

FREEDOM FROM RELIGION *foundation*

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SENT VIA EMAIL & U.S. MAIL: pkuhns@cityofreboth.com

The Honorable Paul Kuhns
Mayor, City of Rehoboth Beach
229 Rehoboth Avenue
Rehoboth Beach, DE 19971

Re: Thank you for upholding the separation of church and state

Dear Mayor Kuhns:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) to applaud the City's commitment to maintaining the separation of church and state by not hosting private religious displays on public property, and to assure you that the City's decision is consistent with the Constitution. FFRF is a national nonprofit organization with more than 30,000 members across the country, including members in Delaware. FFRF's purposes are to protect the constitutional separation of state and church, and to educate the public on matters relating to nontheism.

It is our understanding that in 2018, the City of Rehoboth Beach decided that in order to uphold the separation of church and state and to not appear to be endorsing religion, it would no longer allow Saint Edmond's Church to place a nativity scene on city property. We understand that the City even agreed to work with the church to find a private location where the scene could be displayed without City endorsement. Despite this generous compromise, we understand that a local division of the Knights of Columbus has now threatened to sue the City if it does not allow the church to display a nativity scene on City property.

We write to commend the City on how it handled this situation and to thank the City for protecting the rights of *all* of its citizens. Not only is the City's decision legally sound, it is the best way for the City to ensure that all of its citizens feel that they are welcome in the Rehoboth Beach community.

As you are likely aware, the City is not obligated to allow private entities to erect unattended displays on public property. The City is well within its rights to prohibit private unattended displays. The Supreme Court has addressed this issue:

It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State. *Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981);

Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802–803, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985). If the former, a State's right to limit protected expressive activity is sharply circumscribed: It may impose reasonable, content-neutral time, place, and manner restrictions (**a ban on all unattended displays, which did not exist here, might be one such**), but it may regulate expressive *content* only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest. *Perry Ed. Assn.*, *supra*, at 45, 103 S.Ct., at 955.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761(1995) (holding that it was unconstitutional to ban a KKK cross from a public forum because of its message) (emphasis added).

In *Pinette*, it was central to the case that the Board had affirmatively allowed displays through a permitting scheme and that it had granted applications for some displays. *Id.* at 758. Once it did so, the Board could not reject the KKK cross display based on its content. The City can, however, reserve public property for specific uses, like city-endorsed holiday displays, without opening a public forum. The fact that the City displays secular Christmas decorations on public property does not mean that it has opened a public forum.

A policy that disallows private unattended displays is a valid time, place, or manner restriction consistent with the First Amendment. *See, e.g., Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) (“We are not cognizant of . . . any private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures. Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.”); *Knights of Columbus v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001), *cert denied*, 122 S.Ct. 1911 (2002) (finding a ban on unattended displays in a park to be neutral and narrowly tailored); *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, No. CV 12-8657 (C.D. Cal. Order of Dismissal Nov. 29, 2012).

While the City cannot host a public forum and deny equal access to certain groups because of the content of their display, the City can host its own holiday display as long as that display does not endorse religion. The Supreme Court has repeatedly found that “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). When the City controls the display and citizens view the display as sponsored by the City, it is government speech and no group has the right to demand inclusion. In *Lubavitch Chabad House, Inc.*, the Seventh Circuit Court of Appeals held that private

speakers did not have a right to place a menorah among an airport's holiday decorations. 917 F.2d 341. The court said:

[W]e see no reason to mandate that *Allegheny* provides a basis for Lubavitch's assertion that Chicago *must* allow it to erect free-standing Chanukah menorahs in the public areas of O'Hare along with the City's Christmas decorations.

Id. at 345.

Again, we thank the City of Rehoboth Beach for making a fair and reasonable decision that respects the right of conscience of all its citizens. The City's decision ensures that no one religious group is favored or excluded. If you or your attorneys have any questions, the FFRF legal department, which has extensive experience in First Amendment matters, would be more than happy to consult with you on this matter.

Sincerely,



Christopher Line
Staff Attorney
Freedom From Religion Foundation