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MEMORANDUM

To: Mayor and City Council

From: William F. Riley, Jr., Assistant City Attorney

Date: October 3, 2019

Subject: Policy to define holiday displays on public ground for the City of Dunwoody.

ITEM DESCRIPTION

Policy to define holiday displays on public ground for the City of Dunwoody.

DISCUSSION

State of the Law on Holiday Displays

There are two principal Supreme Court decisions concerning the display of religious symbols as holiday displays on public grounds. The Court in both cases has stated that determining the constitutionality of such displays involves a fact intensive examination. "Each government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 695 (1984)(O'Connor, J. concurring). Generally, courts will look at the particular physical setting of the holiday displays and evaluate the message the government practice communicates. If the display's context viewed by a reasonable observer tends to send the message that the government endorses religion, then the display violates the Establishment Clause.

Lynch v. Donnelly, 465 U.S. 668 (1984):

In *Lynch v. Donnelly*, the U.S. Supreme Court considered whether the inclusion of a crèche in a municipality's Christmas display was a violation of the Establishment Clause. This case involved the city of Pawtucket, Rhode Island, which owned a crèche and included it as part of an overall, elaborate Christmas display on the grounds of a park owned by a non-profit. The city's display included a depiction of Santa, reindeer, a Christmas tree, carolers, cut out figurines, and candy-stripes poles, in addition to the nativity scene.

In a 5-4 ruling which has spawned much discord, the Supreme Court held Pawtucket's annual Christmas display did not violate the Establishment Clause. The Court found that the display passed constitutional muster under the *Lemon* test. The Court reasoned, “the display is sponsored by the City to celebrate the Holiday and to depict the origins of the Holiday.” 465 U.S. at 681. The Court determined these to be legitimate secular purposes. The Court also determined the crèche included in the overall display did not impermissibly advance religion. “. . . [D]isplay of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums.” *Id.* at 683. Finally, the majority of the Court found no excessive government entanglement with religion because of minimal costs associated with the assembly and dismantling of the crèche each year. The Court further stated that “[T]here is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche. No expenditures for maintenance of the crèche have been necessary. . . .” *Id.* at 684.

Notably, Justice O'Connor wrote a concurring opinion, in which she discussed the “endorsement test.” Government endorsement or disapproval of religion is unconstitutional. She stated, “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Id.* at 688.

Justice Brennan wrote the dissent, joined by Justices Marshall, Blackmun and Stevens. He rejected the majority's conclusion that the city's display passed the *Lemon* test. He stated, “[n]othing in the history of such practices or the setting in which the City's crèche is presented obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith.” *Id.* at 695. He argued the display had no purpose other than to 'Keep Christ in Christmas,' and had the effect of publicly recognizing the beliefs embodied in the crèche. He continued, “[i]n the absence of any other religious symbols or of any neutral disclaimer, the inescapable effect of the crèche will be to remind the average observer of the religious roots of the celebrations he is witnessing and to call to mind the scriptural message that the nativity symbolizes.” *Id.* at 713.

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989):

In *Allegheny v. ACLU*, the Supreme Court considered whether two recurring holiday displays on government property were constitutional. The first display at issue was a crèche, which was prominently displayed on the “Grand Staircase” of the Allegheny County Courthouse. The second display, located outside the City-County building, included a menorah, a Christmas tree, and a sign, which read, “During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.”

After analyzing each display separately, the majority of the Court held the display of the crèche unconstitutional while the menorah displayed with the Christmas tree and sign was held constitutional. The Court used the endorsement test laid out by Justice O'Connor in *Lynch* as the relevant analysis to determine the constitutionality of both displays. The Court stated,

“ *Lynch v. Donnelly*, confirms, and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. The display of the crèche in the county courthouse has this unconstitutional effect.” *Id.* at 621.

With regard to the first display, the Court determined, 5-4, that the crèche display was unconstitutional because the crèche stood alone and was the single element of the display. Furthermore, it was located on the main and “most beautiful part” of the government building. The Court stated,

“No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the 'display of the crèche in this particular setting,' *Lynch*,(O'Connor, J., concurring), the county sends an unmistakable message that is supports and promotes the Christian praise to God that is the creche's religious message.” *Id.* at 599-600.

The Court also rejected the notion that the accompanying sign notifying observers that the nativity was owned by a Roman Catholic organization sufficiently removed the perception that the government endorsed the religious message conveyed by the nativity scene.

In contrast, the Court held, 6-3, the display of the menorah constitutional. The Court reiterated that the constitutionality of the display must be assessed in the particular setting of the display, which in this case, included the accompanying Christmas tree and sign saluting liberty. The Court found the Christmas tree, which it viewed as a secular symbol, was the predominant feature of the holiday display. The Court also reasoned that the accompanying sign saluting liberty diminished the possibility that a reasonable observer would view the display as government endorsement of either Christianity or Judaism. Viewing the display in this context, the majority of the Court determined that there was no inference of dual endorsement of religion through this display. The Court stated the “city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season.” *Id.* at 620.

City of Dunwoody Holiday Display Policy

The following guidelines apply to decorating City buildings for holidays. They are based on decisions of the United States Supreme Court and other federal courts interpreting the Establishment Clause of the U.S. Constitution in the context of decorating public buildings:

1. Common Space - defined as areas in the building that a reasonable person would believe is open for all to use.
 - a. The city manager or designee is responsible for determining the selection and placement of holiday decorations in common areas of City buildings.
 - b. Holiday decorations may not be placed in such a way as to inhibit access to, or egress from the building. Holiday decorations shall be made of materials and placed in locations such that they do not violate applicable life and fire safety codes or create a hazard.

c. Decorating using religious symbols is not appropriate in common areas of City buildings unless the decorations are part of a display celebrating religious diversity, religious freedom, or similar subject.

d. Examples of religious items which would generally be inappropriate for use in holiday decorations in common areas of City buildings include:

- i. The Nativity Scene
- ii. A Cross or Crucifixion
- iii. A Menorah
- iv. The Star of David
- v. The Star and Crescent
- vi. Drawings of Jesus or Mohammed
- vii. The Bible or Quran

e. Examples of decorations which are appropriate for use in common areas of City buildings because they are not religious symbols include:

- i. Flowers
- ii. Greenery
- iii. Wreaths
- iv. Christmas Trees
- v. Bells
- vi. Snowmen
- vii. Winter Scenes
- viii. Santa Claus
- ix. Animals
- x. Ribbon
- xi. Flags
- xii. Pilgrims

2. Personal Space

a. Staff may place holiday material (secular or sacred) within their personal space and personal offices.