

## FEBRUARY 2002 NRPA LAW REVIEW

### “UNATTENDED STRUCTURES” BAN INCLUDES NATIVITY SCENE ON TOWN GREEN

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In regulating private displays on public property, the Establishment Clause of the First Amendment prohibits government from endorsing or discriminating against particular religious beliefs or messages. The case described herein, *Knights of Columbus v. Town of Lexington*, is the latest in a long line of “creche” cases in which local governments have struggled to address Establishment Clause concerns regarding traditional nativity scene displays in public parks and open space.

In this particular case, the federal appeals court found the Town had regulated access to a public forum in a manner which was consistent with the First Amendment. Specifically, the court held that “the Town’s ban on unattended structures on the Green is a permissible ‘time, place, and manner’ restriction that operates without reference to the content of speech, and that the aesthetic preservation of so historic a landmark furnishes an appropriate basis for imposing this narrowly tailored restriction in a public forum.”

#### PREFERENTIAL TREATMENT OR DISCRIMINATION?

In the case of *Knights of Columbus v. Town of Lexington*, No. 01-2460 (1st Cir. 11/29/2001) the United States Court of Appeals for the First Circuit had to decide “whether the Town of Lexington, Massachusetts (the Town) violated the First Amendment by adopting a regulation that bans unattended structures from the historic Battle Green.” The facts of the case were as follows:

The situs of this controversy is the historic Battle Green (the Green) - the very place where the first battle of the Revolutionary War occurred. Seven of the eight minutemen killed during the battle are buried there, and the Minuteman Statue - located at the apex of the Green - memorializes the American colonists who fought in the Revolutionary War. The Green is a registered historic landmark, owned and maintained by the Town.

The Town’s governing legislative body is the Board of Selectmen (the Board). The Board is entrusted with suzerainty over, and protection of, the Green. In the exercise of that function, the Board from time to time promulgates rules governing the use of the Green. Historically, these rules have allowed for a wide range of public uses, including recreational activities and activities involving the expression of political, religious, and other views. The rules divide activities on the Green into three categories: (1) allowed activities, (2) forbidden activities, and (3) activities for which a permit is required. To

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illustrate, picnicking in small groups is allowed as a matter of right; commercial solicitation is prohibited altogether; and rallies are allowed if a permit is first obtained (but otherwise are forbidden).

For most of the twentieth century, the creche - a figurine representation of Christ's nativity in the stable at Bethlehem - appeared on the Green for roughly six weeks each year (in late November and December). For some thirty years, the Town had erected the creche, disassembled it, and stored the components. In or around 1973, however, two fraternal organizations - the Knights of Columbus and the Masons - assumed responsibility for these tasks.

There is evidence that the display of the creche long has been a source of friction within the Town, and that some residents complained bitterly about its presence on the Green. For the most part, however, the regulations, insofar as they pertained to the creche at all, seem to have been honored more in the breach than in the observance. Despite the fact that the regulations have required a permit for a religious display of this type since at least 1982, no permit ever was sought or demanded prior to the erection of the creche in any year before 1999.

Beginning in the fall of 1998, the issue was repeatedly discussed at the Board's meetings. A group consisting of clergy and citizens with various viewpoints was formed to study the problem and suggest solutions. This committee reported to the Board on September 27, 1999. It unanimously concluded that "private citizens do have the right to have religious observances on the common land within guidelines established by the town," but suggested that a shortened display period might be a reasonable compromise. For the 1999 season, the owners of the creche, including the Knights of Columbus, agreed to a display period of three weeks.

Subsequent to the Board's decision to allow the three-week display, it began receiving requests to allow a wide range of other religious structures on the Green for comparable periods. One group desired to place a sign near the creche indicating some citizens' objections to its presence on public land. Other applicants requested permission for a display honoring witchcraft at Halloween and for the erection of a pyramid to honor the Egyptian Sun God Ra during the month of April. Yet another resident inquired about the possibility of erecting a Sukkah, an open hut-like structure, to commemorate the Jewish harvest festival of Sukkoth.

The minutes of the Board's meetings reveal a keen awareness that if it continued to allow a display of the creche, many of these competing applications would have to be granted. The Board thus believed that it was on the horns of a dilemma: it could not

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constitutionally pick and choose among competing applications, but granting them all likely would compromise the aesthetic and historic elements of the Green.

After seeking legal advice, the Board modified the rules governing use of the Green in several ways. First, it limited permit eligibility for public expressions on the Green to active events of less than eight hours in duration. Second, it restricted displays of a ceremonial nature to those "in connection with special events and limited in duration to the period required for such events." Third, it added an explicit prohibition against "placement on the Green of any unattended structure."

On October 19, 2000, the Knights of Columbus and the organization's grand knight, Michael O'Sullivan (collectively, the Knights), applied for a permit to erect the creche on the Green. The application was denied, although the Board indicated that a one-day event that included the creche would be approved. In point of fact, a Town resident was granted a permit to hold a "live" nativity scene and service on the Green on December 23, 2000.

Unhappy with the new regulation which effectively ousted the creche from the Green, the Knights sued the Town, claiming a violation of their free speech rights. The federal district court granted summary judgment for the defendant Town. The Knights appealed. The federal appeals court expedited the appeal "in an effort to resolve the matter in advance of the Christmas season."

On appeal, the Knights claimed the challenged regulation infringed on their First Amendment rights. In so doing, the Knights alleged that the Town had adopted the regulations for an improper purpose, viz., "to exclude the annual religious display of a creche from the Battle Green." Moreover, the Knights argued that the "Town's selective application of the regulation following its adoption" was unconstitutional.

Accordingly, the issue before the federal appeals court was whether the new regulation or its application violated Free Speech Clause of the First Amendment. As cited by the court, [t]he Free Speech Clause provides that "Congress shall make no law abridging the freedom of speech." Further, the court noted that "this prohibition applies equally to states and their political subdivisions" under the Fourteenth Amendment. "Despite the uncompromising language in which this proscription is couched," the appeals court acknowledged that the Free Speech Clause "is not absolute." Rather, the court found that "[t]he Supreme Court has articulated a framework for determining whether a particular regulation impermissibly infringes upon free speech rights":

That framework dictates the level of judicial scrutiny that is due - and that choice, in turn, informs the nature of the restrictions on free speech that may be permissible in a

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public forum.

The triage works this way. The bedrock rule is that government may not prohibit all communicative activity in a public forum. Content-based prohibitions may endure - but only if they are justified by compelling state interests. Accordingly, such prohibitions engender strict judicial scrutiny.

Content-neutral restrictions pose less of a threat to freedom of expression.

Consequently, content-neutral restrictions on the time, place, and manner of speech trigger an intermediate type of scrutiny such that they will be upheld as long as they are "narrowly tailored to serve a significant governmental interest, and allow for reasonable alternative channels of communication."

Applying this analytical framework to the facts of the case, the federal appeals court found that the Green was a public forum. Moreover, the court acknowledged that the Knights had "a free speech interest in exhibiting the creche." On the other hand, the appeals court noted that "the Town's limitation of free speech on the Green is not absolute: the new regulation merely prohibits one manner of expression (unattended structures) in a particular place (the Green) at certain times (when unconnected with an event)." Accordingly, the specific issue was whether the restriction on unattended structures on the Green was "content-based or content-neutral."

### CONTENT-BASED OR CONTENT-NEUTRAL?

In determining "whether a regulation is content-based," the federal appeals court stated that it would inquire whether the ban on unattended structures on the Green "regulates speech because of disagreement with the particular message that the speech conveys." As cited by the court, "government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech."

In this particular instance, the Knights conceded that "the language of the regulation is facially neutral." Similarly, the federal appeals court found that "the ban on unattended structures is comprehensive; it does not discriminate among types of unattended structures, and certainly does not single out the creche."

The Knights, however, contended that "the legislative history demonstrates that the regulation's primary purpose is to prevent display of the creche." The federal appeals court acknowledged that "a court may have to look beyond the bare language of a regulation to determine whether its justification is content-neutral." However, under the circumstances of this particular case, the appeals court found "nothing in the record that evinces a content-based animus against the creche."

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The Town's longstanding practice of permitting the creche to be displayed on the Green without a permit helps, rather than hinders, the Town's argument. That practice shows a receptivity to the display and, contrary to the Knights' importunings, creates no entitlement to preferential treatment in the future.

[T]he Board proposed the new regulation only after requests for permits for alternative religious displays began to sprout. Mindful of the strictures of the Establishment Clause, the Board reasonably assumed that it must treat all applications for religious displays alike, regardless of the message conveyed. Fearing a flood of applications and a corresponding cluttering of the Green, the Board devised a regulation prohibiting all unattended structures. This is a far cry from an invidious singling-out of the creche.

The only inference that the record permits is that the new regulation was conceived out of a desire to treat all religious expression even-handedly. If the Knights feel that the burden of the regulation falls most heavily on them, it is perhaps because they are now held to the same standard as all other similarly situated applicants. While the adjustment may not be an easy one, the outcome is inescapably content-neutral.

### SIGNIFICANT GOVERNMENTAL INTEREST/NARROW TAILORING?

Having determined that the challenged regulation was content-neutral, the federal appeals court had to consider whether the ban on unattended structures on the Green was "narrowly tailored to serve a significant governmental interest, and allow for reasonable alternative channels of communication." The Town had argued that it had a significant governmental interest in "preserving the historical and aesthetic qualities of the Green" which "amply justifies the restriction." The federal appeals court characterized the Town's claim as "a theoretically sound position."

[A]esthetic preservation may warrant a content-neutral restriction on speech in a public forum... the Town's interest in aesthetic preservation qualifies as a significant one. Moreover, that interest is enhanced here by the site's designation as a national historic landmark.

In response, the Knights contended that "the regulation is not narrowly tailored to the achievement of this aesthetic rationale." In so doing, the Knights asserted the following three points:

First, that it is not only unattended structures that produce clutter; second, that the Town should have pursued alternatives less restrictive than a total ban; and third, that the creche is aesthetically pleasing.

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According to the appeals court, “[t]he first two parts of this argument are plainly misguided.” In reaching this conclusion, the appeals court noted that “[t]he narrow tailoring requirement does not mandate a least restrictive means analysis.” As a result, the court found that “the Town was not required to implement or experiment with other alternatives before finally choosing the total ban.” On the contrary, the appeals court stated that “[t]he ‘narrow tailoring’ requirement is satisfied as long as the particular regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” In this particular instance, the court found the challenged regulation was a logical response on the part of the Town to address a number of “Establishment Clause concerns.”

[A]voiding an Establishment Clause violation may be a compelling state interest justifying even content- based restrictions on speech. The Town legitimately could conclude that unattended displays were more likely to present Establishment Clause issues than attended ones because, for instance, a reasonable observer might be confused as to the source of the message. This is significant because the context of a religious display is crucial in determining its constitutionality.

We note, too, that the Supreme Court has explicitly indicated that a total ban on unattended structures in a public forum would pass constitutional muster.

As a result, the federal appeals court held that “the total ban on unattended structures” was “constitutionally permissible” because it was “both content-neutral and narrowly tailored to achieve a substantial governmental interest.” In so doing, the court rejected as “irrelevant” the Knights’ argument that “the creche is aesthetically pleasing” and, therefore, presumably worthy of preferential treatment.

[T]he Establishment Clause makes clear that the Town was bound to consider a range of potential religious displays when it envisioned the future of the Green. Thus, the aesthetics of the creche, in the abstract, are irrelevant. The Town rationally could have decided that some of the requested displays, or the sheer number of potential displays, would be inconsistent with the aesthetic quality of the Green. Even if the creche were more beautiful than all the others - a matter on which we take no view - the Town was not at liberty to allow the creche while at the same time prohibiting other religious displays.

### ALTERNATIVE AVENUES OF COMMUNICATION?

In reaching this determination, the federal appeals court found further that “the regulation does not unduly restrict the Knights’ free speech rights because they have adequate alternative avenues of communication available to them.”

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The Knights remain free to display the creche, either during the course of an event on the Green or at any time on nearby private property. The record shows that one of the two churches facing the Green is willing to have the creche displayed on its front lawn for the customary six-week interval.

To be sure, the Knights argue that these are not adequate alternatives - an event would be too transitory and placing the creche on private property would not convey the same message. But the message that they suggest is suppressed is that the creche belongs "at the center of public life in the Town of Lexington."

This reasoning turns the constitutional standard upside-down. Although the Constitution protects private expressions of beliefs, it does not authorize - and sometimes even forbids - citizens' attempts to invoke public backing of their beliefs. The Knights have no constitutional right to communicate a message of public support for the creche.

It is also notable that the creche is not completely banned from the Green. Like any other ceremonial display, it may appear on the Green in conjunction with an active event for up to eight hours. The Knights have not explained why such a display is impractical, instead stating that the Town has no right to dictate to them how they must express their private beliefs. Yet the Town has issued no general ukase [i.e., edict or proclamation] regarding private religious observances; only religious displays on a single strip of public land are affected. In a forum of this kind, it has long been established that government may impose reasonable restrictions on the manner of speech.

As a result, in adopting the challenged regulation, the federal appeals court concluded that "the Town has done no more than exercise its right to manage its property in the manner it deems desirable without crossing the constitutional line."

### CONSISTENCY IN APPLICATION?

On appeal, the Knight had also argued that "the amended regulation has been applied so inconsistently that it gives municipal officials unfettered discretion." In support of their claim of selective enforcement, "the Knights presented evidence of other unattended structures that have been seen on the Green since the new regulation was adopted, e.g., bleachers and a platform truck were left on the Green prior to a Patriots' Day celebration, and a podium appeared on the Green some days prior to a Memorial Day event."

In addressing the issue of selective enforcement, the federal appeals court acknowledged that "a neutral ordinance may violate the First Amendment if it invites uneven application." However, under the

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circumstances of this case, the appeals court found no evidence that these structures were erected by private parties. Moreover, the court noted that “the regulation was never intended to apply to actions by the Town itself,” only private parties. Further, the court found no evidence on the record that “shows preferential treatment in respect to any unattended structure erected by such a [private] party.”

Having determined that “the ban on unattended structures is a content-neutral restriction on the time, place, and manner of speech, narrowly tailored to achieve a significant governmental interest and framed so as to allow access to ample alternative avenues of communication,” the federal appeals court affirmed the summary judgment in favor of the defendant Town of Lexington.