

Our town has received a request from a private group to erect a nativity scene in front of the town hall. How should we handle the request?

Though not strictly prohibited under the law, nativity scenes, menorahs, and other religious symbols erected by municipalities or placed on municipal property by private groups during the holiday season run the risk of violating the Establishment Clause in the First Amendment of the United States Constitution. The Establishment Clause may be violated if the display does not have a secular purpose, its principal or primary effect advances or inhibits religion, or the action fosters an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In determining whether a display advances religion, the following variables have been considered: the location of the display; whether the display included a larger setting with other nonreligious items; the religious intensity of the display; whether it is shown in connection with a secular holiday; the degree of public participation in the ownership and maintenance of the display; and the existence of disclaimers of public sponsorship of the display. The test applied by a court is whether the display would convey the message of government endorsement of religion to a reasonable observer. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

There have been two federal cases involving a Vermont municipality and the display of a religious holiday symbol. In both cases, the display was found to violate the Establishment Clause. In the first, *Kaplan v. Burlington*, 891 F.2d 1024 (2d Cir. 1989), the court held that an unattended, solitary display of a menorah in the park in front of the Burlington City Hall violated the Establishment Clause. In the second, *Chabad-Lubavitch of Vermont v. Burlington*, 936 F.2d 109 (2d Cir. 1991), parties sought a permit to place a menorah alongside a secular display in the same Burlington park. The court noted that the viewer could not view the menorah and the secular displays as a whole because they were not intended to appear as a single display. Given the park's close association with the seat of city government, the court held that granting the permit would have conferred state approval on a religious sect.

Nativity scenes, menorahs, and other religious holiday symbols, when displayed in a larger setting with secular holiday decorations, may not run afoul of the Establishment Clause, so long as the overall context of the display is secular. However, if the symbol stands alone, then a court may likely conclude that the display constitutes a governmental endorsement of religion in violation of the Establishment Clause. Municipalities are cautioned that Establishment Clause analysis is fluid and always depends on the specific facts of the case and the context in which the symbols are displayed. The law remains unsettled and officials concerned about a request to display a holiday religious symbol on municipal property are well advised to consult their municipal attorney before acting on the request.

- *Jim Barlow, Attorney, VLCT Municipal Assistance Center*

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