PARK BAN ON UNATTENDED HOLIDAY DISPLAYS

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If you can't do it right, don't do it at all. As illustrated by the federal circuit court opinion described herein, this approach may not only make good common sense, but also good legal sense under certain circumstances. Traditional holiday displays in public parks have increasingly generated contentious constitutional law challenges, particularly by individuals and groups opposed to any display of religious symbolism in public spaces in general and public parks in particular. Over the years, many of these traditional holiday displays giving rise to legal controversies had been erected and maintained by private parties with the tacit or expressed permission of the local government.

MORE TROUBLE THAN IT'S WORTH

In the case of *Santa Monica Nativity Scenes Committee v. City of Santa Monica*, 784 F.3d 1286; 2015 U.S. App. LEXIS 7155 (9th Cir. 4/30/2015), upon the advice of legal counsel, the city chose to avoid potential costly constitutional law pitfalls by eliminating private holiday displays altogether from a popular public park.

Palisades Park in Santa Monica, California, regarded as the "crown jewel" of the City's park system, is a picturesque strip of land 14 blocks long that overlooks Santa Monica State Beach and the Pacific Ocean. Beginning in about 1955, every year during December, local residents erected a series of large dioramas in the Park depicting various scenes from the biblical story of Christmas.

The display consisted of 14 booths, each 18 feet long and filled with life-sized mannequins and decorations. Putting up and taking down this elaborate display was a significant undertaking, and in 1983, the nonprofit Santa Monica Nativity Scenes Committee was organized to manage the yearly construction of the dioramas.

In the early years of the nativity scenes' existence, the City of Santa Monica had no formal regulations dealing with private, unattended structures on public parkland, and the City allowed and even encouraged the yearly display of the Committee's nativity scenes.

In 1994, the City prohibited the construction of unattended displays—*i.e.*, large, multi-day installations—in its parks, but it nonetheless continued to allow the nativity scenes. Subsequently, in 2003, the City Council enacted an exception to the general prohibition on unattended displays to allow the "long-standing tradition" of the nativity scenes in Palisades Park to continue.

This "Winter Display" exception authorized unattended displays during the month of

December, but only in Palisades Park. Under the "Winter Display" rule, all members of the community, not just the Committee, were permitted to put up displays, and display space was to be allocated on a first-come, first-served basis. The Winter Display system functioned without incident in its first few years of existence, during which time the only applicant who requested substantial display space was the Committee.

In 2011, however, applications for Winter Display space surged. That year, a number of atheists who opposed the placement of religious displays in Palisades Park applied for Winter Display space. In response to increased demand, the City instituted a lottery system to allocate the available space. As a result, the atheists received the majority of the display spots. The Committee alleged these applications were a coordinated attempt to keep the space away from the Committee and other religious groups. The Committee and the atheists both vowed to flood the display-space lottery with even more applications in 2012.

In early 2012, the city attorney submitted two separate reports to the city council in which she recommended that the city council eliminate the legal exception permitting Winter Displays in Palisades Park. In these reports, the city's attorney acknowledged the First Amendment prohibited the city from picking and choosing which displays to allow in the Park during December.

Accordingly, in the attorney's opinion, the city had only two options: it could continue with the lottery system it had in place, or it could repeal the Winter Display system altogether. The city attorney recommended repealing the Winter Display system entirely. According to the attorney, Santa Monica residents wanted to "preserve the aesthetic qualities" of the Park and their ability to "look at the ocean vista" for which the Park was renowned, rather than continue to allow the Winter Displays.

Further, as noted by the city attorney, city staff had reported the lottery system for display space was "time consuming and costly" to operate, requiring the investment of hundreds of hours of staff time. Moreover, this problem was likely to intensify in the future because the groups involved had indicated that they planned to "flood" the lottery process in future years "to increase their odds of being allocated more spaces."

In the opinion of the city attorney, eliminating the Winter Display exception would "serve the purposes of resolving the controversy, eliminating legal risks, conserving the staff time and resources necessary to operate a constitutionally valid regulatory system, conforming usage of Palisades Park to the long standing, City-wide standard which prohibits unattended displays in parks, and protecting the views of the park and ocean."

The city council agreed with the city attorney and subsequently adopted their legal counsel's advice and unanimously adopted an ordinance which repealed the Winter Display exception.

DISTRICT COURT

The Committee responded to enactment of the ordinance by suing the City, alleging the City's policy banning private unattended displays in Palisades Park violated the First Amendment's Free Speech Clause. In particular, the Committee claimed the challenged ordinance was an unconstitutional "heckler's veto." The heckler's veto doctrine applies in situations where a particular speaker is silenced because his speech invites opposition, disorder, or violence.

The federal district court disagreed and dismissed the Committee's claim. In so doing, the federal district court found the City's policy of banning all unattended displays in Palisades Park was content neutral and a valid time, place, and manner regulation consistent with Free Speech Clause of the First Amendment. The Committee appealed to the United States Court of Appeals for the Ninth Circuit.

PARK TRADITIONAL PUBLIC FORUM

As noted by the ninth circuit court of appeals, all parties agreed that Palisades Park was a "traditional public forum." Since public parks are categorized as traditional public for a for First Amendment purposes, the court acknowledged that the government's ability to regulate speech is "sharply circumscribed." Specifically, "[a] content-based speech regulation in a traditional public forum is subject to strict scrutiny and will be upheld only if it is narrowly drawn to serve a compelling governmental interest."

> Content-neutral time, place, and manner regulations …are permitted in traditional public forums if the regulations are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication.

Moreover, the federal appeals court found previous opinions issued by the Supreme Court had indicated "a content-neutral ban on all private unattended displays in a city's parks is very likely to be a legitimate time, place, and manner regulation." Further, the court found no "private constitutional right to erect a structure on public property" because such a right in "our traditional public forums, such as our public parks, would [allow parks to] be cluttered with all manner of structures."

HECKLER'S VETO

In this particular instance, the Committee conceded that the challenged ordinance was content neutral. In other words, the ordinance did not discriminate between particular displays based on their content. On the contrary, the ordinance effectively banned all unattended displays in Palisades Park. That being said, the Committee claimed the

reaction by atheist groups to the religious content of their displays prompted the City's ban on all unattended displays in Palisades Park. As a result, the Committee claimed the ban invoked the "heckler's veto" doctrine wherein it may be unconstitutional for the government to restrict or "veto" speech in reaction to the opposition of other antagonistic observers or "hecklers".

> The [heckler's veto] doctrine prohibits the government from pointing to the "reaction of listeners" to speech as a "secondary effect" justifying that speech's regulation; in other words, the government may not regulate speech on the grounds that it will cause its hearers anger or discomfort. If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech.

In this particular instance, the Committee had contended "Ordinance 2401 was a heckler's veto because the City Council enacted it in response to the atheists' objections to the Committee's nativity scenes." Specifically, the Committee argued "the City reacted to the controversy that had begun to brew over the competing claims for display space in Palisades Park by opting to suppress speech there altogether." In so doing, the Committee cited the city attorney's reports and public remarks by city council members expressing "fear that the display controversy would escalate and turn ugly."

The federal appeals court rejected this argument. As noted by the court, the "prototypical heckler's veto case is one in which the government silences *particular* speech or a *particular* speaker due to an anticipated disorderly or violent reaction of the audience."

However, in this particular instance, the court found no "restriction of particular speech due to listeners' actual or anticipated hostility to that speech." On the contrary, the court found "the City adopted a generally applicable regulation meant to balance competing speech rights rather than to suppress a particular message because of the audience's reaction to it."

> In 2010 and 2011, the City was confronted for the first time in its history with a profusion of requests for display space in Palisades Park—requests that the City reasonably believed the First Amendment required it to treat equally, given that the Park is a traditional public forum. The City made an effort to accommodate both the Committee and the other applicants for space, but the City soon came to the conclusion that the administrative problems and intramural strife caused by the Winter Display lottery system outweighed the benefits of continuing it…
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> It is sufficient for present purposes to note that the City set for itself the laudable goal of treating all applicants equally and that, once the City concluded that

> perpetuating the Winter Display system would be more trouble than it was worth, the City addressed the problem with a neutral regulation that banned all unattended displays, whether religious or secular.

As described by the federal appeals court, "[t]he heckler's veto doctrine is concerned with the possibility that *particular* speech will be wrongfully excluded from the marketplace of ideas merely because it is offensive to some of its hearers." On the other hand, the court found the heckler's veto would not apply "when a regulation applies to *all* speech and does not allow for arbitrary enforcement based on particular speech's offensiveness." (*Emphasis of Court*)

Accordingly, in the opinion of the federal appeals court, the City did not violate the First Amendment when it chose to permit unattended displays in its public spaces for some period of time and then withdrew that permission when the displays later generated "controversy."

SIGNIFICANT GOVERNMENTAL INTERESTS

In addition to being "content neutral," to pass constitutional muster as a time, place, and manner regulation, the federal appeals court noted that the challenged ordinance must also be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication."

In the opinion of the federal appeals court, the challenged ordinance "served at least two significant governmental interests" because it preserved park aesthetics and conserved city resources.

> First, it preserved the aesthetic qualities of Palisades Park and prevented obstruction of patrons' views of the ocean. The Supreme Court has held on several occasions that governments may regulate speech for aesthetic purposes. And the City has long manifested its intent to preserve its parks from clutter: since at least 1994, it has prohibited unattended displays in all parks while making a limited exception for "Winter Displays" in Palisades Park. Ordinance 2401 simply made that prohibition applicable to all of Santa Monica's parks at all times.
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> Second, Ordinance 2401 conserved the City's resources. Prior to 2011, coordinating the Winter Displays in Palisades Park had been an easy task for the City's staff; in 2011, however, the staff spent "hundreds of hours" administering the lottery system, and all indications were that the system would become more time-consuming in the future as the number of applications for space increased. It was permissible for the City to seek to alleviate this burden on its employees' time.

NARROW TAILORING

In the opinion of the federal appeals court, the challenged ordinance was also "narrowly tailored" to achieve the above noted significant governmental interests. According to the court, the ordinance unquestionably "furthers the City's interests in preserving the aesthetics of Palisades Park and conserving City resources." Moreover, the court found the ordinance did not "burden substantially more speech than necessary" because the ordinance "affected only unattended displays" which "require laborious permitting in ways that other forms of speech, even attended displays, usually do not."

In response, the Committee had pointed out "several steps that the City could have taken to address the problems it identified, short of repealing the Winter Display exception." As noted by the federal appeals court, such "observations are irrelevant to the question of narrow tailoring."

> A time, place, and manner regulation need not be the least restrictive or least intrusive means" of furthering the government's interests in order to be narrowly tailored. Rather, narrow tailoring requires only that a regulation "promote substantial government interest that would be achieved less effectively absent the regulation and not burden substantially more speech than is necessary to further that interest.

ALTERNATIVE CHANNELS OF COMMUNICATION

Having found the challenged ordinance satisfied the "narrow tailoring requirement," the federal appeals court also found the challenged ordinance "leaves open ample alternative channels of communication." In the opinion of the court, "many alternative avenues" existed for the Committee to "communicate its religious message" after the City excluded unattended displays from its parks. As noted by the court, the Committee could "erect its unattended nativity scenes on private property." According to the court, the Committee could also "speak in many other ways in Palisades Park, including erecting one-day, attended displays, leafleting, preaching, holding signs, and caroling."

The Committee, however, found these "alternative channels of communication" were inadequate to reach their intended audience, i.e, visitors to Palisades Park. For the Committee, Palisades Park was "the optimum location for reaching the greatest number of spectators" in Santa Monica. As a traditional public forum, the appeals court acknowledged the Committee could claim a First Amendment right to communicate their message to Palisades Park visitors. Such communication protected by the First Amendment, however, did not necessarily involve unattended displays. As characterized by the appeals court, consistent with the challenged ordinance, the Committee would still be "able to speak in the Park," but "simply cannot do so by erecting large, unattended

structures."

The Committee also argued it was "impractical" to "arrange for the nativity scenes to be attended displays." Specifically, the Committee claimed it could not "practically recruit volunteers or afford to pay people to be present" while the displays are up. The appeals court rejected this argument. According to the appeals court, "the fact that the alternative channels of communication left open by a regulation are more expensive is not, by itself, sufficient to show that those alternative channels are inadequate."

The Committee contended further that "the First Amendment "protects its right to choose a particular means or avenue of speech"—*i.e.*, unattended displays." The federal appeals court agreed that "speakers have a First Amendment right to choose a particular means or avenue of speech to advocate their cause." That being said, the appeals court noted that speakers do not have a First Amendment right to dictate the *manner* in which they convey their message within their chosen avenue.

On the contrary, the appeals court acknowledged "Government may regulate the *manner* of speech in a content-neutral way." Accordingly, consistent with the First Amendment, the court found the City could limit the manner of speech by requiring large displays to "be attended or erected as part of limited-duration 'community events'."

In the opinion of the federal appeals court, the challenged ordinance left open sufficient alternative channels of communication allowing "the Committee to disseminate its message in person in many different ways, including attended displays and unattended displays that are part of single-day 'community events'."

CONCLUSION

Having found the challenged ordinance was a "valid time, place, and manner regulation," the federal appeals court affirmed the judgment of the district court dismissing the Committee's claim under the Free Speech Clause of the First Amendment.

In so doing, the federal appeals court acknowledged that the Committee might understandably resent "the way in which the City curtailed its traditional way of celebrating the Christmas season in Palisades Park," but the City did not violate the First Amendment when it banned all unattended private displays.

SEE ALSO: "Unattended Structures" Ban Includes Nativity Scene On Town Green
James C. Kozlowski. *Parks & Recreation* . Feb 2002. Vol. 37, Iss. 2
http://cehdclass.gmu.edu/jkozlows/lawarts/02FEB02.pdf

Religious Message Excluded From Christmas Displays In Park
James C. Kozlowski. *Parks & Recreation* . Jul 2004. Vol. 39, Iss. 7

http://cehdclass.gmu.edu/jkozlows/lawarts/07JUL04.pdf

Constitution Bans Religious Effect in Public Holiday Displays
James C. Kozlowski *Parks & Recreation* . Oct 1989. Vol. 24, Iss . 10; p. 20
http://cehdclass.gmu.edu/jkozlows/lawarts/10OCT89.pdf

A Christmas carol in the park from the Supremes.
James C. Kozlowski. Parks & Recreation June 1985 v20 p16(6)
http://cehdclass.gmu.edu/jkozlows/lawarts/06JUN85.pdf

YouTube Videos: "Palisades Park Nativity"
https://www.youtube.com/watch?v=9swxIvDWVhA
https://www.youtube.com/watch?v=Jaw3gGXI0Cs
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