December 16, 2015

The Honorable Stephen Brint Carlton, County Judge
Orange County
123 South 6th Street
Orange, Texas 77630
hwheeler@co.orange.tx.us

Dr. Shawn Oubre, City Manager
803 W. Green Avenue, Room 201
P.O. Box 520
Orange, Texas 77630
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Re: Nativity Displays in Orange County

Dear Judge Carlton and Mr. Oubre:

Through media reports, Alliance Defending Freedom has learned that a local atheist group has requested to erect a display alongside the nativity displays in front of City Hall and the County Courthouse. In response, City officials decided to remove the City Hall nativity display, and County commissioners will soon meet to discuss whether to remove the County Courthouse nativity display. In light of these actions, Alliance Defending Freedom wishes to provide free legal advice and support to the City and to the County to help both entities legally erect their nativity displays. By way of introduction, Alliance Defending Freedom (ADF) is a non-profit legal organization that represents government entities for free in their efforts to commemorate the role of religion in our history and culture. Thus, ADF is well-positioned to advise and defend the City and the County in their effort to celebrate the Christmas season.

The City and County Can Constitutionally Erect Nativity Displays

After the local atheist group requested to erect their display on government property, City officials apparently took down their nativity display for fear that it violated the First Amendment's Establishment Clause. County officials may have the same concern. But that fear is misplaced. City and County officials should know that government entities can erect nativity displays that comply with the Establishment Clause.

Although the Supreme Court has used different tests to evaluate Establishment Clause claims at different times and in different contexts, it has already confronted a nativity scene and

upheld it against an Establishment Clause challenge in *Lynch v. Donnelly*. 465 U.S. 668 (1984). As that decision so clearly stated, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 674. Therefore, the city in *Lynch* could erect a nativity display because in doing so, the city had merely "taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday." *Id.* at 680.

Federal courts have subsequently interpreted *Lynch* and provided detailed guidance about how to erect a constitutional nativity display:

- *Mather v. Vill. of Mundelein*, 864 F.2d 1291 (7th Cir. 1989) (upholding holiday display with crèche, Santa Claus figures, sleigh, carolers, snowmen, carriage lights, wreaths, and two soldiers in the shape of nutcrackers).
- *Doe v. City of Clawson*, 915 F.2d 244, 245 (6th Cir. 1990) (upholding holiday display with crèche, Santa Clause figure, and four evergreen trees).
- *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997) (upholding holiday display with crèche, menorah, and Christian tree).
- *ACLU v. City of Florissant*, 186 F.3d 1095 (8th Cir. 1999) (upholding holiday display with a roofed stable, bales of hay, three dimensional figures of the three wise men, two kneeling camels, Mary, Joseph, and the infant Jesus in a manger).
- *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999) (upholding holiday display containing crèche, menorah, and Christmas tree).
- *Freedom from Religion Found., Inc. v. City of Warren*, 707 F.3d 686 (6th Cir. 2013) (upholding holiday display with nativity scene and reindeer, wreaths, snowmen, a mailbox for Santa, and other objects).

As these cases show, government entities can certainly erect nativity displays. These cases also provide a detailed roadmap about how to legally do so. Indeed, the United States Court of Appeals for the Sixth Circuit has recently stated that "much of the 'line-drawing' with respect to holiday displays has already been done…. Not just the Supreme Court, but our court and many others as well, have upheld similar displays." *City of Warren*, 707 F.3d at 692. In light of this caselaw, City officials simply misspoke when they stated that "there is not a clear case that gives affirmative direction to displaying the Nativity scene. This makes it difficult to formulate a policy for Christmas decorations on City property."[1] Such cases do exist and provide clear guidance. Alliance Defending Freedom is happy to explain those cases and to help City and County officials create a clear, constitutional policy regarding Christmas decorations on government property so that the City and County can retain their nativity displays.

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[1] A copy of the City's statement regarding its nativity decision is available at
http://www.12newsnow.com/story/30743497/city-of-orange-pulling-nativity-scene-after-atheists-demand-equal-access (last visited December 15, 2015).

The City and County Can Constitutionally Erect their Nativity Displays and Refuse to Erect Others' Displays

Besides the fear of violating the Establishment Clause, City and County officials may also fear violating the First Amendment if they refuse to erect the display requested by the local atheist group. Indeed, the local atheist group apparently demanded that the City and County allow the group to erect its own display. But that demand is meritless. The City and County can legally erect their own display and refuse to erect all other displays.

The Supreme Court has already addressed this exact issue in 2009. In *Pleasant Grove City v. Summum*, a city allowed a Ten Commandments monument on government property and then rejected a request to erect a different monument from a private religious group. 555 U.S. 460 (2009). Just like the local atheist group here, the private religious group in *Summum* said the city had to erect the requested monument or the city would violate the First Amendment. But the Supreme Court rejected that argument because monuments on government property typically speak for the government. *Id.* at 470. And because those monuments speak for the government, the city had the freedom to choose which monuments to erect and which to reject. *Id.* As other Supreme Court decisions have clarified, governments only have to accept displays from private parties when the government "intentionally" opens government property for public discourse. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015).

But no such intent is present in Orange County. The City and County have not opened up their property to private expression. They have merely erected their own holiday displays. And the government can do precisely this and still maintain the freedom to reject all requests from private groups to erect displays. In fact, federal courts have reached this conclusion in the nativity context. *See, e.g., City of Warren*, 707 F.3d at 692 (allowing city to erect its own holiday display and reject atheist group's request to display winter solstice display); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1137, 1143–44 (10th Cir. 2001) (allowing city to erect holiday display in front of city hall and to reject atheist group's request to erect a sign saying, "The 'Christ Child' is a religious myth").

In light of this caselaw, we hope that City officials will reconsider their decision to remove the nativity scene and that County officials will reject demands to remove their nativity display. If you have any questions regarding the constitutionality of your nativity displays or would like our assistance in responding to any legal action filed to challenge the nativity displays, we would be happy to discuss the situation with you further and provide our free legal services.

Sincerely,

Jonathan Scruggs
Legal Counsel

cc: <u>City Councilors</u>:
        Mayor Jimmy Sims
        Patrick A. Pullen
        Dr. Wayne Guidry
        Essie Bellfield
        Mary McKenna
        Bill Mello
        Larry Spears, Jr.

        <u>County Commissioners</u>:
        David Dubose
        John Banken
        Jody Crump
        Barry Burton