policy does not meet the threshold of "substantial overbreadth." "The concept of 'substantial overbreadth' is not readily reduced to an exact definition[, but] . . . the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Instead, this is "the paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16. Thus, I find that the defendant does not have standing to assert a facial challenge to the Authority's trespass policy under the "overbreadth doctrine."

Nor do I believe that the defendant can make a facial challenge to the trespass policy under the "vagueness" doctrine. "A [defendant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *accord Parker v. Levy*, 417 U.S. 733, 756 (1974); *but see Morales*, 527 U.S. at 55. The defendant's conduct when he was arrested for trespass clearly violated both the trespass policy and Code § 18.2-119. He had been previously banned from Whitcomb Court and had been given written notice that he was not to trespass on the Authority's property. Nevertheless, he entered upon the property on the day in question. There

can be no question that this conduct was clearly proscribed.

Thus, I conclude that the defendant may only challenge the trespass policy as it was applied to him. Before turning to that issue, I am compelled to point out that, if a facial challenge is to be allowed in this case, it should be analyzed under the framework established by the Supreme Court for deciding when an individual's First Amendment rights have been violated by a denial of access to government property. *See United States v. Kokinda*, 497 U.S. 720, 726-27 (1990).

"[T]he [U.S. Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985). The first inquiry in this analysis is whether the particular activity at issue is speech protected by the First Amendment. *Id.* at 797. If it is, the nature of the forum must then be identified, "because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). The final inquiry is whether the "justifications for exclusion from the relevant forum satisfy the requisite standard." *Cornelius*, 473 U.S. at 797. The defendant agrees that this analytical framework applies in this case, as reflected by his statement on brief that, "[i]n determining whether [the Authority's trespass policy] is

permissible, this Court must first define the areas affected by the regulation."

Returning to the issue regarding the constitutionality of the trespass policy as applied to the defendant, I find that the only constitutional right that the defendant could have been asserting when he entered upon the Authority's property for the purpose of bringing diapers to his son was his right of association under the Fourteenth Amendment. *See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (constitutional protection afforded to freedom of association in two distinct areas: freedom to enter into and maintain certain intimate or private relationships, and freedom to associate for purpose of engaging in protected speech or religious activities). Although the defendant argues that his conviction for trespassing violated his First Amendment rights of speech and association, and his Fourteenth Amendment right of intimate association, he was not engaged in speech or expressive association on the day in question. Thus, I conclude that the defendant's claim must be analyzed under the Fourteenth Amendment rather than the First Amendment. *See Thompson v. Ashe*, 250 F.3d 399, 406-07 (6th Cir. 2001). Consequently, it is not necessary to engage in a forum analysis, as the Court of Appeals did. As I previously explained, the first step in that analysis is whether the particular activity at issue is speech protected by the First Amendment. *Cornelius*, 473 U.S. at 797. When it is not, as in this case, then it is not necessary to determine the nature of the forum.

In determining whether the Authority's trespass policy impermissibly infringes upon the defendant's freedom of association under the Fourteenth Amendment, it is necessary to decide first whether the defendant's

asserted purpose for being on the Authority's property, i.e., to take diapers to his child, involved the exercise of a fundamental right. The Supreme Court has recognized a fundamental right of privacy that includes the freedom to enter into and maintain certain intimate relationships. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (constitutional protection of marriage); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (right to choose whether to bear children); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (right to cohabitate with certain family members); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (parents' right to send children to private school); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (parents' right to have children instructed in foreign language). However, the Court has not characterized the provision of diapers or visitation with family members as the exercise of fundamental rights. *See Thompson*, 250 F.3d at 407. Therefore, the trespass policy as applied to the defendant must be judged under the rational basis test. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997) (when legislation does not burden a fundamental right, it will be upheld "so long as it bears a rational relation to some legitimate end"). Under that standard of review, the trespass policy need only be rationally related to a legitimate governmental purpose, and the Court cannot "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*)).

I conclude that the Authority's trespass policy passes constitutional muster under this test. The undisputed purpose of the policy is to create a safe, drug-free environment for the residents of Whitcomb Court. It cannot be

questioned, in my view, that the prevention of crime in public housing is a legitimate governmental goal. *See Department of Hous. & Urban Dev. v. Rucker*, ___ U.S. ___, 122 S. Ct. 1230, 1232 (2002) (recognizing "reign of terror" imposed by criminal activity in public housing). The policy of banning individuals who are not residents or employees of the Authority, or who cannot demonstrate a legitimate business or social purpose for coming onto the premises, is rationally related to, and advances, the legitimate governmental goal of preventing crime in public housing. Charging individuals with trespass when they enter upon the Authority's property after having been banned, as in the case of the defendant, also advances that goal. It must be remembered that the defendant is challenging his conviction for trespass in this appeal, not his barment from the Authority's property.

Based on the record in this case and for the stated reasons, I conclude that the defendant's arrest and conviction for trespassing did not violate his right of association afforded under the Fourteenth Amendment. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the defendant's conviction.[*]

Because I agree with section III(A) of the majority opinion, I respectfully concur in part and dissent in part.

[*] On brief, the defendant asserts a freedom to "loiter" based on a statement in a portion of *Morales* in which three justices joined, 527 U.S. at 53. He did not raise this specific argument before the trial court and is, therefore, precluded from doing so on appeal. *See* Rule 5:25.