

Washington State Farmers Market Association FAQ on Expressive Activity / Free Speech at Farmers Markets

May 19, 2016

FREQUENTLY ASKED QUESTIONS

The First Amendment to the United States Constitution and the Washington State Constitution protect most forms of speech and assembly made in a public forum, such as parks or sidewalks traditionally open to public speech and debate. (The speech and assembly rights under the Washington constitution are at least as protective as the federal constitution. This FAQ will primarily cite the federal constitution for sake of readability.) That means government cannot discriminate against individuals based on what they say, although government can impose restrictions to protect “compelling interests,” such as safety and health, as long as those restrictions are as narrow as possible to serve those interests. If government violates an individual’s First Amendment rights, it could be subject to a lawsuit claiming that the government violated the speaker’s free speech or assembly rights.

Generally speaking, a private individual or group cannot be liable for violating a speaker’s civil rights because the person or group is not the government. However, the private individual or group may become liable for violating one’s First Amendment rights if the individual or group is closely aligned with government officials. The fact that an individual or group is using a public forum may also be a consideration. Thus, legal questions of whether and to what extent a farmers market should be mindful of First Amendment concerns must take into consideration the location of the market and how closely market organizers work with government officials.

Even if a farmers market believes it could not be liable for a First Amendment violation because it is a private group on private land, market organizers may choose to be as accommodating as reasonably possible because they believe in speech rights and they do not want to find themselves in expensive litigation.

There are no cases in Washington or the federal courts addressing what restrictions a farmers market can impose on an individual’s speech rights. In addition, there are many variations as to who runs farmers markets and where they are located. As a result, this FAQ can provide only broad information and legal principles. Please consider this FAQ to be a general guideline for free expression policy for your farmers market and not specific legal advice. Farmers markets should consult with legal counsel if they have specific concerns based on their unique circumstances.

1. Are farmers markets bound by or required to follow the free speech protections in the First Amendment?

A market may be liable for violating free speech rights if that market is considered a “state actor.” There are no cases in Washington or the federal courts addressing whether a farmers market is a state actor. If a market were sued, the court’s analysis of whether a market is a “state

actor” would consider who runs the market and who owns the land where the market is held. (FAQs Nos. 2 and 3 discuss the location factor in more detail.) The answer also depends on how involved governmental entities (including police officers and all other city, county, state, or federal employees) are with the market.

Are farmers markets run by governmental entities on publicly owned land considered “state actors”?

Probably. Markets run by governmental entities on publicly owned land are likely considered “state actors.” The rules for traditional public forums likely apply to these markets.

Are farmers markets run by private entities “state actors”?

It depends. Markets run by private entities on privately owned land with little or no involvement by the government are likely not “state actors.” First Amendment obligations likely do not apply to these markets.

Markets run by private entities on either publicly owned land or privately owned land with a lot of government involvement may be considered “state actors.” Whether a market is considered a “state actor” depends on how much involvement the government has with the market. The more involvement the government has with a particular market, the more likely it is that market will be considered a “state actor.”

A market run by a private entity may be considered a “state actor” if:

- It appears the government is influencing or exerting control over the decisions of the market manager in a “coercive” manner.
- It appears the government is encouraging the market manager to run the market in a certain way.
- It appears the government and the market manager are “jointly” running the market together.
- It appears the market is performing a “public function,” or performing a task that is traditionally performed by the government.
- It appears the market is exercising control over police officers or other government employees.
- It appears there is significant “entwinement” between the market and the government. The government and a market may be “entwined” if government employees are members of the private entity that is running the market, and these employees work on market matters during work hours or while wearing government-issued uniforms. They may also be “entwined” if the government provides significant financial support to the market.

In general, a market will not be considered a “state actor” if a private entity independently controls the operation of the market, and the government (including police) independently controls traditional government functions, such as law enforcement and safety.

Is a farmers market a “state actor” if police officers are called?

A market will not automatically be considered a “state actor” if a market manager merely calls the police to have them enforce laws (including trespass laws). However, a market may be considered a “state actor” if the market attempts to use the police to enforce the market’s own policies and regulations.

2. How does the location of the market affect the analysis?

Market organizers may be able to implement rules regulating speech inside a market that are different from the rules for speech outside the market. The level of legal protection for speech, and thus a market’s ability to regulate speech, depends in part on the location of a specific market.

Traditional public forums

The areas with the highest level of First Amendment protections are called “traditional public forums.” Quintessential examples of traditional public forums are public streets, public sidewalks and public parks. The open nature of these locations is said to make them particularly conducive to First Amendment activity. But courts have been very reluctant to expand the category of traditional public forums beyond these three examples. So if a piece of property is to be considered a traditional public forum, it must be very similar to a public street, sidewalk and park.

To be a traditional public forum, a property must be open to general pedestrian passage and must have the physical characteristics of a public thoroughfare or park. General pedestrian passage is a key factor. The more access granted to pedestrians, and the more a property blends into the larger automotive, bicycle, or pedestrian transportation grid, the more likely it is to be a traditional public forum. A property is even more likely to be designated as a traditional public forum if the property has a history as a social gathering place and a site of expressive activity, which suggests that the government has permitted or acquiesced in broad public access to the property.

Markets that take place in a traditional public forum may still be able to impose rules restricting speech if the market is run by a private entity. The fact that a market is located in a traditional public forum, however, is one consideration (but not a controlling factor) on the question of whether the market is a state actor.

Non-public forums

Areas with the lowest level of First Amendment protections are called “nonpublic forums.” A property may be a nonpublic forum when there is some separation from acknowledged public areas that indicates that the separated property is a special enclave, subject to greater restriction. This separation may take many forms. There may be physical barriers or boundaries or a change in paving or landscaping. There also may be signs that announce to pedestrians that they are

about to enter a private area. Similarly, when streets and sidewalks simply enable access to an isolated property, they are more likely to be nonpublic forums.

Markets that take place on public school grounds or in public buildings have more flexibility to regulate speech activities. In addition, markets that take place on private property, such as private school grounds, have broader authority to regulate speech.

3. Parking lots are often used for farmers market locations. Are parking lots categorized as traditional public forums, similar to streets, sidewalks, and parks? Are there any special speech considerations for markets held in parking lots?

If the market is located in a public parking lot, then there will be a greater ability to regulate speech activities because public parking lots are likely to be nonpublic forums. Some courts have held out a small possibility of heightened speech protection if the government makes a specific effort to designate a public parking lot as a public forum, but that is unlikely in the case of a weekly farmers market. Similar to other private property, markets held in private parking lots will have broad authority to regulate speech.

4. If a market pays to lease space in a traditional public forum, can it control the activities that occur in the space however it wants? Is the law for markets similar to the law for parades according to which the organizer that holds the parade permit is entitled to control the message and exclude those with whom it does not agree?

Once a property is designated as a traditional public forum, its protected status is not easily removed. The mere fact that a market obtains a permit or license or pays a fee to lease space in a traditional public forum does not transform that forum into a nonpublic one, as long as the market remains free and open to the public. To have greater latitude to restrict First Amendment activities, a market would have to obtain an exclusive license to the property and charge admission or otherwise select who enters the market. Even then, the market could not control First Amendment activity in any way it pleased.

It is true that the First Amendment allows a parade organizer to exclude from participation any group that expresses a message with which the parade organizer does not agree, but this rule does not apply to farmers markets. Courts created this rule specifically for parades because a parade is considered an inherently expressive activity and parade organizers have a right to control their own message. A market is not an inherently expressive activity. Moreover, there is a difference between participating in an event and merely being present in the same location. Merely being present at a public event does not make one part of the organizer's message for First Amendment purposes.

5. Is it OK to have special rules for certain districts like Pike Place Market or other areas that have special considerations (such as special rules for buskers)?

The location of a market in a special district, such as the Pike Place Historic District, will generally not change the legal protection given to speakers at that market. Thus, because a sidewalk is a traditional public forum, it is given the same legal protections, whether it is in the Pike Place Historic District or not. But if buskers or other individuals commonly engage in speech at a market, then reasonable “time, place and manner” restrictions may be allowed. For more information on time, place and manner restrictions, see FAQ No. 7.

6. “Freedom of speech” doesn’t apply to all types of speech. What is the difference between protected speech or expression and other types of expression?

Protected speech has a political, religious, philosophical, or other similar message. But some types of expressive activity are not protected at all. They include obscenity, “fighting words,” defamation, and “true threats.” Another type of expressive activity is only partly protected: commercial speech. Farmers markets may take action to stop unprotected speech and may regulate partly protected speech.

The law does not protect **obscenity**, which includes pornography. The legal definition of “obscenity” is complicated, but a lot of the time, people “know it when they see it.”

The law does not protect **fighting words**. “Fighting words” are words that are likely to start a fight. They may be offensive or involve insults or cursing.

The law does not protect **true threats**. A “true threat” communicates the intent to physically harm someone. True threats can include intimidation and threats of violence.

The law only partly protects **commercial speech** like advertising. Commercial speech communicates information about the availability or prices of products and services. The purpose of commercial speech is making a profit. If someone is speaking in support of a particular political or religious view and is also selling shirts or books about that view, the speech would probably not fall in the commercial speech category because the main goal is communicating a viewpoint. Commercial speech also does not include asking people for donations or handing out flyers advertising an event.

7. Can market managers ban offensive speech, such as foul language or displays of aborted fetuses, especially when children are present and vendors sell food?

Both the federal and Washington Supreme Courts have recognized the need to protect the psychological well-being of children as a “compelling government interest” that may allow restrictions on speech. The need to protect children is particularly a concern when the children are in a situation where they cannot avert their eyes or cover their ears to avoid the speech. However, even if protecting children is a recognized justification, any limits should be no broader than necessary to protect that interest. For example, a ban on offensive speech could run afoul of the First Amendment if it were imposed at a time when children were not present or children were not likely to be exposed to the speech.

Protecting vendors who sell food is not likely to be a compelling enough reason for placing limits on one's First Amendment rights under the circumstances described in this scenario.

8. In what ways may a market regulate speech or expressive activities?

Speakers must abide by criminal statutes, such as prohibitions on disorderly conduct, public nuisance, littering, and aggressive begging. The market can therefore take action, such as calling the police. The market can also enforce its own rules such as limits on noise volume, bans on amplified equipment, restrictions on sign size, rules aimed at avoiding intentional and significant blocking of pedestrian or vehicle traffic, and restrictions on advocacy of illegal causes. The courts have found these to be reasonable "time, place and manner" restrictions. The key is that the restrictions described above are not aimed at the message or content of the speech: they are called "content-neutral" restrictions. A market should be very cautious when taking action to limit speech based solely or primarily on the speaker's message, unless the speech is unprotected, as described in FAQ No. 5.

9. Can a farmers market limit free speech activities to a free speech "zone" or approved booth? Can market managers legally insist that stationary petition gatherers remain at a market entrance rather than stand in the middle of market?

Courts are more likely to approve a speech zone than other speech restrictions as long as the speech zone offers the speaker a reasonable opportunity for communication. In other words, a court can uphold a speech zone or booth if the speaker retains the ability to communicate effectively. Thus, a speech zone should be well integrated into the market. Even a market with limited space should provide a location in an area with significant pedestrian traffic. A speech zone outside the market is unlikely to satisfy the requirement of a reasonable opportunity for communication. If a market were to create a speech zone, it should do so on the basis of a significant concern, such as crowd control, rather than a lesser concern, such as aesthetics.

A market entrance might provide a speaker with the ability to communicate effectively. Whether the market entrance does, in fact, provide a reasonable opportunity to communicate will depend on variables such as the market's size and layout. The courts have not laid out a definitive rule approving or disproving speech zones at market entrances.

10. If one candidate is campaigning at the market, do we have a duty to give all candidates "equal time"? If one person is speaking out in support of a cause, must we give the opposing side "equal time"?

No. The law does not require "equal time" for competing viewpoints.

11. Does a farmers market have to allow a person to stand in front of one particular vendor booth with a sign?

A person holding a sign generally has the same rights as others who attend a farmers market, so the market's policy on lingering or standing in front of a vendor booth should be enforced consistently. For example, if the market's policy is to encourage attendees to move through the

market, and market organizers discourage people from lingering too long in front of a particular vendor booth, the market would have a basis for requesting that the sign-holder move to another location.

12. How can market managers legally respond to aggressive or unruly behavior by people expressing their First Amendment rights?

If a person is violating the law, market organizers should contact law enforcement. If a person is violating a market rule, organizers should contact the individual and clearly give notice about the rule that has been violated and request that the conduct stop. If a person is going to be banned from a market for a prolonged period of time, market organizers should be aware of legal requirements for “notice” and an “opportunity to be heard” to contest the banning. Finally, it is extremely important that market organizers enforce all rules consistently, and not single out individuals or groups based on their message.

13. Is there any safe language that market managers can use when discussing First Amendment rights with protestors or in other situations that raise free speech and assembly concerns?

The courts have not recognized any safe or specific *legal* language that should be used. If the market is making contact based on content-neutral concerns such as crowd control, market organizers should explain that concern and avoid any discussions about the message or speech. Similarly, if the contact is based on a concern about unprotected speech such as obscenity or fighting words, those specific concerns should be the focus of the conversation. Ultimately, the best way to approach an individual or group is very fact-specific and will require a best judgment call by market organizers.

14. What if a particular vendor is the target of a protest? Is there anything the market can do to help the vendor protect its sales?

As discussed above, if the protest is violating criminal laws, market managers can call law enforcement. If the protest causes a significant blocking of pedestrian or car traffic, the market managers can request that the protestors move so that the walkway or street is clear. Additional content-neutral rationales are discussed above in FAQs Nos. 8 and 9. However, asking protestors or the person distributing flyers to leave or stop because of their message or for the sole reason of protecting vendor sales is more likely to run afoul of the First Amendment.

15. What are the rules for commercial speech? For instance, if a store has employees walk through the market handing out flyers promoting a sale, is it legal to request that they stop?

Commercial speakers must follow criminal laws and reasonable, content-neutral restrictions. So, for example, littering might be an issue, and littering laws may be enforced. If the individual is overly aggressive or causes a problem with traffic, such rules may be enforced. Because commercial speech receives some protections under the First Amendment, such speech cannot be banned solely because it is commercial in nature. There may be other permissible limitations,

based on the particular circumstances. There are no hard-and-fast rules on how or when commercial speech may be restricted in a market-like setting.

16. Is initiative or referendum signature gathering treated any differently than other forms of expression?

Yes, the Washington State Constitution provides special protection to initiative or referendum signature gathering. This is protection beyond that in the federal Constitution. In Washington, people generally may gather signatures for initiatives or referendums at private shopping malls. This is because private malls are generally open to the public and they are places where people tend to congregate. A Washington court may find that a farmers market is similar to a private shopping mall in these respects.

A market manager may wish to give greater leeway to such signature gatherers. But a market manager should be able to impose reasonable restrictions if signature gathering interferes with the functioning of the market by, for example, blocking pathways into or out of the market (“ingress and egress”) or by heavily restricting the free flow of traffic in the market. It is even possible that a farmers market could limit signature gathering to a designated area within the market, so long as doing so would not unreasonably restrict someone’s ability to gather signatures.

Reminder: Please consider this FAQ to be a general guideline for free expression policy for your farmers market and should not be construed to be legal advice. Please consult your own attorney should any specific questions arise.

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