

CONSTITUTIONAL FENCE FOR A MONUMENTAL CONTROVERSY?

James C. Kozlowski, J.D., Ph.D.

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On October 12, 2004, the Supreme Court of the United States agreed to review a 2003 decision issued by the Fifth Circuit Court of Appeals in the case of *Van Ordon v. Perry*, 351 F.3d 173 (5<sup>th</sup> Cir. 2003). In this case, Van Ordon, a resident of Austin, Texas, was seeking to have a monument inscribed with the Ten Commandments removed from the grounds of the Texas State Capitol. As characterized in Van Ordon's Supreme Court brief, the Fifth Circuit had concluded that "Texas had permissible secular purposes in placing the monument on government property: honoring the Fraternal Order of Eagles, the monument's donor, for its work against juvenile delinquency, and commemorating the Ten Commandments' 'influence upon the civil and criminal laws of this country'."

In granting Van Ordon's petition to review this decision, the Supreme Court framed the constitutional question posed by the facts of this case as follows: "Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment."

Oral arguments in *Van Ordon v. Perry* were scheduled for March 2, 2005. On that same date, the Supreme Court is also scheduled to hear oral arguments in another Establishment Clause case involving display of the Ten Commandments in a county courthouse, *McCreary County v. ACLU of Kentucky*. The Bush Administration filed an amicus (friend of court) brief supporting the "display of historical documents that influenced the development of American law," including the Ten Commandments. In so doing, the Administration's brief claimed an interest in retaining "numerous displays of the Ten Commandments and similar religious symbols on federal property, including in federal court-houses, the United States Capitol, the National Archives, the Library of Congress, national monuments, and national park lands."

Echoing these same sentiments, the American Center for Law and Justice (ACLJ) has weighed in with the city of Frederick, Maryland in a recent case challenging the validity of a sale of a small parcel of parkland containing a monument inscribed with the Ten Commandments. As reported by CNSNews.com, senior counsel for ACLJ, Francis Manion, asserted a view similar to the above described position taken by the Bush Administration: "Many courts have recognized that the Commandments displayed in conjunction with other historical documents are constitutionally appropriate and does not violate the Establishment Clause of the Constitution." In this particular instance, Manion expressed ACLJ's desire "to convince the court that the monument in Frederick merely reflects the acknowledgement that the Commandments served as a basis for western law and have played an important role in the development of our legal system." Further, Manion characterized the monument in a Frederick, Maryland park as a "part of the fabric of this community for nearly 50 years."

According to CNSNews.com, "the monument was donated to the city in 1958 and originally stood outside the city hall, but it was later moved to a city park where it was displayed along with war memorials, a George Washington plaque, and other markers of local historical

significance.” In response to a suit brought in 2002 by the American Civil Liberties Union (ACLU), the City of Frederick had decided to sell the parcel of land containing the monument to the group which had originally donated the monument to the city, the Fraternal Order of the Eagles. The ACLU subsequently dropped its suit, but the Americans United for the Separation of Church and State then brought the present challenge to the sale in federal district court. The district court judge was scheduled to issue his ruling in late February.

In the 1950s and 1960s, the Fraternal Order of the Eagles had given a number of similar Ten Commandments monuments to towns and cities as part of a project begun by a Minnesota juvenile court judge who saw the Ten Commandments as the cure for juvenile delinquency. Since that time a number of federal and state courts have grappled with the question of whether such displays in public parks violated the Establishment Clause of the United States Constitution.

The controversy in Frederick, Maryland is just the latest in a growing line of federal court cases involving constitutional challenges to Eagles’ Ten Commandment monuments in public parks.

In one of the more recent opinions, *ACLU Nebraska Foundation v. City of Plattsmouth*, No. 02-2444 (8<sup>th</sup> Cir. 2004), a federal appeals court held that “the words and symbols on the monument” conveyed a message which was “undeniably religious.” Specifically, the court found “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.” Further, the court found that “[t]he reasonable viewer would perceive this monument as an attempt by Plattsmouth to steer its citizens in the direction of mainstream Judeo-Christian religion” in violation of the Establishment Clause. (See “Eagles Ten Commandments Park Monument Fails ‘Lemon’ Test” *Parks & Recreation*. May 2004. Vol. 39, Iss. 5, <http://classweb.gmu.edu/jkozlow/lawarts/05MAY04.pdf>)

Similarly, in the case of *Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7<sup>th</sup> Cir. 2000), the federal appeals court found that the proximity of a statue of Jesus to City property and the lack of visual definition between City and private property “created a perception of improper endorsement of religion by the City” in violation of the Establishment Clause. Accordingly, despite the sale of the statute site to a private party, the City still had a legal obligation “to take steps to avoid being perceived as supporting or endorsing a private religious message.” (See “Establishment Clause Violation Persists Despite Sale of Park Statue” *Parks & Recreation*. June 2000. Vol. 35, Iss. 6)

## FLOOD VOLUNTEER TRIBUTE

Citing *Marshfield*, the Seventh Circuit recently upheld the constitutionality of a sale of a small parcel of parkland containing a Ten Commandments monument to the Fraternal Order of Eagles in the case of *Mercier v. Fraternal Order of Eagles*, Nos. 04-1321 & 04-1524, 2005 U.S. App. LEXIS 9 (7<sup>th</sup> Cir. 2005). However, in contrast to *Marshfield*, the federal appeals court in *Mercier* found the city had taken adequate steps to create a visual distinction between the public park the monument’s religious message on private property through the use of double fencing and signs surrounding the Eagles’ Ten Commandments monument. In the Frederick, Maryland

case pending in federal district court, the City and the ACLJ have cited the reasoning in *Mercier* this opinion to support the constitutionality of Frederick's sale of Ten Commandment monument parkland to the Eagles. Pending some resolution of this ongoing controversy by the Supreme Court in *Van Orden*, the *Mercier* opinion may provide some insight into the manner in which "a sale of real property [containing a Ten Commandments monument] is an effective way for a public body to end its inappropriate endorsement of religion." Moreover, given the proximity of the Ten Commandments monument in *Van Orden* to the Texas State Capitol, the Supreme Court could narrow its decision to situations where such monuments are located near, or in, governmental buildings. Unlike *Van Orden*, the Ten Commandments monument in *Mercier* was not located near any governmental buildings.

As described by the federal appeals court in *Mercier v. Fraternal Order of Eagles*, for almost forty years, a Ten Commandments Monument had occupied a spot in Cameron Park, a public park in the City of La Crosse, Wisconsin. In response to a lawsuit by residents claiming the Monument violated the Establishment Clause, the City sold the Monument and a portion of the park to the Fraternal Order of Eagles, the same service organization that had originally donated the Monument to the City in 1964. The federal district court held that the sale violated the Establishment Clause.

As noted by the federal appeals court, there are no governmental buildings within sight of Cameron Park. Moreover, it is not necessary to walk through or past the Park in order to enter any governmental buildings. The Monument does not occupy a particularly prominent location in the Park. Rather, it was situated at the corner of the Park directly across from the Eagle's La Crosse headquarters. A spotlight on the roof of the headquarters illuminated the Monument at night, but such illumination was never formally approved by the City. At its dedication, the Monument was said to pay tribute to several hundred youth who had volunteered in fighting a severe flood in April 1965. The Eagles assumed full responsibility for preserving and maintaining the Monument. No City funds were ever expended on the Monument.

In June 2001, the Freedom from Religion Foundation, Inc. asked the City to remove the Monument from the park. The City Council denied the request. The City also denied several requests by the Foundation and other groups to move the Monument to another location. In April 2002, the City Council passed a resolution acknowledging the threat of litigation by the Foundation and City's intent to keep the Monument in its present location in the belief that the Monument did not violate the Constitution. After the Foundation filed suit in July 2002, the City authorized the sale of the parcel of parkland containing the Monument at fair market value. State law authorized the City to sell park land no longer needed for park purposes. In August 2002, a 20 x 22 foot area of the park on which the Monument was located was sold to the Eagles for its assessed value, \$2,640. The deed conveying the property to the Eagles provided that "appropriate fencing, landscaping and signage shall be provided by 10/24/02 and maintained in order to commemorate the youth of the La Crosse area for their assistance and great help for the spring, 1965 flood that the City of La Crosse experienced."

In October 2002, the Eagles erected a four-foot-high steel fence around the parcel. Temporary signs were later added which read "This is the property of the La Crosse Eagles Aerie 1254." In March 2003, these temporary signs were replaced with permanent signs on all four sides of the

fence stating: "This is the property of La Crosse Eagles Aerie 1254. Dedicated to the volunteers who helped save the city of La Crosse during the 1965 flood." Below this wording is a picture of volunteers filling sand-bags during the 1965 flood.

One month later, the City of La Crosse erected a second fence, this one wrought-iron and, like the first fence, four feet high, almost immediately outside the fence erected by the Eagles. On the north and south sides of this fence are metal signs. On these signs in ten-inch high black letters is the statement "PRIVATE PARK." Beneath this statement, in four-inch black letters, are the words: "THIS PROPERTY IS NOT OWNED OR MAINTAINED BY THE CITY OF LA CROSSE, NOR DOES THE CITY ENDORSE THE RELIGIOUS EXPRESSION THEREON."

Despite the sale and the above described measures, the Foundation continued to claim that the presence of the Monument in the Park violated the Establishment Clause. The federal district court agreed with the Foundation and held that the appropriate remedy for the violation was the return of the plot of land to the City and the removal of the Monument from the Park. The City and the Eagles appealed.

#### APPROPRIATE SALE?

As cited by the appeals court, the First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I, cl. 1. This provision, the Establishment Clause, is made applicable to the States through the Fourteenth Amendment. In this particular instance, the specific issue before the court was "whether the sale by the City to the Eagles of the plot of land underneath and surrounding the Monument was an independent violation of the Establishment Clause."

Citing *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), the appeals court noted that "absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." The court, however, acknowledged it was required to "look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased." In so doing, the court would also consider the proximity of the Monument to City property. Specifically, the court would find a violation of the Establishment Clause where the lack of visual definition between City and private property created a perception of improper endorsement of religion by the City.

In *Marshfield*, the federal district court instructed the parties to develop some way to differentiate between private property and property owned by the City." In so doing, the district court ordered the installation of a four-foot-high wrought-iron fence on which were attached two signs reading: "Private Park This property is not owned or maintained by the City of Marshfield, nor does the City endorse the religious expressions thereon." The district court further ordered that "the text 'Private Park' will be in ten (10) inch block letters while the subsequent text will be in four (4) inch block letters."

Applying this reasoning to the facts of the case, the appeals court in *Mercier* noted that "[t]he fencing and signs installed by La Crosse identical (even to the point of having the same-size

lettering) to that ordered by the district court in *Marshfield*.” Moreover, on appeal, the Eagles and the City contended that there were “no unusual circumstances to call into question the sale.” Consequently, citing the reasoning of *Marshfield*, the sale at issue was an appropriate way for the City to end its otherwise inappropriate endorsement of religion. The appeals court agreed. In so doing, the court found “no unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion.”

As noted by the court, *Marshfield* highlighted some "of the typical sort of improprieties that might cause us to disregard a transaction."

Such improprieties would include a sale that did not comply with applicable state law governing the sale of land by a municipality; a sale to a straw purchaser that left the City with continuing power to exercise the duties of ownership; or a sale well below fair market value resulting in a gift to a religious organization.

In this particular case, however, the appeals court found that “the sale complied with Wisconsin state law and the Eagles paid the market rate, as determined by the City Assessor.” Further, the court noted that “[t]he Eagles also assumed the traditional duties of ownership.” In so doing, the sale would allow the City to extricate itself “from any perceived endorsement of the religious wording on the Monument” while retaining the “historical benefit” of keeping the Monument in place, i.e., “the 1965 flood and the youth who helped protect the city.”

In addition, the appeals court found the location of the Monument to be particularly significant in dispelling the notion that the government is tacitly endorsing religion.

The parcel sold by the City is not located near, or in, any governmental building. Residents of La Crosse do not pass by the Monument to attend court hearings, pay fines, meet with government officials or employees, or participate in any other way in the civic affairs of La Crosse. Although Cameron Park is public property, it is a park and is not, like a courthouse, capitol building, or even the grounds of a government complex, a setting where the presence of government is pervasive and inescapable.

La Crosse is not selling property inextricably linked with the seat of government. Obviously, a city could not sell space under the dome of its City Hall or the sidewalk in front of the courthouse steps. Such sale would be, on its face, a sham. Instead, the location [is] in a neighborhood park nowhere near the seat of government.

Further, the court found that the sale of the Monument parcel near the periphery of the park would not “eviscerate the design or plan of the Park's layout” or “suddenly deprived the visitors to the Park of normal access and enjoyment.” On the contrary, park visitors would “remain free to utilize the park grounds, much the same way as before the sale” with the exception of a “twenty by twenty-two-foot-space fenced around the Monument.”

In the opinion of the appeals court, “[t]his sale clearly meets the standards set out in *Marshfield*,” given “the somewhat extensive effort made to distinguish the now-private property from the Park.”

[T]he parcel is surrounded by two fences adorned by six signs, four of which state the parcel is owned by the Eagles and refers to the 1965 flood, and two that state the parcel is not owned by the City. These last two signs also disclaim any endorsement of the Monument by the City... [T]he impression that the Monument is no longer part of the City's property could not be any clearer. Any reasonable person walking past the Monument (either in front or behind) will quickly recognize that the Monument, whatever its past history, is not the property of the City of La Crosse.

In addition to “meeting the legal standards of the Establishment Clause,” the appeals court found the sale achieved “a practical goal.”

The City is able to extricate itself completely from the implied endorsement of the purpose and content of the religious symbol, yet the Monument can remain in the location it has occupied for many years. If the local citizens at some point want the symbol moved to make way for an alternate use, the solution can be found in the political rather than the legal process... This sale has clearly not pleased everyone, and it likely did not entirely please anyone. It was, however, constitutionally appropriate.

The appeals court therefore, reversed the decision of the district court to have the City remove the Monument and ordered the district court to enter a summary judgment in favor of the City and the Eagles.