

Council Study Session

August 2, 2022

Agenda Item	Commemorative & Ceremonial Flags at City Facilities	
From	Douglas M. McGeary	Acting City Attorney
Contact	Doug.mcgeary@ashland.or.us ; 541-552-2091	
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SUMMARY

The City Council adopted a resolution on May 4, 2021, that included the proclaiming of Juneteenth as an annual day of municipal commemoration. As part of its commemoration the City of Ashland currently flies Juneteenth commemorative flags on the Plaza near City Hall, and at the Council Chambers/Police Station on East Main Street. This Study Session item is to discuss the potential for expanding the flying of other commemorative flags at City Facilities under a potential new Council municipal commemoration proclamation.

POLICIES, PLANS & GOALS SUPPORTED

Resolution 2021-01, Section 1.B proclaiming Juneteenth as an annual day of municipal commemoration.

BACKGROUND AND ADDITIONAL INFORMATION

The issue of use of the city's flags and banners policy has arisen again after a recent Supreme Court of the United States (SCOTUS) ruling, *Shurtleff v. City of Boston*, 596 U.S. (2022). The *Shurtleff* case concerned the city of Boston's practice of allowing the public to fly flags on city poles but in this particular case the city denied a Christian group from flying a flag on Constitution Day. The group claimed its purpose for flying their flag was "to enhance the understanding of the country's Judeo-Christian moral heritage". The case went up through appeals evaluated under Establishment Clause doctrine despite the complaint presenting only a First Amendment free speech violation. SCOTUS simply agreed with the plaintiff that "the city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech".

As noted, *Shurtleff's* issues of speech were also conflated with issues involving the 1st Amendment Establishment Clause pertaining to religion. Although not dealt with directly by the majority in *Shurtleff*, the issue was discussed in a concurring opinion that later appeared as underlying authority in the majority in a subsequent case, *Kennedy v. Bremerton School District*, 597 U.S. (2022). The *Kennedy* case now interprets the Establishment Clause much more strictly to protect religious expression. This is an important development because the city will need to develop flag and banner policies that take both these new interpretations for free speech and religious expression into account.

Boston apparently did not have a well-established policy limiting the use of its flagpoles. Public entity policies, including for the City of Ashland, will need to establish clear rules of what flags are to be presented on their poles and when. To that end the city will want to differentiate between government speech and public forum. The more liberal a policy that the city applies to allow use of their flag poles (or a showing of a lack of "meaningful involvement in the selection of flags or the crafting of their messages"), the more it

will be subject to a Boston outcome under *Shurtleff*. That is, under *Shurtleff*, a policy and practice that allows public speech use of its flag poles cannot be restricted to only those uses dictated or supported by the city. Allowing public speech use of city flag poles means that any and all public speech uses must be tolerated and allowed.

If the city allows public speech use of its poles, the city will clearly need to guard against any content-based regulations to the extent that it can. That is, an American flag as a symbol is arguably content based but undoubtedly would be permitted, on the other hand prohibiting flags with specific symbols or messages would be problematic. Flying a “Black Lives Matter” flag would be a difficult rule to write since it is a particular statement about a particular group of people. Flying a rainbow-colored flag is a similar statement that would also be a hard one to differentiate without exposing the possibility for an opposing group to fly their flag. A Juneteenth flag has now become a national holiday so a rule may be easier to differentiate since you could craft one without reference to the content of the flag. In short, the more the city makes the flagpole the city’s (government speech) and not the public’s (public speech) and the more neutral the policy, then the more likely the city will avoid a *Shurtleff* or *Kennedy* outcome.

Review Of City Pennant Policy & Guidelines

In a quick peruse of the city’s pennant policy, the document appears to comply or fall within the meaningful involvement in the selection of flags or the crafting of their messages and the related *Kennedy* restrictions on government activity effecting the public’s use of city property. The city’s policy is detailed with restrictions that are not content based and apply uniformly on a design basis. It specifically states that “[p]ennants may not advertise or promote commercial products or services, or religious, political, or social viewpoints”, hence the rules are intended to remain neutral by simply eliminating content. However, *Kennedy* and other recent decisions of SCOTUS have shown that the court is beginning to interpret strictly against government action particularly related to those which inhibit or injure the free practice of religious expression.

The city’s policy restricts displays in specific areas or places which affect aesthetics and safety. They provide criteria for sizing, permanence, manner of displays, and maintenance which again all remain neutral and relate to important government interests to protect against litter, aesthetic degradation, and overall health concerns.

With pennants, the ordinance again appears content neutral and design oriented, and yet detailed enough to craft a message for public purposes while establishing criteria to steer away from promoting particular personal or singular information messaging. In this regard, the city appears to be establishing a “meaningful involvement in the selection of flags or the crafting of their messages” which the majority in *Shurtleff* agreed was necessary despite a concurring opinion that picked at the edges as the *Shurtleff* decision that touched on First Amendment religious concerns.

If the City Council wishes to consider expanding flag or banner presentations at city facilities or on its flag poles, to include additional commemorative flags, it will be necessary to produce a detailed legal review of the intended governmental speech purpose to avoid an unintended consequence of creating a policy or practice that creates a private forum that would, in turn, obligate the city to allow any and all other private speech uses at city facilities or flag poles.

FISCAL IMPACTS

It is anticipated that adding additional flag commemorative dates at the Plaza near City Hall, and the Council Chambers/Police Station on East Main Street will require nominal expenditures to purchase flags, assuming the selected commemoration days are limited in number and have flags that are recognized as appropriate for the intended use that are readily available for purchase off the shelf.

DISCUSSION QUESTIONS

- What additional days are the City Council interested in proclaiming as annual days of commemoration that include flag or banner presentations? Operationally, how often and on what dates should the City raise commemorative flags or banners?
- Do the identified commemoration days have recognized and readily available flags for purchase?
- What legal considerations or circumstances should be reviewed by the City Attorney prior to expanding commemoration flag days of the City of Ashland?

SUGGESTED NEXT STEPS

Commemorative flags or banners the City Council wishes to propose to be flown at city facilities, on city flag poles or on public rights-of-way should be reviewed by the City Attorney for their potential to contain personal or singular information messaging that can legally be considered private speech. The City Attorney should report back their related findings or recommendations, including on any updates to the city's pennant policy that should be considered by the City Council.

Also, the flags or banners proposed for city commemorative use should be reviewed for availability and cost by city staff.

REFERENCES & ATTACHMENTS

NA