

MEMORANDUM

TO: Mayor Michael Foley

FROM: Mark A. Bower, Esq.; Paige E. Eggleston, Esq.

RE: Legal Opinion – Holiday Decorations and Municipal Property/Resources

DATE: November 6, 2023

You requested a legal opinion regarding whether the City is permitted to (1) place secular displays on public property; (2) place non-denominational seasonal lights on municipal property in recognition of the holiday season; and (3) whether the City may either use taxpayer funding for such materials, or is required to have outside organizations fund such items.

Generally, the Establishment Clause of the U.S. Constitution prohibits the City from displaying materials as a form of “government speech” that would reasonably be perceived to be an endorsement of a religion; secular holiday displays are generally not considered to trigger an Establishment Clause violation. There are circumstances where religious displays may be deemed constitutionally permissible, but determining this permissibility is heavily fact-specific and we advise caution in assessing whether to do so. Although the placement of secular holiday decorations and lights may be permissible, the City should also exercise caution with respect to use of City financial resources to ensure that such resources are not used in connection with materials that may be deemed religious in nature.

These questions are further discussed below.

Displays and Non-Denominational Lights

A statute or practice, should it relate to religion, is permitted under the Establishment Clause of the U.S. Constitution (part of the First Amendment) provided that it has (1) a secular (non-religious) purpose; (2) neither promotes nor inhibits religion in its principal or primary effect; and (3) does not foster an excessive entanglement with religion. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

Municipal Buildings

As the cases discussed below suggest, secular holiday displays have generally been considered constitutionally permissible decorations on governmental property. A Christmas tree display, for example, is considered a secular symbol. See *County of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989) (citing *American Civil Liberties Union of Illinois v. St. Charles*, 794 F. 2d 265, 271 (7th Cir. 1986), cert. denied, 479 U.S. 961 (1986)). However, whether potentially religious displays violate the Establishment Clause is both complicated and fact-specific. The U.S. Supreme Court has analyzed this question in two cases, including *Lynch v. Donnelly* and *County*

of *Allegheny v. ACLU*. These cases focus on whether displays may be considered endorsements of a particular religion, thereby violating the Establishment Clause. Thus, a municipality would want to consider the type of display, the extent of its religious significance, the location and placement of such decorations, and whether additional decorations exist so as to determine whether displays are constitutionally permissible.

In *Lynch*, the City displayed figures and decorations associated with Christmas, including a Santa Claus house, reindeer pulling a sleigh, candy-striped poles, a Christmas tree, carolers, and – at issue in the case – a crèche (nativity scene). *Lynch v. Donnelly*, 465 U.S. 668 (1984). All display items were owned by the City. In the Court’s majority opinion, the Supreme Court held that notwithstanding the religious significance of the crèche, its appearance – which the Court described to be a passive symbol – in the display did not violate the Establishment Clause. The Court specifically did not find that the record demonstrated sufficient evidence to establish that the inclusion of the crèche constituted subtle governmental advocacy of a religious message.

By contrast, the Supreme Court found that the placement of a crèche *did* violate the Establishment Clause in *County of Allegheny v. ACLU*, 492 U.S. 573, 580 (1989). In that case, the County allowed a Catholic organization to display a crèche on the grand staircase inside the main area of the county courthouse; the crèche included a banner that read, “Gloria in Excelsis Deo!” Santa Claus figures and additional Christmas decorations were placed elsewhere in the Courthouse. Another display outside an office building jointly owned by Pittsburgh and the County included a 45-foot Christmas tree, 18-foot menorah for Hannukah, with a sign articulating that the City salutes liberty during the holiday season. Neither the crèche nor the menorah in this case were owned by a governmental entity. In the Court’s majority opinion, the Supreme Court held that the crèche display violated the Establishment Clause. Six members of the Court agreed that the menorah display did not advance religion so as to violate the Establishment Clause, but were unable to agree on an opinion as to this issue.

There is another case worth mentioning involving the Town of Somerset (Massachusetts), which decorated the outside of Town Hall with holiday lights, as well as a wreath, Christmas tree, plastic Santa Claus, and a crèche at the center. See *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677 (D. Mass. 1998). The U.S. District Court for the District of Massachusetts found that the decorations violated the Establishment Clause because of the centrality of the Nativity scene, which it found to convey that the Town officially supports Christianity.

Using either a nativity scene or a menorah as an example, if the City were to use such a display as a standalone decoration at City Hall, this display alone would likely violate the Establishment Clause. Whether the inclusion of multiple symbols of this kind is permissible is fact-specific; we would generally advise against inclusion of either a singular religious display or multiple religious displays when either constitutes government speech.

Traditional Public Forum

The cases previously referenced concern instances of governmental speech and, relatedly, the Establishment Clause. Note, too, that where public property constitutes a

“traditional public forum,” speech may potentially be considered private, rather than governmental. Where private speech is at issue, protections related to Free Speech and the Free Exercise Clause are implicated. The Supreme Court said in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995), that religious expression does not violate the Establishment Clause when the speech is both purely private and occurs on either traditional or designated public forum that is publicly announced and open to all on equal terms. In that case, a state-owned square surrounding the statehouse in Columbus was accessible for public activities, and in one month, the state received separate permit requests for a Christmas tree lighting, a menorah lighting, and the placement of a KKK cross. The Capitol Square Review denied the KKK’s permit request, and conceded that its doing so was because its content was religious, and in an effort to avoid an official endorsement of Christianity. Ultimately, the Supreme Court articulated that the state cannot ban all private religious speech from a public square or discriminate against it by requiring religious speech alone to disclaim public sponsorship.

Non-Denominational Lights

In considering the principles from the case law discussed above, non-denominational lights on municipal property that display secular messaging (Christmas trees, snowflakes, dreidels) would be considered constitutionally permissible and would not violate the Establishment Clause.

Use of Taxpayer Funding

According to Maine Municipal Association guidance, if a nativity scene or other religious display is publicly sponsored, meaning that it was displayed at the government’s expense, then it violates the Establishment Clause unless accompanied by traditional secular symbols. MMA further notes that, if a nativity scene or other religious display is privately sponsored, meaning that it is displayed at private expense, it must be allowed on public property that is considered a traditional public forum (*i.e.*, parks, common public space). The limitation of religious expression in a public place where secular expression is otherwise allowed would be considered a violation of the Free Exercise Clause.

Notwithstanding this guidance, if displays and/or lighting is intended to be financially provided by the City, we would advise ensuring that such items are objectively secular in nature.

Conclusion

Generally, the City’s placement of secular decorations and lights during the holiday season is constitutionally permissible on municipal property. To the extent that any decorations may be viewed or perceived as religious, we advise the City to (1) refrain from the display of a sole and singular religious display on property that is not a “traditional public forum”; (2) refrain from the display of multiple religious displays on property that is not a traditional public forum, absent a fact-specific legal review; (3) consider whether the placement constitutes government speech or, alternatively, private speech in a traditional public forum; and (4) refrain from using taxpayer funds toward decorations or displays that may be considered religious.