



TO: Members of the Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
DATE: March 14, 2006
SUBJECT: First Amendment Article for Hot Topics in Municipal Law Practice

Enclosed please find a copy of my article, *Competing Dictates of the First Amendment: Walking The Fine Line Between the Establishment Clause and Religious Free Speech*. This was presented at the recent seminar, **Hot Topics in Municipal Law Practice**, which was co-sponsored by the Institute of Continuing Legal Education and the Public Corporations Section of the State Bar of Michigan.

Hopefully, the material will be of value to Michigan municipalities that are struggling with First Amendment issues. Of particular assistance will be the City of Troy's Private Display Policy, which was incorporated as a part of the seminar presentation.

I was honored to represent the City of Troy as a speaker at this seminar. If Council would like further information on these matters, or if there are any questions concerning the material, I would be happy to address them.



THE INSTITUTE OF CONTINUING LEGAL EDUCATION
The source Michigan lawyers trust
February 22, 2006

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Re: *Hot Topics in Municipal Law Practice*
Thursday, February 16, 2006
MSU Management Education Center, Troy

Dear Lori:

Thank you very much for taking part in the ICLE presentation "**Hot Topics in Municipal Law Practice.**" We appreciate very much your participation in the program and the time and effort you devoted to preparing your materials and lecture.

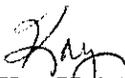
I am enclosing a summary of the registrant evaluations turned in after the presentation. As you can see, the registrants were generally very pleased both with the course and with your presentation. Evaluations were done on a seven-point scale, seven as the highest possible score.

Also enclosed is an expense voucher which you can use to claim reimbursement for any out-of-pocket expenses you may have incurred as a result of your participation in the program. Simply complete and return to me using the enclosed envelope. Please note that mileage is reimbursed at 44.5 cents per mile, and that the University requires original cash register or credit card receipts for all other expenses.

Thank you again for taking part in the course. I would be very interested in any comments you might have concerning the course, and also any suggestions you might have for future programs the Institute should present. We strive to present the topics that will be the most useful and of the highest possible quality for Michigan lawyers. Your thoughts would be very welcome.

Cordially,

Thanks so much, Lori!


Kay Holsinger

Assistant Director, Partnership Seminars and Online Content

KH/sam
Enclosures

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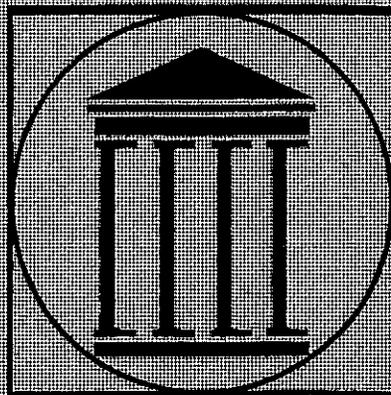
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Hot Topics in Municipal Law Practice

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**Competing Dictates of the First Amendment: Walking the Fine Line
Between the Establishment Clause and Religious Free Speech**

by

Lori Grigg Blum

City of Troy City Attorney's Office

Troy

COMPETING DICTATES OF THE FIRST AMENDMENT: WALKING THE FINE LINE BETWEEN THE ESTABLISHMENT CLAUSE AND RELIGIOUS FREE SPEECH

Submitted by: Lori Grigg Bluhm, City Attorney, City of Troy

I. Mixing Religion and Government.

Pursuant to the Establishment Clause of the First Amendment of the U.S. Constitution, "Congress shall make no law respecting an establishment of religion." Although this Constitutional provision centers on the federal government (Congress), the passage of the Fourteenth Amendment extended this prohibition to state and local government as well (including counties, cities, townships, villages, and school districts). *Widmar v. Vincent*, 454 U.S. 263 (1981). The Michigan Constitution of 1963, Article 1, §4 also requires a separation of church and state.

Under the Free Exercise Clause of the First Amendment to the U.S. Constitution, government shall not interfere with an individual's free exercise of religion. Some governmental entities may be tempted to provide preferential treatment to religious organizations, to avoid a challenge that the government activity impedes an individual's free exercise of religion.

Recently, there is an increasing presence of organizations devoted to the promotion of the Christian faith, and the rights to publicly express religious beliefs and practice their religion. These organizations include the Beckett Fund for Religious Liberty and the Thomas More Law Center, among others. These groups emphasize the Free Exercise Clause of the First Amendment of the United States Constitution, and provide a counter to the long-standing tradition of the ACLU in emphasizing the Establishment Clause of the First Amendment. Governmental entities are subject to challenges from either side if they fail to maintain the tenuous balance between these two constitutional positions. Unfortunately, governmental entities are left with little guidance when religion is involved. The majority of cases are decided on a fact specific basis, in the absence of a bright line test or even definitive guidance on the applicable test for each circumstance. Governmental entities are left to decipher this maze of First Amendment jurisprudence to determine when the fine line between the Establishment Clause and the Free Exercise Clause of the First Amendment has been crossed.

II. Establishment Clause Cases.

A. Invocations in Legislative Sessions

For many municipalities, each legislative session opens with the pledge and an invocation. In today's more diverse society, there are more challenges to both the recitation of the pledge and also the invocation practice as a violation of the Establishment Clause. As with the other First Amendment issues, there is no bright line rule. Many jurisdictions allow invocations at legislative sessions, based on the ruling in

Marsh v. Chambers, 463 U.S. 783 (1983). In *Marsh*, the U.S. Supreme Court determined that it was not an Establishment Clause violation for a Christian chaplain to offer invocations for the Nebraska legislature, even when the minister had continuously and exclusively given the invocations for a period in excess of 16 years. In reaching this decision, the Court looked to the practices of the founding fathers, and determined that just one week before the ratification of the Constitution, they authorized the expenditure of public funds to pay a chaplain to give an invocation for each legislative session. The Court reasoned that the founding fathers approved of invocations, based on their hiring authorization, and based on this, they would not have authorized a practice that was in violation of the Establishment Clause.

Marsh does not provide carte blanche approval of invocations at public meetings, however. In *Lee v. Weisman*, 505 U.S. 577 (1992), a divided U.S. Supreme Court declared that non-sectarian prayers could not be offered at public school graduations. First, the audience at a high school graduation is primarily comprised of students, who are more susceptible to religious indoctrination than adults. Second, attendance at the event was essentially compelled for those who wanted to graduate. Third, the local officials (the government) had too much control over the content, and therefore the government had crossed the line in promoting religion, which violated the Establishment Clause.

The Courts are highly suspect of invocations or other religious practice in the schools. In *Engel v. Vitale*, 370 U.S. 421 (1962), the school regents had composed a prayer, that was required to be daily recited by the students. The Courts held this practice was unconstitutional. In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), the required daily reading from the Bible violated the Establishment Clause. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the requirement of starting each new school day with a moment of silence was declared unconstitutional and in violation of the Establishment Clause. In *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), prayers offered by the coach at the beginning of high school basketball games were prohibited. In *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989), prayers at the beginning of high school football games were prohibited.

Prayers at local school board meetings should also be avoided. In *Coles ex. Rel. Coles v. Cleveland Board of Education*, 171 F.3d 369 (1999), the Plaintiffs challenged the recently initiated practice of invocations at public school board meetings, where there were students regularly in attendance (including student representatives, students being honored or grieving a policy). These invocations did not commence until 1992, when there was a significant change in the composition of the school board. The justification for suddenly including invocations at the school board meetings was to create a "more businesslike and professional decorum" that would give the attendees a "greater respect for the process and attach importance to the school board meetings." (Affidavit of School Board President). Although local clergy initially gave the prayers, this practice was modified by the election of a Christian minister to the school board in 1996. The School Board President/ Minister assumed all responsibility for offering invocations from that point on. The Court ruled that this practice was in violation of the Establishment

Clause. This case may have been impacted by the recent additions of giving invocations, as opposed to the long-standing tradition of invocations in *Marsh*.

Apparently, religious reflection and spontaneous prayer is permissible at university events. In *Chaudhuri v. State of Tennessee*, 130 F. 3d 232 (6th Circuit 1997), the Court upheld the practice of offering a moment of silence at university functions, in spite of a First Amendment challenge by a practicing Hindu professor of the university. These functions included graduation exercises, faculty meetings, dedication ceremonies, and guest lectures. During two such functions, participants “spontaneously” recited the Christian Lord’s Prayer during the moment of silence. Chaudhuri challenged this as an unlawful encouragement or endorsement of religion, but the Court disagreed, and found there was no need to admonish the audience or to censor the speech of the graduation attendees. This speech to a college age crowd is much different than a speech to public school students.

Invocations are an area where governmental entities should proceed with caution, since they are being closely monitored for upsetting the delicate balance between the Establishment Clause and the Free Exercise Clause. There has been a great deal of press about a recent decision in Indiana, where the primarily Christian invocations of the Indiana legislature were declared unconstitutional and in violation of the Establishment Clause. *Hinrichs v. Bosma*, 400 F. Supp.2d 1103 (S.D. Indiana, December 2005). In *Hinrichs*, the Court reviewed the content of the past invocations, and declared that although the policy was to accommodate ecumenical prayers from different faith backgrounds, 41 of the 53 most recent prayers were given by Christians, who invoked the name of Jesus Christ in at least 29 of the prayers.

There is no guarantee that the practice of invocations at public meetings will not be challenged. Those entities with long standing practices are most likely to withstand challenges. Government should be cautious in promoting prayer to audiences of children or others that are susceptible to religious indoctrination. As additional insurance, governmental entities should attempt to recruit persons from diverse religious backgrounds and beliefs to offer the invocation on a rotating basis, or instead opt to have a moment of reflective meditation, rather than a spoken prayer at a public meeting.

Governmental entities can hopefully learn from the mistakes of others. For example, it is pretty clear from *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292 (4th Circuit 2004) that municipalities should not take retaliatory actions against anyone who refuses to participate in the invocation. In *Wynne*, the municipality allegedly banned the Plaintiff, a Wiccan, from speaking at the council meeting, since she didn’t participate in the invocation. In addition, municipalities should not be tolerant of invocation speakers that are critical of other religions or persons. Tolerance of all should be paramount in the invocations at public meetings, and any prayer that criticizes other religions or disparages other persons may result in an invalidation of the entire practice of prayer at public meetings. *Snyder v. Murray*, 159 F.3d 1227 (10th Cir. 1998).

B. Religious Speech or Assembly on Public Property.

Recent requests by organizations such as the National Day of Prayer or the Christian student "See You At the Pole" have forced some governmental entities to review their policies for religious assemblies on public property, and to protect against violations of either the Establishment Clause or the Free Exercise Clause of the First Amendment.

Under the First Amendment, freedom of speech is a fundamental right, and therefore any impediment to protected speech on publicly owned property is subject to scrutiny. (Obscenity and defamation would not fall within the protected speech category). The level of scrutiny for each regulation is dependent upon the characterization of the forum where the religious speech occurs. There are essentially three types of fora- the traditional public forum, the limited or designated forum, and the non-public forum.

Public forums are defined in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). According to the case, traditional public forums are properties that have been "used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Streets and sidewalks are examples of public fora. According to the cases, any government regulation of speech occurring in a traditional public forum must be content neutral time place and manner restrictions that serve a legitimate government interest. These regulations must be narrowly tailored to serve the interest, and must leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Content neutral regulations are those that are applied equally to all persons desiring to use a forum, and are implemented in order to protect the public property or the surrounding properties. For example, the requirement to obtain a permit for a parade would be a content neutral regulation. Although content neutrality has been used interchangeably with viewpoint neutrality in some cases, the U.S. Supreme Court has distinguished the two terms, and has clarified that the public forum analysis requires content neutrality, which is subject matter based, as well as viewpoint neutrality.

In addition to the traditional public forum, the government can also create a limited public forum. A limited public forum is a designated public area (other than a traditional public forum) that is opened up for speech by the government. The difference between the traditional public forum and the limited public forum is that the government can limit the availability of the forum. Examples of limited public forums include public libraries, sports and entertainment facilities, fairgrounds, and public university facilities. It is reasonable for a municipality to declare that these limited public forums are available only during the operational hours of the public facility. It is also reasonable for a municipality to declare only certain portions of the facilities as limited public forums. However, once government property is designated as a limited public forum, it should be treated just like any traditional public forum.

The designation of a limited public forum is not a claim in perpetuity. However, municipalities should be cautious in the closure of a limited public forum, and should be

careful that the closure of the forum is not perceived as a masked attempt to censor the content of a proposed speech. The closure of a public forum should be related to some change in circumstance, such as a proposed reuse of a facility or redevelopment of the property, or budget limitations that cut janitorial service budgets, etc.

According to *Paulsen v. County of Nassau*, 925 F.2d 65 (2nd Cir. 1991), a county owned sports and entertainment facility is a designated public forum. In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), a state fairground was limited public forum. In *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), a government owned cable television station was a designated public forum. In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), a public school was declared a limited public forum, and therefore it could be used for after hours prayers and religious studies, as long as the facilities were also available to any other organization under the same conditions.

Government property can also be classified as a non-public forum, where the freedom of speech can be reasonably limited. Non-public forums can include the interior of prisons, public school buildings, airports, postal service letterboxes, military reservations, etc.. According to *Grayned v. City of Rockford*, 408 U.S. 104 (1972), there is no absolute constitutional right to use all parts of a school building or its surrounding environment for unlimited expressive purposes. According to *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), if unlimited free speech would interfere with the primary function of the location, then it is likely a non-public forum. In addition, according to *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) and *U.S. v. Kokinda*, 497 U.S. 720 (1990), public property that has not traditionally been available for free speech can be a non-public forum. In *Kokinda*, the U.S. Supreme Court held that a sidewalk and an adjacent parking lot was a non-public forum. Government has the ability to impose reasonable limitations on free speech in non-public forums. These limitations, however, should not be viewpoint based.

As long as religious speech is occurring in a traditional public forum, a municipality doesn't need to fear that the tolerance of the speech would violate the Establishment Clause. In addition, religious speech in a previously designated limited public forum is not likely to be challenged. However, if a municipality designates a limited public forum in order to accommodate religious speech or activity, then the action may be subject to an Establishment Clause challenge. As long as religious speech is afforded the same opportunities as all other categories of speech, the municipality has successfully accommodated the free exercise of religion, without violating the Establishment Clause. However, if religious speech is given preferential treatment on publicly owned property, a municipality has violated the tenuous balance.

Municipalities should establish policies or regulations for speech on government owned property. For traditional public forums and limited public forums, these regulations must be content neutral time place and manner restrictions that serve a legitimate government interest. These regulations must be narrowly tailored to serve the

interest, and must leave open ample alternative channels of communication. For non-public forums, government regulations must be reasonable and not discriminate against the speaker's viewpoint. Suggested regulations include:

1. Regulations must be time, place and manner only (ie. a uniform ban of sound amplification, prohibitions on obstructing entry ways, etc.).
2. There should be a quick and easy permit process for persons wanting to conduct First Amendment activities that is supported by the municipality's need for advance notice (ie- if a police presence is necessary, the government should have some advance notice)
3. No viewpoint discrimination should occur. Permit denials should include detailed reasons for denial that are tied to regulations or policy.
4. There should be an expedited appeals process for any suppressed First Amendment activity. The appeal should be decided by a neutral party.
5. The municipality should emphasize that the regulations stem from the need to retain physical control over the public facility- not a need to censor speech.
6. There should be ample alternative avenues for First Amendment activity- and provisions for emergency situations.
7. If the distribution of materials will be limited, the policy should clearly define the limits, as well as any limits to solicitation or other activities.
8. In non-public forum cases, the government should expressly state that the regulations are not intended to create a limited or designated public forum.
9. Enforcing agencies or persons should not be given unfettered discretion, which could lead to censorship based on viewpoint or content.
10. All staff and enforcing entities should be properly trained.

C. Religious Displays on Public Property.

On one hand, municipalities are pressured by religious groups to allow nativity scenes on public property. On the other hand, governments are sued to have Ten Commandment monuments removed from public buildings. Both of these factual scenarios engender controversy in the community, and are likely to result in litigation. Since a religious display on public property could be governmental endorsement of religion, municipalities should proceed with caution to avoid an unconstitutional entanglement of religion and government.

There are at least seven Establishment Clause cases where the U.S. Supreme Court has rejected the three part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In addition, the Supreme Court cases that were decided under *Lemon* are usually cases where the Court is sharply divided. However, *Lemon* is still controlling for most Establishment Clause cases, absent another pronouncement from the U.S. Supreme Court or an express rejection of the *Lemon* test by the U.S. Supreme Court. Under the *Lemon* three-part test, any religious display on public property must first have a secular purpose. In addition, the government action must not advance or inhibit religion. Third, the government action cannot foster excessive government entanglement with religion.

Under the first prong of *Lemon*, the Courts must decide “whether the government’s actual purpose is to endorse or disapprove of religion.” *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). If the actual purpose is something other than to endorse or disapprove of religion, then it is a secular purpose. Governmental entities are entitled to some deference when they articulate a secular purpose. *Edwards*, p. 586-587. However, the Courts will scrutinize the pronouncement of a secular purpose, if they suspect that the true purpose is actually religious promotion.

Under the second prong of *Lemon*, the Courts must decide whether the reasonable observer would conclude that the government regulation had the principal or primary effect of either advancing or inhibiting religion. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). In *Allegheny*, a free-standing nativity scene at a county courthouse was held to be an endorsement of religion. However, a menorah that was integrated with other holiday symbols, such as a Christmas tree, was not unconstitutional endorsement of religion.

Under the third prong, there must not be excessive entanglement of church and state. In other words, the government should not be an integral proponent of religious displays on public property. Excessive entanglement is also found whenever government officials have a direct connection with a display, or have the authority to censor or reject displays.

Many of the cases employing the *Lemon* test involve the display of the Ten Commandments. For this reason, it is perhaps ironic that the U.S. Supreme Court holds its sessions in a building that is decorated with a statute of Moses with the Ten Commandments. The U.S. Supreme Court had not issued an opinion on the Ten Commandments for over 25 years, when it decided *Stone v. Graham*, 449 U.S. 39 (1980). In *Stone*, the Court struck down as unconstitutional a Kentucky law that required all public schools to post a copy of the Ten Commandments in the schools. This law was enacted to promote religious purposes, and therefore could not pass the *Lemon* test.

Just as in *Stone v. Graham*, the U.S. Supreme Court has more recently invalidated the government’s actions in *McCreary County, Kentucky v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005). In a five to four divided opinion, the U.S. Supreme Court affirmed the issuance of an injunction preventing a new, framed copy of the Ten Commandments from being posted in the County Courthouse. In so affirming, the Court held that the display was motivated by religious purposes, and therefore was unconstitutional. Initially, the Ten Commandments were initially the sole item on display. However, after the ACLU filed their lawsuit, the County added other historical documents, including the Bill of Rights, the Magna Carta and the Mayflower Compact, to create a “Foundations of American Law and Government Display.” The majority reviewed the origins of the display, as well as the dedication of the Ten Commandments, and found religious intentment- which did not pass the required secular purpose prong of the *Lemon* test, and was therefore unconstitutional.

In a second Ten Commandments case decided on the same day, (*Van Orden v. Perry*, 125 S. Ct. 2854 (2005)), the Supreme Court steered clear of the *Lemon* test, and found that a six foot granite monument, which had been in a large park outside the Texas capitol for the past 20 years, was not in violation of the Establishment Clause. This monument was one of several in the park, and was labeled with the words "I am the Lord thy God." The *Van Orden* and *McCreary County* cases could be distinguished on the basis that *Van Orden* had been on public property for over twenty years, and was intermixed with other monuments in a public park. In contrast, *McCreary County* was challenged immediately upon the placement of the Ten Commandments. In addition, the Ten Commandments in *McCreary County* were initially going to be stand alone. Only when the ACLU challenged the action did the government add the other historical documents. In addition, the dedication of the Ten Commandments in *McCreary County* was reviewed, and based on the clearly religious statements therein, the Court declared the placement unconstitutional.

Unfortunately, the Court's use of the *Lemon* test in one case, and rejection of *Lemon* in the second case, has deprived municipalities of a bright line test for religious displays cases. Therefore, the government must continue to analyze each display on a case-by-case basis. A review of some of the recent cases may help with this required fact-specific inquiry.

In *ACLU of Kentucky v. Mercer County*, ___ F.3d ___, 2005 WL 3466545 (6th Circuit, December 2005), the Court found no Establishment Clause violation when the Ten Commandments were combined with other historical items to form a display. In *ACLU v. City of Plattsburgh*, 419 F.3d 772 (8th Cir. 2005), the Court similarly held that a Ten Commandments display, which was located in a park with other recreational items, was within the permissible boundaries of the Establishment Clause. In *O'Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005), the Court again found no violation of the Establishment Clause under *Lemon*. *Washburn* involved a statute of a pointing Roman Catholic Bishop, with the sign "Holier Than Thou." This statute was placed in a prominent location of the University. The University was sued under 42 USC §1983, since the statute was allegedly anti-Catholic. However, the statute was one of approximately thirty outdoor statutes, and therefore was seen more as "art" than an unconstitutional endorsement against the Catholic faith.

The *Lemon* analysis is not limited to the Ten Commandment cases, but instead is extended to most cases involving religious displays on public property. The nativity scene cases (holiday displays on public property) also invoke the *Lemon* constitutional analysis. In *Lynch v. Donnelly*, 465 U.S. 668 (1984) a divided Court held in a five to four decision that a City's ownership, maintenance, and display of a nativity scene in the town square was not in violation of the Establishment Clause, since it was one element of a secular display, which also contained a Santa Claus & reindeer.

There are also recent cases that do not employ the *Lemon* test to adjudicate Establishment Clause matters. In *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995), the Court relied on the public forum cases to decide the Establishment Clause

issues. The Court recognized that religious displays in dedicated public forums, which were placed by private groups and divested of any government involvement, would pass constitutional muster, as long as the public forum was available to all equally. If both religious and non-religious groups had the equal opportunity to place displays on the designated public forum, then religious displays were not unconstitutionally placed on public property. *Pinette* involved a cross that was located on property that was otherwise used openly for other displays, gatherings and festivals. This hands off, public forum approach may be the ultimate direction of the U.S. Supreme Court, now that there has been a change in its composition. Whatever the direction, however, it is almost guaranteed that there will continue to be Establishment Clause challenges. The next wave will focus on the phrase "In God We Trust," which is found in the pledge, on government buildings and on our money.

Each municipality should adopt a uniform policy to address religious displays on public property. Attached for reference is the private display policy for a designated public forum in the City of Troy. (Exhibit A) Although this document may provide a starting point, it should be carefully reviewed to insure that the policy is compliant with all state and local laws, and also the internal policies and procedures of a community. However, the adoption of such a policy will not necessarily immunize a municipality against lawsuits. Recently, the ACLU has filed a lawsuit against Polk County, Florida, challenging the "free-speech zone" policy. A crèche was placed in the "free-speech zone," without adherence to the requirements of the "free speech zone policy." In that case, the church did not obtain the required \$500,000 in liability insurance, or obtain approval from the county attorney, or execute the document that held the county harmless from any liability.

III. RLUIPA

Municipalities are left without a bright line rule in discerning what religious uses are permitted on public property. However, this fact specific analysis might be preferable to the automatic preferential treatment afforded by the federal Religious Land Use and Institutionalized Persons Act, or RLUIPA. The Religious Land Use and Institutionalized Persons Act, has been federal law since 2000, but it has been subject to many challenges and criticisms. There are essentially two components of RLUIPA. First, when government imposes a substantial burden on the religious exercise of an institutionalized person, then the governmental entity must have a compelling interest that is served by the regulation, which must be the least restrictive path of promoting the compelling government interest. (42 U.S.C. § 2000cc(a)). A recent ruling of the U.S. Supreme Court has upheld the constitutionality of this institutionalized portion of the statute. *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). However, this opinion is specifically limited to the facial constitutionality of the institutionalized persons provisions. The *Cutter* Court distinguished the state run institutions, such as mental hospitals and prisons, as those where "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." (Id., p.2121) The opinion does not necessarily extend to the land regulation sections of RLUIPA, which were not at issue in the *Cutter* case. It similarly does not rule out an as applied challenge to the statute, in the

event that the accommodations of the religious practices of prisoners or mental patients weakens the security of the institutions or presents other disruptive challenges.

42 U.S.C. § 2000cc is the land use regulation component of RLUIPA that directly impacts municipalities. According to the provisions of 42 U.S.C. §2000cc, governmental entities cannot impose land use regulations on persons, churches, or religious institutions that substantially burden the free exercise of religion unless there is a compelling governmental interest that is furthered in the least restrictive manner. Under the statute, the Court is vested with jurisdiction on a RLUIPA claim when one of the following elements are established:

- The religious program or activity that is substantially burdened receives federal financial assistance (Spending Clause jurisdiction- where there is an implied right that Congress can attach conditions to federal grants); or
- The religious program or activity that is substantially burdened impacts commerce with foreign nations or between states (Commerce Clause jurisdiction); or
- The religious program or activity that is substantially burdened requires the government to complete a formal or informal individualized assessment of the proposed use of the property. (Enforcement Clause jurisdiction)

Lower court cases and law review articles challenge that RLUIPA exceeds the powers of Congress, in spite of the efforts of Congress to specifically address the constitutional challenges to RLUIPA's predecessor, the Religious Freedom Restoration Act (RFRA, codified at 42 U.S.C. § 2000bb et. seq.). One of the modifications made to the RFRA was to tie the legislation to the Spending Clause and also the Commerce Clause, since federal legislation must be based on one of the enumerated powers of Congress. This action was in response to *Boerne v. Flores*, 521 U.S. 507 (1997), where the U.S. Supreme Court invalidated RFRA as exceeding Congressional powers. Congress also strengthened the Congressional record, after the *Boerne* decision, to articulate examples of widespread and persistent religious discrimination, which would allow Congress to enact laws under the Enforcement Clause, § 5 of the 14th Amendment, since the First Amendment protections of Free Speech and Free Exercise of Religion were not being adequately protected. In *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp.2d 1083 (2003), the Court discusses the insufficiency of the Congressional record in establishing the widespread and persistent religious discrimination, which is necessary for Enforcement Clause jurisdiction. Hopefully, the U.S. Supreme Court will have the opportunity to address whether RLUIPA sufficiently corrected the fatalities of RFRA in the land use regulation context.

Although the Spending Clause and the Commerce Clause allegedly provide jurisdiction for a RLUIPA claim, most of the claims against municipalities are brought under the individualized assessment jurisdictional basis. Individual assessments are made in special use zoning requests, rezoning requests, variance requests, and all other requests that vest discretionary power with a municipality. The municipality is charged with overseeing orderly development and the preservation of property values in the

community. However, under RLUIPA, the churches and religious institutions are afforded special treatment, and are not necessarily required to follow the rules that are otherwise evenly applied to all other landowners. Under RLUIPA, municipalities must meet the strict scrutiny test to deny a requested land application for churches, but they are only required to have a reasonable basis to deny requested land applications for all other entities. This preferential treatment for churches and religious institutions may cross the line between the Establishment Clause and the Free Exercise Clause. The U.S. Supreme Court will eventually need to assess whether Congress successfully walked the fine line between the Free Exercise of Religion Clause and the Establishment Clause. The U.S. Supreme Court will also need to determine whether RLUIPA in its current form is within the limits of Congressional authority.

In the interim, municipalities will face difficulties in securing uniform development in the communities. The use of the words “strict scrutiny” are reflective of the true application of the test, and very few municipal land use regulations will satisfy the elevated burden of proof. The strong bias in favor of de-regulation for churches and religious institutions is evident in the RLUIPA cases during the past five years, when RLUIPA was passed.

Under RLUIPA, the Courts must first assess whether one of the three jurisdictional elements have been satisfied. It would be unusual to have a land use regulation that didn't vest some discretion with the municipality, so the jurisdictional test would easily be satisfied. Once the jurisdictional hurdle is overcome, the Plaintiff must then set forth a prima facie case to show that the challenged land use regulation substantially burdens their religious exercise. In *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*, 259 Mich. App. 315 (2003), leave to appeal denied, 471 Mich. 877 (2004), the parties did not sufficiently address this issue, and therefore the case was remanded to determine whether the municipality had imposed a substantial burden on the Plaintiff's religious exercise. According to *Shepherd Montessori*:

The substantial burden must be based on a “sincerely held” religious belief. (citations omitted) In *Lyng* (citation omitted), the Supreme Court indicated that for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs (citation omitted). Conversely, a government regulation does not substantially burden religious activity when it only has an incidental effect that makes it more difficult to practice the religion (citation omitted). **Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient.** *Shepherd Montessori*, 259 Mich. App. 315, 330 (2004), emphasis added

Although Plaintiffs should be required to satisfy this burden of proof, recent decisions demonstrate the balance has shifted to the Plaintiff religious institutions. Religious exercise is broadly defined as “any exercise of religion, whether or not

compelled by, or central to, a system of religious belief.” (42 U.S.C. § 2000cc-5(7)(A)) The religious exercise could be carried out by one person or by an undefined group of persons that formed their church just moments before asking for leniency in the land use regulations. The object of worship is also unlimited and above reproach, as long as it is a sincerely held belief. The Church of What’s Happening Now is on equal footing with the traditional religious institutions. These factors alone could lead to a very broad application of the RLUIPA protections. The recent cases, and especially the cases in the 6th Circuit, have essentially eviscerated the ability of municipalities to regulate land uses.

Although under RFRA (the predecessor to RLUIPA), the Court’s deference to the church in *Jesus Center v. Farmington Hills Zoning Board of Appeals*, 215 Mich. App. 54, 544 NW2d 698 (1996) foreshadowed the Michigan approach to land use regulations for churches. The Court in *Jesus Center* unquestionably accepted the church’s pronouncement that it was engaging in a religious exercise when it was operating a homeless shelter in a residential district. This same approach was recently taken in *Greater Bible Way Temple of Jackson v. City of Jackson*, 268 Mich. App. 673 (2005). In *Greater Bible Way Temple*, the Court unquestionably accepted the pastor’s affidavit that claimed that providing housing to the elderly and disabled is “central” to plaintiff’s ministry. In this case, the church filed a lawsuit against the City of Jackson for failing to rezone eight parcels of property from single family residential to a multiple family residential. The church had recently acquired the property for \$150,000, and the requested rezoning would allow the church to build 32 elder family residences. The church did not claim that the elder family residences were reserved for church members or their families. The project’s major significance for the members was the revenue-raising potential, which would finance other projects. The church also belatedly argued that the elder housing near the church would serve as an excellent membership recruitment tool. After a bench trial, the Circuit Court issued an injunction against the City, finding that the refusal to rezone was a substantial burden on the church’s free exercise of religion. The Court then rejected all compelling governmental interest arguments submitted by the City. The Michigan Court of Appeals recently upheld this decision, which is now being submitted to the Michigan Supreme Court on an application for leave to appeal. Hopefully the Michigan Supreme Court will grant leave to appeal, and provide some relief to all the other Michigan municipalities that are being challenged on their land use regulations.

IV. Conclusion.

Municipalities must walk through a narrow and always changing path to avoid violating the Establishment Clause and the Free Exercise Clause of the First Amendment to the U.S. Constitution. Changes in the make up of the U.S. Supreme Court may lead to more definitive guidance on these First Amendment questions, and based on the recent changes, the balance will likely be in favor of the Free Exercise Clause.

Exhibit A
DISPLAY POLICY FOR TROY CITY PLAZA¹

1.0 MISSION STATEMENT

The Troy City Plaza is dedicated to the positive expression of our cultural and historical heritage, philosophies, and ethnic diversity, encouraging activities and displays depicting events which highlight and honor them.

In recognition of the rights protected by the U.S. Constitution and Bill of Rights the City of Troy provides this plaza as a limited public forum.

This Policy is established to ensure equal access and opportunity to use the Troy City Plaza. All displays shall comply with the provisions of this Policy.

2.0 PUBLIC FUNDING PROHIBITION

- 2.1 There shall be a disclaimer prominently displayed immediately in the front of the designated display areas, which shall read substantially as follows:

This display was not constructed with public funds and does not constitute an endorsement of any message by the City of Troy.

- 2.2 A notice must be prominently posted in the immediate area of the designated display areas advising the public that the area, as a limited public forum, is available to all Troy citizens and Troy civic and charitable groups.
- 2.3 All displays must be privately owned, erected, and maintained.
- 2.4 The City of Troy shall have no role in the planning, construction, erection, or storage of any display.

3.0 LOCATION OF AREAS DESIGNATED FOR DISPLAYS

- 3.1 The display areas shall be limited to two areas identified by the City of Troy on the Civic Center site as follows:

Display Area A - A 25' x 25' area located on the north side of the sidewalk west of the Peace Garden Court Yard, which is north of City Hall and west of the Library, as depicted in the diagram attached and incorporated as Exhibit A.

Display Area B - A 25' x 25' area located on the south side of the sidewalk west of the Peace Garden Court yard, north of City Hall and west

of the Library, as depicted in the diagram attached and incorporated as Exhibit A.

- 3.2 The designated display area will remain in its natural vegetative state. The area does not currently have any direct artificial light, other than the light that emanates from building lights and light poles that are already in place on the property.
- 3.3 There shall be no concrete or asphalt or other permanent materials placed or poured in the designated display area.

4.0 DISPLAY RULES AND REGULATIONS

- 4.1 Displays shall be erected and installed only within the designated display areas, as indicated by survey markers on the property.
- 4.2 No portion of the displays shall extend more than 20' above the ground, nor outside the display area.
- 4.3 No sound shall be emitted by the display that exceeds 65 decibels measured at a distance of 15' from the display area in any direction.
- 4.4 Displays shall be designed or secured so that they will not be moved out of the designated display area by forces of nature, such as the effect of wind. Displays shall be designed and installed to be structurally sound and self-supporting of their own weight and loads, so that the displays can withstand any negative effects of wind, rain, snow or other natural forces.
- 4.5 Displays shall be designed and installed in a manner to prevent damage to the City's designated display areas.
- 4.6 There shall be no excavation of the display site as part of the installation of the display.
- 4.7 No part of the display shall be driven into the ground, except that stakes not bigger than 4 square inches can be used to secure the display to the ground as long as there is no permanent damage to the property.
- 4.8 There shall be no detectible odors emanating from the display.
- 4.9 Displays shall not include foul, putrid, or hazardous material.
- 4.10 There shall be no open flames or pyrotechnics as part of any display.
- 4.11 There shall be no spray painting of the public property designated for the displays.

- 4.12 Displays may be set up beginning at 8:00 am on the first day of the designated date group. Displays must be totally removed from the display area by 6:00 pm on the last day of the designated date group. The designated date group is the number of the grouping of days for the allowable display periods, as set forth on the attached Exhibit B, which shall be prepared annually for each calendar year and incorporated by reference into this Policy. The designated date group shall be determined by the lottery, as set forth in section 5.0 of this policy.
- 4.13 No public assembly will be permitted in the designated display area. Displays shall be unattended, and there shall be no solicitation in the designated display area.
- 4.14 There is no accessibility to electricity on the site, and displays shall not require external electric power. In addition, generators or motors of any kind shall not be used on the property. Displays shall be permitted to utilize battery or solar power sources.
- 4.15 There shall not be awnings or canopies or tents erected in the designated display area.
- 4.16 There shall be no commercial speech in or on the designated display area. Signs with company logos which indicate sponsorship of a display shall not be considered commercial speech, as long as they are located in the designated area and do not exceed 8 ½ x 11" in size, and as long as the sponsorship signs do not include telephone numbers and/or web site addresses.
- 4.17 There shall be no profanity, pornography, or obscenity in or on the designated display area.
- 4.18 There shall be no vehicles used on, in, or leading to the designated display areas unless the City approves the use of a vehicle in advance. Such approval shall be based on the ground conditions and the expected impact of the use of a vehicle.

5.0 SITE/DATE GROUP SELECTION PROCESS

- 5.1 Sites/Date Groups for the displays shall be selected by lottery process conducted by the City of Troy.
- 5.2 The selection lottery for each calendar year shall be held at 10:00 am on the first Wednesday of the month of November in the preceding year. This date shall also be used as the selection lottery for the remaining date groups in the 2004 calendar year.

- 5.3 Applications for the lottery shall be filed on forms provided by the City of Troy and shall be filed no less than 7 calendar days prior to the selection lottery.
- 5.4 Applications for the lottery shall be accepted from residents of the City of Troy above 18 years of age, or businesses, , civic groups or non-profit organizations located in the City of Troy.
- 5.5 Not more that one application for the lottery shall be accepted from any one individual or group.
- 5.6 The lottery process shall require the applications to be selected at random.
- 5.7 Applicants shall either appear in person at the lottery, or have their designee present, as identified in their application for the lottery. The applicants or their designee must be present to select their preferences for the designated display area. Applications that have been selected, for which there is no applicant or designated representative present at the time of the drawing, shall be disqualified.
- 5.8 If selected, applicants shall pick the designated display area (A or B) and date group for their display from the remaining available locations and date groups. This process shall continue until all dates for each location are selected or until all applications have been drawn in the lottery.
- 5.9 Any date groups not selected for either of the two designated display areas on the day of the lottery shall become available after the first day of December. Troy residents, businesses, , civic or non-profit organizations can apply for one of these available dates by filing an application at least 21 calendar days in advance of the first day of the desired date group.

6.0 AGREEMENT BETWEEN CITY AND SUCCESSFUL APPLICANTS

- 6.1 Each successful applicant shall pay a non-refundable fee of \$50.00 for each display to offset any public costs. This fee shall be paid at least 21 calendar days prior to the first date of the date group, as designated by the lottery system described in Section 5.0 of this policy.
- 6.2 Each successful applicant shall enter into an agreement with the City of Troy at least 21 calendar days prior to the first date of the date group, as designated by the lottery system described in Section 5.0 of this policy. The agreement shall be in the form approved by the City of Troy. The approved agreement form shall be supplied to all persons at the time of the yearly application for the lottery, and shall be subsequently available at City Hall, the Community Center, and the web site.

- 6.3 The agreement shall require the successful applicant to provide a proposed layout of the proposed display (at a suitable scale), which shall include the size (square footage) and location of any signs, booths, tables, or temporary structures of any kind. Applicant shall provide a written description of the display material types (wood, metal, plastic, etc.), the dimensions, and a description of the method of anchoring the display. This information shall be provided at least 21 calendar days prior to the first date of the date group, as designated by the lottery system described in Section 5.0 of this Policy.
- 6.4 The agreement shall require each successful applicant proposing a display for the Troy City Plaza to submit an executed hold harmless agreement on the applicant's letterhead. The hold harmless agreement shall be signed by the applicant's authorized representative, and shall agree to defend, indemnify, or hold harmless the City of Troy, its elected and appointed officials, employees and volunteers and others working on behalf of the City of Troy; against any and all claims, demands, suits, loss, including all costs connected therewith, for any damages that may be asserted, claimed, or recovered against or from the City of Troy, its elected and appointed officials, employees, volunteers or others working on behalf of the City of Troy, by reason of personal injury, including bodily injury and death; and/or property damage, including loss of use thereof, which arises out of or is in any way connected or associated with the activity authorized by this permit.
- 6.5 The agreement shall require each successful applicant proposing a display for the Troy City Plaza to procure and maintain insurance acceptable to the City, demonstrating that general liability coverage is available for claims for personal injury or property damage caused by the display or attributed to the placement of the display. Such insurance shall be in the amount of \$500,000 per occurrence and aggregate limit. The Certificate of Insurance shall name the City of Troy as an additional insured. The City reserves the right to modify the insurance requirements as necessary with 30 calendar days notice to the successful applicant. The successful applicant agrees to provide the certificate of coverage at least 21 calendar days prior to the first date of the date group, as designated by the lottery system described in Section 5.0 of this Policy. The successful applicant must keep said insurance or a similar policy with the above minimum insurance coverage in effect for the term of the display. The successful applicant shall submit to the City of Troy Risk Management Department a Certificate of Insurance acceptable to the City demonstrating coverage for the above insurance amounts. Additionally, the City may request a copy of said insurance certificate at any time during the display.

- 6.6 The agreement shall require each successful applicant proposing a display for the Troy City Plaza to provide a \$100 deposit to the City. This deposit shall be security for the City against any property damage to the designated display areas caused by the successful applicant's display or any costs or contract or Troy personnel charges incurred by the City as a result of the successful applicant's failure to comply with the terms of the agreement or this display policy. This deposit shall be made at least 21 calendar days prior to the first date of the date group, as determined by the lottery system set forth in Section 5.0 of this Policy. The existence of a deposit does not preclude the City from taking any other available legal action to recoup any City damages resulting from the successful applicant's failure to comply with the terms of the agreement or this display policy. Upon removal of the display, the deposit shall be returned to the successful applicant, less any costs incurred by the City as a result of the applicant's breach of the Policy or agreement.
- 6.7 The agreement shall require each successful applicant to submit the details for any graphics, and any messages or wording for the display (at a suitable scale) at least 21 calendar days prior to the first date of the date group, as determined by the lottery system set forth in Section 5.0 of this Policy. This information shall be reviewed by the Troy City Attorney or Attorney's designee for compliance with this Policy. The Attorney shall indicate any objections to the proposed display in writing within seven days of receiving the information. Objections can be based on the inclusion of pornography, profanity, obscenity, or commercial speech, which are prohibited in the limited public forum. The Attorney shall rely on First Amendment jurisprudence in making this determination. Appeals of the Attorney's decision can be made to the Troy City Council or by filing an action with the Oakland County Circuit Court.
- 6.8 The displays must contain only the items that were submitted and approved by the City, in accordance with this policy.
- 6.9 The failure to comply with the terms this policy or the agreement will result in disqualification of the successful applicant, and shall be considered grounds for removal of the display (at the expense of the successful applicant) from the designated area and a forfeiture of the remaining time contained within the lottery assigned time slot.
- 6.10 The successful applicant agrees to comply with all federal, state, and local laws and regulations that apply to the display.