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December 13, 2019

BY REGULAR MAIL AND FAX

Mr. Roger Byron, Esquire
First Liberty Institute
2001 W. Plano Parkway, Suite 1600
Plano TX, 75075

RE: Religious Displays – Rehoboth Beach

Dear Mr. Byron:

I am the City Solicitor for Rehoboth Beach and this correspondence is in response to your December 12, 2019 correspondence.

During the 2018 holiday season St. Edmond Catholic Church erected a crèche in a small grassy area near the Rehoboth Beach Bandstand that is barely large enough to accommodate the crèche and certainly is not large enough to accommodate other multi-denominational and secular holiday displays and symbols alongside the crèche. Because the crèche was essentially a stand-alone display, the City of Rehoboth Beach ordered its removal from public lands.¹ As you can imagine, those actions engendered a lively debate that included faith issues, free speech issues, and establishment clause issues.

Although this holiday season the City took proactive measures to find a resolution that respected all views while being constitutionally defensible, we are disappointed to learn that Knights of Columbus Star of the Sea Council 7287 and First Liberty Institute do not agree that the City has fashioned an appropriate remedy.

¹ While it was not a driving factor in the City's decision, it is worth noting that the small grassy area at issue is adjacent to several veteran memorials. To maintain the dignity of the space, a small sign exists in the area reminding individuals to keep off the grass. Indeed, in its effort to be respectful of the military service represented by this location, the City had the grassy area sodded approximately one month ago. I feel certain you, as a military veteran, can appreciate the effort to maintain this area. As you noted in connection with the *American Humanist Association v. Maryland-National Capital Park and Planning Commission* case, "We are thankful for the right to intervene in this matter and committed to ensuring this time-honored veterans memorial stands for another hundred years. . . The men it honors, all others who have served, and those in uniform today deserve no less." *American Humanist Association*, C.A. No. DKC 14-0550 (U.S. Dist. Ct., MD); Comments by Roger Byron, Esq reported at <https://www.libertyinstitute.org/bladensburg-memorial>

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I will take this opportunity to briefly describe the thoughtful measures taken by the City so I can be certain you are aware of them. After the crèche was peacefully removed at the City's request last year, the City made a commitment to create a solution that would invite the prominent display of religious and secular symbols during the 2019 holiday season, while also observing rights and responsibilities embodied in the United States Constitution. With that objective in mind, the Rehoboth Beach-Dewey Beach Chamber of Commerce partnered with the City of Rehoboth Beach and the faith community and later announced that the Chamber would be welcoming religious and secular holiday displays at its prominent location at 306 Rehoboth Avenue. That location has ample space that is nearly double the grassy area near the Bandstand. All faith groups, secular groups, and individuals wishing to create a holiday display are encouraged to decorate the Chamber property. The City has committed to prohibiting parking in the area so the displays will be viewable from the surrounding properties, the sidewalk, and while traveling on Rehoboth Avenue. The Chamber's location on Rehoboth Avenue is on public land leased from the City, making it the perfect location within the City to blend public and private interests by embracing displays of religious and secular diversity.

I appreciate the benefit of receiving the considerable research you have compiled on this issue. I too have reviewed several cases that address factual scenarios similar to the matter presently before the City of Rehoboth Beach. But I feel certain we can agree that no two cases present the same facts and no decision of any court presents facts identical to those present in Rehoboth Beach. And even the United States Supreme Court has found the crèche to be constitutional (*Lynch v. Donnelly* 1984) or unconstitutional (*County of Allegheny vs ACLU* 1989) depending on the specific facts presented.

The Establishment Clause of the United States Constitution appears in the First Amendment of the Bill of Rights and provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. Amend. I. Although not explicitly stated in the First Amendment, "[t]he United States Supreme Court has recently interpreted 'establishment' to mean 'endorsement' not of a 'particular church, sect, or denomination' but of 'religion' in the broadest sense such as 'all religions.'" *King v. Village of Waunakee*, 517 N.W. 2d 671, 674 (Wisc. 1994). Although endorsement or establishment of a state-backed religion is explicitly prohibited, the United States Supreme Court "consistently has declined to take a rigid, absolutist view of the Establishment Clause[.]" due to the country's unique history. *Conrad v. City & Cnty. of Denver*, 724 P.2d 1303, 1314 (Colo. 1986) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Indeed, "[i]n every Establishment Clause case, [the reviewing court] must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that . . . total separation of the two is not possible." *King*, 517 N.W. 2d at 676-77 (quoting *Lynch*, 465 U.S. at 672). Consequently, courts "scrutinize[] challenged official conduct 'to determine whether, in reality, it establishes a religion or a religious faith, or tends to do so.'" *Id.* (quoting *Lynch*, 465 U.S. at 678).

The test used to evaluate whether the Establishment Clause has been violated was first articulated in *Lemon v. Kurtzman*, but was modified by the United States Supreme Court in *Agostini*



v. Felton. See *Am. Civil Liberties Union of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92, 97 (3rd Cir. 1999). The *Lemon* Test was originally comprised of three prongs: “first, the [government action] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [government action] must not foster ‘an excessive entanglement with religion.’” *Conrad*, 724 P.2d at 1313 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). The *Agostini* Court determined that the third prong was better suited as a factor to consider when evaluating the second prong, as entanglement, standing alone, is insufficient to render a government action unconstitutional without an overall effect of advancing or inhibiting religion. *Schundler*, 168 F.3d at 97 (citing *Agostini*, 521 U.S. 203, 232-236 (1997)). Additionally, the United States Supreme Court and other courts evaluating the issue have stressed the importance of the context in which the government action occurs and the historical practices and understandings of the community and the United States when evaluating whether there has been an Establishment Clause violation. *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (quoting *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (KENNEDY, J., concurring in judgment in part & dissenting in part)); *Schundler*, 168 F.3d at 100 (quoting *Lynch*, 465 U.S. at 680-81); *King*, 517 N.W.2d at 675-76 (discussing historical evolution of Christmas from Pagan holiday to Christian holiday to an American secular holiday).

There are several Establishment Clause cases in which a nativity scene or other religious symbol has been erected on public lands either by a government or a private group. The determination on constitutionality in each case requires a fact intensive analysis. There are generally two types of nativity scene displays: (1) stand-alone displays of the nativity scene and (2) group displays of multi-denominational and secular holiday symbols in which a nativity scene is included. The former group of displays has been found to be unconstitutional as violative of the Establishment Clause. See *e.g.*, *Cnty. of Allegheny*, 492 U.S. at 579-602 (display of nativity was placed in courthouse by a private group with no other symbols or decorations around it other than an angel with a plaque proclaiming “Gloria in Excelsis Deo.”). The latter has been found to pass constitutional muster. See *e.g.*, *Cnty. of Allegheny*, 492 U.S. at 614 (finding that display of menorah with Christmas tree and a sign saluting liberty was not an endorsement of the Christian and Jewish faiths), *abrogated on other grounds by Galloway*, 572 U.S. 565; *Lynch*, 465 U.S. at 679-85; *Schundler*, 168 F.3d at 104-08; *King*, 517 N.W.2d at 678-82; *Conrad*, 724 P.2d at 1314-17. Despite the dichotomy of cases, *there has not been a bright-line drawn with nativity scenes* as much of the United States Supreme Court precedent regarding nativity scenes have been plurality opinions with numerous concurrences. In my view, we would all be better off and discussions over the proper placement of the crèche would be more productive if all the various groups involved would acknowledge that basic reality—there is no bright line test to determine the constitutionality of the placement of a crèche.

The best evaluation of a nativity scene appears in *Conrad* where the Colorado Supreme Court applied the *Lemon* Test to the facts of the case, citing heavily to *Lynch*. The nativity scene in *Conrad* was a part of the City of Denver’s annual light display and was located “in close proximity to the reindeer, Santa Claus, and a wreath that says ‘Merry Christmas. . . .’” *Conrad*, 724 P.2d at 1312-13.



Conrad is distinguishable from the Rehoboth Beach facts. In Rehoboth Beach, due to space limitations the proposed location of the crèche near the Bandstand is not large enough to accommodate other religious and secular displays. Consequently, the proposed location strategically renders it impossible for the crèche to be accompanied by other religious and secular displays, effectively rendering it a stand-alone display intended to convey the religious message of one particular faith, thereby creating a violation of the Establishment Clause.

* * *

Putting all the court cases and religious passions aside, it seems relevant to reduce this issue to the basic essence of what has occurred. Here, one church of one faith has sought to secure a single prominent location not large enough to accommodate a display of any other religious or secular group. In an effort to balance the delicate rights established by the United States Constitution for all the various interested parties, the City worked closely with the Chamber of Commerce to identify a prominent location on the City's most travelled street to permit religious and secular displays of any and all varieties. But because that location is not the significantly smaller location demanded by St. Edmond Catholic Church, it has been declared unacceptable by the Church.

In a season that most would agree is largely about the message of peace on Earth and goodwill, it seems ironic that a thoughtful resolution accepting of all religious and secular views would be so aggressively rejected by the Church, Knights of Columbus, and First Liberty Institute.

The First Liberty Institute's website proclaims "We believe that in today's diverse, pluralistic society, the government must protect the constitutional rights of its citizens in order for us all to coexist peacefully — even when we disagree."² The City of Rehoboth Beach agrees completely, and we are hopeful that if we all focus on that common belief this matter may be resolved in a way that is emblematic of peace on Earth and goodwill.

Wishing you a joyous holiday season,

Glenn C. Mandalas
City Solicitor

GCM

pc: Mayor and Commissioners
City Manager

² <https://firstliberty.org/about-us/>