

**ASK THE LEAGUE, DEC. 2014**

**Should we allow a holiday display on town property?**

Before allowing a holiday display on town property, a town should consult with its attorney. Depending on the circumstances, the use of town property for a holiday display may have significant legal and political implications. When a town permits the erection of symbols or messages that are religious in nature, the town may be violating the Establishment Clause of the U.S. Constitution. The Establishment Clause, which is part of the First Amendment, states that government “shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” This is commonly referred to as the constitutional “separation between church and state.” The Establishment Clause forbids government from supporting or preferring one religion over another and from supporting religion over irreligion (and vice-versa).

In a leading case on the subject, the U.S. Supreme Court declared that the Establishment Clause is violated by a display of holiday symbols if that display does not have a secular purpose, if its primary effect advances or inhibits religion, or if the action “fosters an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Unfortunately, the U.S. Supreme Court has not created a “bright-line test” to assess the constitutionality of holiday displays. Instead, the Court’s analysis in each case has been fact-dependent and fluid. It is therefore difficult to predict whether any future holiday display will pass muster. By looking at past cases we can at least see that the Court has allowed displays where there is secular as well as religious content and where the display is created or implemented by a private entity rather than the government. The Court’s concern in these cases has been whether a reasonable observer of the display would believe that the display constituted an “endorsement” of religion by the government.

Context is important. The display of a nativity scene, for instance, has been held to be constitutional when it is presented in the context of other symbols that are not overtly religious such as a Santa Claus figure or a banner reading “Seasons Greetings.” *Lynch v. Donnelly*, 465 U.S. 668 (1984). In *Lynch*, the Court reasoned that, although the other symbols were traditionally associated with Christmas, they did not have an overt religious significance and therefore the display was not entirely religious. Context was also important in the case of *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), where the display of a nativity scene without any other symbols was found unconstitutional. In the *Allegheny* case, the nativity scene was located inside a county courthouse and included a banner stating “Gloria in Excelsis Deo!” (“Glory Be to God in the Highest!”).

Two cases against the City of Burlington have also turned on the issue of context. Both cases arose when a private party sought to erect a menorah in Burlington City Hall Park. In both instances the Court ruled that the City’s permission to display an “unattended, solitary religious symbol in City Hall Park” was tantamount to the “imprimatur of state approval on religious sects

or practices.” *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir.1989), *c.f. Chabad-Lubovitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991).

In addition to the legal considerations involved in these situations, the town should also be sensitive to local sentiment and citizen expectations when considering holiday requests. Even if a particular display seems to be entirely secular – and, therefore, constitutional – it may still be unwelcome in the community. This was the case in Charlotte when the light poles outside the school were decorated to look like candy canes. Despite the fact that candy canes are not overtly religious symbols, some residents complained that the display should not have been allowed by the town.

Lastly, the town should be aware that anything that occurs on town property sets a precedent for future use. Permitting one group to create a display on town property raises expectations that other requests will be permitted. Therefore, before granting any particular request, the town may want to create a plan or policy for how it will manage all such requests.

Sarah Jarvis, Staff Attorney II  
Municipal Assistance Center