



Cedar City

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Maile L. Wilson

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Ronald R. Adams
Paul Cozzens
Terri W. Hartley
Craig E. Isom
Fred C Rowley

City Manager
Rick Holman

REDEVELOPMENT AGENCY MEETING

APRIL 6, 2016

Immediately following the City Council Meeting

The Cedar City Redevelopment will be held in the Council Chambers at the City Office, 10 North Main Street, Cedar City, Utah. The agenda will consist of the following items:

I. Call to Order

II. Business Agenda

1. Consider request to have a manger scene on Mayor's Square. Symbria Patterson

Dated this 4th day of April, 2016.

Renon Savage, MMC
City Recorder

CERTIFICATE OF DELIVERY:

The undersigned duly appointed and acting recorder for the municipality of Cedar City, Utah, hereby certifies that a copy of the foregoing Notice of Agenda was delivered to the Daily News, and each member of the governing body this 4th day of April, 2016.

Renon Savage, MMC
City Recorder

Cedar City Corporation does not discriminate on the basis of race, color, national origin, sex, religion, age or disability in employment or the provision of services.

If you are planning to attend this public meeting and, due to a disability, need assistance in accessing, understanding or participating in the meeting, please notify the City not later than the day before the meeting and we will try to provide whatever assistance may be required.

CEDAR CITY REDEVELOPMENT AGENCY INTEROFFICE MEMORANDUM

TO: CHAIR AND MEMBERS OF THE CEDAR CITY REDEVELOPMENT BOARD, CITY
MANAGER
FROM: CEDAR CITY ATTORNEY
SUBJECT: PROPOSED NATIVITY SCENE TO BE LOCATED IN MAYOR'S SQUARE
DATE: APRIL 3, 2016
CC:

During your meeting on Wednesday April 6, 2016, there will be a representative of a group that would like to use Mayor's Square for a nativity scene during the holiday season this year. I do think this is an issue the Cedar City Redevelopment Agency (hereinafter referred to as RDA) needs to take a close look at and consider rejecting. If the RDA chooses to go ahead with the proposal there is a high degree of risk that the use of government property for a nativity scene could end up in costly litigation. I will set forth my reasons for this opinion below.

Brief Statement of Fact

Mayor's Square is a 0.11 acre piece of property located on the southwest corner of the intersection of Main Street and Center Street. The property was acquired by the RDA in 1992 from State Bank of Southern Utah in exchange for a lease on a small piece of property in front of Lin's where the State Bank of Southern Utah maintained an automated teller machine. During recent past holiday seasons Mayor's Square has hosted various holiday displays including trees, lighting, and a sleigh. There are several facts I am not aware of including: the size and scope of the proposed nativity scene; the length of time the nativity scene is proposed to be displayed, and; what if anything else is proposed to be displayed in Mayor's Square during the time the nativity scene is displayed.

Statement of Law

The Utah Constitution has multiple provisions related to religion. Article 1, Section 1 of the Utah Constitution states, "all men have the inherent and inalienable right... to worship according to the dictates of their consciences...".

Article 1, Section 4 of the Utah Constitution states, "The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religions test shall be required as a qualification for any office of public trust or for any vote at an election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."

The first amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or assemble, and to petition the Government for a redress of grievances". The substantive provisions of the first amendment to the United States Constitution have been held to

apply to the legislative power of the States and their political Subdivisions, see *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008).¹

The first amendment's establishment clause serves multiple purposes. The establishment clause "enshrines the principle that government may not act in ways that aid one religion, aid all religions, or prefer one religion over another," see *Snyder v. Murray City Corporation*, 159 F.3d 1227 (10th Cir. 1998). The establishment clause also guarantees, "religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism", see *Wallace v. Jaffree*, 472 U.S. 38 (1985).

The Establishment Clause of the first amendment to the U.S. Constitution is evaluated using the Lemon test. This test was developed in the case of *Lemon v. Kurtzman* (403 U.S. 602 (1971)). The Lemon test consists of three parts: (1) the statute (or practice) must have a secular legislative purpose; (2) the principle or primary effect must be one that neither advances or inhibits religion; and (3) the statute (or practice) must not foster an excessive government entanglement with religion, see *Lemon, id.* A violation of any one of the three parts of the Lemon test equates to the challenged government action being unconstitutional, see *American Atheists v. Duncan* 616 F. 3d 1145 (10th Cir. 2010) citing to *Green v. Haskell County Board of Commissioners*, 568 F. 3d 784 (10th Cir. 2009). Under the second prong of the Lemon test a government action will be unconstitutional if it has the purpose or effect of endorsing religion, see *Wallace v. Jaffree*, 472 U.S. 60 (1985) (Alabama's moment of silence statute was found unconstitutional as it was enacted for the sole purpose of expressing the State's endorsement of prayer"); see *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Louisiana's Creationism Act was found unconstitutional because it endorsed religion in its purpose).

The essential principle behind the Supreme Court's jurisprudence related to the endorsement of religion is, "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community" see *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

There are cases dealing with the display of a nativity scene on public property. In *Allegheny v. American Civil Liberties Union, id.*, the U.S. Supreme Court held unconstitutional a nativity scene displayed on public property. The nativity scene was displayed on the Grand Staircase of the County building. It had a wooden fence around three (3) sides, some poinsettia plants and a small evergreen tree around it. In *Lynch v. Donnelly*, 465 U.S. 668 (1984) the U.S. Supreme Court upheld as constitutional the use of a nativity scene as a component in an overall holiday display for the City of Pawtucket. In addition to the nativity scene, the City of Pawtucket's holiday display included, "a Santa Clause house with a live Santa distributing candy; reindeer pulling Santa's sleigh; a live 40 foot Christmas tree strung with lights; statutes of carolers in old-fashioned dress; candy-striped poles; a talking wishing well; a large banner proclaiming season's greetings; a miniature village with several houses and a church; and various cut-out figures including those of a clown, a dancing elephant, a robot, and a teddy bear, see *Lynch, id.*

¹ Pursuant to UCA 10C-1-102(3) the RDA is a, "separate body corporate and politic, ... a political subdivision of the state...".

Analysis and Recommendation

During this analysis I am not relying on State law. I referenced Utah State Constitutional provisions above so the reader could see there are very similar provisions in the Utah Constitution as there are in the U.S. Constitution that relate to religion. The Utah Constitution has language that is not found in the U.S. Constitution. One example of more restrictive language in the Utah Constitution is Article 1, Section 4's prohibition on the spending of public money or use of public property for any religious worship, exercise, or for the support of any ecclesiastical establishment. Where the federal law would most likely prohibit the use of government property to house a nativity scene this memorandum will not look to State Law.

This analysis is based on federal law. Under federal law it is very difficult to use government property to display items that may have the effect of relaying to a reasonable person that the government endorses a religion in general or a particular religion. In the Case of *American Atheists v. Duncan*, id., the 10th Circuit Court of Appeals² found that the use of State property and the Utah Highway Patrol's logo on large white roman crosses in the public right of way were un-constitutional as they could be viewed by a reasonable person to endorse a particular Christian set of religious beliefs. In *Allegheny v. American Civil Liberties Union*, id., the U.S. Supreme Court found that the use of a nativity scene (crèche) in its display on the grand staircase of the County building could be viewed by a reasonable observer as an endorsement of a particular set of religious beliefs and therefore it was unconstitutional.

The Courts are not very predictable when it comes to establishment questions. For example, the same court that held the use of the nativity scene in the County building unconstitutional also held the use of a menorah as part of a holiday display outside the City/County building was constitutional, see *Allegheny, id.* There is also the U.S. Supreme Court's holding that the Pawtucket City's use of a nativity scene was constitutional in *Lynch, id.*

The U.S. Supreme Court has stated that the essential principle behind its endorsement of religion jurisprudence is, "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community", *Allegheny, id.* With the proposed nativity scene as the background and where the Court in *Allegheny, id.*, and *Lynch, id.*, acknowledged that the nativity scene conveys a religious message, it is difficult to see how the display of the nativity scene in the Mayor's Square would be able to pass the endorsement test followed by the federal courts.

Without a display similar to the Pawtucket City display in *Lynch, id.*, I do not see how a display of a nativity scene on government property would pass the endorsement test. Anything less than the totality of the Pawtucket City display would be ammunition for costly litigation as these disputes are resolved on a case by case hypothetical reasonable person standard. If the RDA were to allow the display there would be a high degree risk that the display would lead to costly litigation.

² The State of Utah is in the 10th U.S District.

