

THE RUTHERFORD INSTITUTE

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INTERNATIONAL OFFICE
CENTRAL AND EASTERN EUROPE
Budapest, Hungary

January 10, 2012

Ms. Melinda B. Peters, Administrator
Maryland State Highway Administration
770 North Calvert Street, C-400
Baltimore, MD 21202

Re: *Flag Memorial in Roundabout*

Dear Ms. Peters:

The Rutherford Institute¹ has been asked by Rhonda Winkler, a resident of Woodbine, Maryland, to intercede on her behalf with the Maryland State Highway Administration (SHA) regarding its agents' inappropriate removal of a small United States flag honoring the military from the grassy median of a roundabout at the intersection of MD 94 and Old Frederick Road in Woodbine.

The Winkler family erected the flag in the traffic circle three years ago as a way of paying tribute to members of the Woodbine community serving in the U.S. military overseas and of welcoming home returning service people. That the flag has been flown from that circle for the past three years, replaced periodically with a new flag provided by the American Legion Gold Star Post 191 in Mount Airy, is undisputed. That the flag has not been a cause for concern, safety or otherwise, over the course of the three years it has flown in the circle, is also undisputed, given that it took three years for it to "com[e] to the attention of SHA District 7 management."² Also undisputed is the fact that flying the American flag on land that is tantamount to a public park, albeit a small one, constitutes clearly protected expression under the First Amendment, a right recognized by the courts.

Thus, we are greatly concerned about the SHA's unwillingness to acknowledge that its agents may have erred in removing the flag, its disingenuous attempts at raising tenuous safety concerns over the display of the flag in the traffic median and, most critically, its recalcitrance in

¹ The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened or infringed.

² "Flag Controversy Spreads Misinformation," Maryland Department of Transportation State Highway Administration, <http://sha.md.gov/NewsDetails.aspx?ID=108>. Accessed on January 9, 2012.

seeking to find an acceptable remedy to a situation that clearly has less to do with safety concerns than it does with saving face.

Frankly, there is no need for such political ploys. SHA officials have already publicly acknowledged that a statewide solution is needed. David Buck, an SHA spokesman, is quoted by the *Baltimore Sun* as saying that “he hopes there is a solution to be found, just as one was found when more and more people began hanging flags from highway overpasses after Sept. 11, 2001, and the administration drafted a policy to allow them to do so. ‘This would have to be a full, statewide policy that would have to apply to more than just roundabouts, but we did get there with overpasses,’ he said.”³ Moreover, SHA’s own statement on its website notes that “SHA would have welcomed the opportunity to support the community’s desire to honor our troops by working with its representatives to find a safe, protected location for our country’s symbol of freedom.”⁴

Furthermore, our analysis of the situation leads us to believe that should the Winklers choose to pursue a legal challenge over their right to display an American flag in the grassy median, they have a number of strong arguments in their favor.

First, the safety concern raised by the SHA—that the flag “posed a safety threat to motorists”⁵—appears to be a flimsy argument and a losing one, at that, especially in light of the fact that the SHA waited three years to raise it as a safety concern. At this point, the burden rests with SHA to prove the safety concern.

Second, the SHA has stated as another reason for the flag’s removal the fact that it “was installed without permit”⁶ and that it reportedly “constituted trespassing on state property.”⁷ By suggesting that the acquisition of a permit would have made the display of the flag acceptable, the SHA essentially acknowledges the grassy median to be a forum, which moves the discussion to a different level altogether. A citizen’s right of access to public property for purposes of engaging in expression protected by the First Amendment is governed by a forum analysis. Depending on the nature, history and public policies connected with the public property, that property can be considered either a traditional, designated or non-public forum. In this case, the traffic circle is not technically a designated forum because it has not been set aside for First

³ Kevin Rector, “Removal of American flag from Woodbine traffic circle sparks patriotic rally,” *Baltimore Sun* (Dec. 27, 2011), http://www.baltimoresun.com/explore/howard/news/community/ph-ho-cf-flag-rally-1229-20111227_0_4161766_full.story. Accessed on Jan. 9, 2012.

⁴ “Flag Controversy Spreads Misinformation,” Maryland Department of Transportation State Highway Administration, <http://sha.md.gov/NewsDetails.aspx?ID=108>. Accessed on January 9, 2012.

⁵ “Flag Controversy Spreads Misinformation,” Maryland Department of Transportation State Highway Administration, <http://sha.md.gov/NewsDetails.aspx?ID=108>. Accessed on January 9, 2012.

⁶ “Flag Controversy Spreads Misinformation,” Maryland Department of Transportation State Highway Administration, <http://sha.md.gov/NewsDetails.aspx?ID=108>. Accessed on January 9, 2012.

⁷ Editorial, “State should find a way to allow flags in traffic circles,” *Baltimore Sun* (Jan. 5, 2012), http://articles.baltimoresun.com/2012-01-05/explore/ph-ho-cf-editorial-0105-20120103_1_american-flag-new-flag-flag-controversy. Accessed on Jan. 9, 2012.

Amendment activities by any particular rule or policy. Thus, it would be either a traditional or non-public forum.

One can make the argument that the traffic circle constitutes a traditional public forum, which includes parks, streets and sidewalks. Depending on the size of the circle and its use, it could be considered like a park. However, this particular circle in question is more likely to be considered within the street and highway right-of-way, which some cases have found to fall within the classification of streets and therefore constitute traditional public forums. In fact, The Rutherford Institute recently obtained the acquittal of a man charged with trespassing because he was carrying a protest sign while in a public highway right-of-way. Institute attorneys pointed out in that case that highways, streets and their accompanying rights-of-way are places where persons are presumptively entitled to engage in activities protected by the First Amendment.⁸ Another recent case from Texas held that sidewalks and other areas within public rights of way constitute traditional public forums.⁹

Within a traditional public forum, a regulation on speech must be content neutral and must be narrowly tailored to serve a significant government interest. Time, place and manner regulations are allowed in traditional public forums. In this case, the state of Maryland is asserting a public safety interest in the restriction on the flag. However, it is unreasonable to suggest that the safety of any person was jeopardized by this particular display. Taking into consideration the particular location and placement of the flag in question and the fact that the flag has not triggered any dangerous situations in the past three years, safety concerns cannot justify its outright removal.

In conclusion, the members of the Woodbine community are committed to maintaining a patriotic display at this location as long as Americans are fighting overseas. Such displays are clearly protected by the First Amendment to the United States Constitution and interference with them must comport with applicable constitutional norms. As public servants of the state of Maryland, you have a duty to not only concern yourselves with the safety of Maryland residents but more importantly you must ensure that your actions comply with state and federal laws.

According to your statement, SHA is reviewing its statewide policy regarding the specific placement of fixed objects in roundabouts:

SHA is considering how to accommodate these types of community requests while maintaining the safety of the traveling public. After 9/11, SHA established parameters for flag displays on bridges, which was a popular activity at the time. Regarding the specific placement of fixed objects in roundabouts, SHA is completing an assessment and reviewing its policy statewide. A number of

⁸ "Addressing free speech principle," *The Daily Progress* (July 25, 2011), <http://www2.dailyprogress.com/news/2011/jul/25/addressing-free-speech-principle-ar-1195463/> (accessed January 9, 2012)

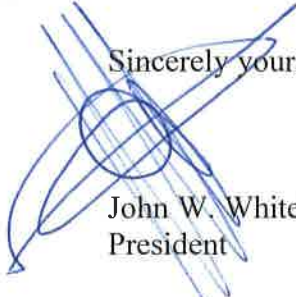
⁹ *Lauder, INC. v. City of Houston, TX*, 2010 WL 460437 (S.D. Tex. 2010).

factors influence the suitability of installing an object in the center of a roundabout including the width of the roundabout median, the approach speeds along the roads leading to the roundabout, as well as the distance of the travel lane to the median.¹⁰

The need for a policy permitting the patriotic display of flags in the traffic medians has been widely acknowledged. However, such a state-wide assessment will take time, and the members of the Woodbine community are seeking an assurance that the flag they have flown for the past three years will not continue to be absent from the circle for much longer.

Thus, until the SHA is able to come to agreement on a statewide policy regarding flags in the traffic medians, we suggest that the agency assume the nominal maintenance and oversight responsibilities for re-installing the flag in the median of the roundabout at the intersection of MD 94 and Old Frederick Road in Woodbine. Doing so would thereby avert any agency concerns about non-governmental workers who are not clothed in traffic vests entering the grassy area in the absence of traffic control.¹¹ Alternatively, the agency can also put this matter to rest and restore its good standing with the people of Woodbine by granting the Winkler family an appropriate permit under § 8-646(b)(1) that would enable them to replace and maintain this patriotic display.

In the hopes that the SHA will demonstrate a sincere willingness to work with the community in devising a timely and suitable resolution to this issue, we request the courtesy of a response by Friday, January 20, 2012.

Sincerely yours,

John W. Whitehead
President

cc: Governor Martin O'Malley
Beverley K. Swaim-Staley, Transportation Secretary

¹⁰ Lauder, Inc. v. City of Houston, TX, 2010 WL 460437 (S.D. Tex. 2010).

¹¹ Kevin Rector, "Removal of American flag from Woodbine traffic circle sparks patriotic rally," *Baltimore Sun* (Dec. 27, 2011), <http://www.baltimoresun.com/explore/howard/news/community/ph-ho-cf-flag-rally-1229-20111227,0,4161766,full.story>. Accessed on Jan. 9, 2012.