

HEYL ROYSTER

GOVERNMENTAL NEWSLETTER

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WELCOME LETTER

Dear Friends:

We are reaching the time of the year when we question whether our good intentions for 2012 can be achieved. One of those intentions for governmental officials is to understand better the laws and regulations which apply to their unit of government. Our job is to assist in making sure that you achieve that goal.

Earlier this year, our firm presented seminars in the Peoria and Urbana areas on cemetery issues. We have found that many of our clients are faced with difficult questions regarding cemeteries and have little in the way of resources to address them. Additionally, changes are being made to cemetery law of which our clients need to be aware. This issue of our newsletter continues with information on cemeteries - Andy Keyt presents an article on "Cemetery Maintenance Districts: An Option for Caring for an Abandoned Cemetery." On another cemetery issue, Stacy Crabtree explains the confusing rules concerning religious symbols in cemeteries and "when cemetery decorations cross the line of constitutional violations."

Beginning the newsletter, John Redlingshafer addresses an issue which too frequently is not understood by those in government – the rules and regulations which have been developed under the statutes of Illinois. Governmental agencies are permitted to establish rules which interpret or expand upon the statutes found in the Illinois Compiled Statutes. These rules have the force of law. John discusses where you can find those regulations and how the rules and regulations are created.

Finally, our next client seminar is called: "It's Not Easy Being a Green Government." This seminar will examine federal and state requirements

on environmental issues, as well as opportunities to promote environmentally friendly practices and how to pay for them – certainly a concern of many voters. Programs will be held on July 25 (Peoria) and July 26 (Urbana). Please contact Adam Harn at 309.677.9558 or at aharn@heyloyster.com to register for this free seminar.

Our governmental legal team wishes you the best for Summer, 2012.



Timothy L. Bertschy is a partner with Heyl, Royster, Voelker & Allen. He concentrates his practice in the areas of complex commercial litigation, employment, and local governmental law. He has litigated cases involving contractual breaches, business torts, partnership and corporate break-ups, stockholder disputes, ERISA, unfair competition, intellectual property, covenants not to compete, lender liability, fraud and misrepresentation, eminent domain (condemnation), computer and software problems, privacy, real estate disputes, zoning issues, and business losses. Tim has represented clients in the business, banking, real estate, stock brokerage, accounting, legal, insurance, governmental, and religious fields.



WHAT ARE ALL THESE “RULES AND REGULATIONS”?

By John M. Redlingshafer, Peoria
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For those of you who have been to a seminar with a session on laws which apply to your public body, you have undoubtedly heard someone talking about the related “rules and regulations.” Indeed, those of you who attended our last seminar and/or read Andy’s article in this newsletter know that with the Cemetery Oversight Act, various “rules and regulations” will need to be put in place before we have a better idea of how the Act applies to your public body.

So what are these “rules and regulations,” where can they be found, and how are they created?

What Are They?

Under numerous Illinois statutes, statewide departments and/or the department heads are advised by the General Assembly that they may have to create further procedures on how to implement the subject matter of the particular statute. Oftentimes, the General Assembly is deferring to the expertise of a particular agency on how best to implement a law (e.g., deferring to the Illinois Department of Transportation on collapsible signs, etc.), and an example of the language used can be found in the Illinois Vehicle Code:

The Secretary [of State] may from time to time make, amend, and rescind such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act, including **rules and regulations** governing procedures for the filing of applications and the issuance of licenses or registrations thereunder.

625 ILCS 5/2-104(b). (emphasis added).

As you can imagine, the Illinois Secretary of State has made numerous rules and regulations governing these procedures. If you have time at the Department

of Motor Vehicles in the near future, you should read some of the literature provided. While some may have specific statutory citations, I can assure you that some of the information is not contained in “the law.” They are contained in the depository of the rules and regulations known as “the Illinois Administrative Code.”

Are you interested in getting license plates promoting your alma mater? If you are, the brochure available at the DMV is undoubtedly based on Title 92 (Transportation), Chapter II (Secretary of State), Part 1010 (Certificates of Title, Registration of Vehicles), Section 1010.458 (Collegiate License Plates), which would be cited as 92 Ill. Admin. Code 1010.458.

Where Can I Find Them?

If you are looking for a copy of any provision under the Illinois Administrative Code (a/k/a, any “rule or regulation,” including 92 Ill. Admin. Code 1010.458), you have an online resource available to you.

The Joint Committee on Administrative Rules (JCAR) is a committee of the General Assembly authorized to review rules created by the various state agencies. JCAR is tasked with ensuring the General Assembly is informed of how laws are being implemented by agencies and to help the public understand these regulations. It is responsible for creating a weekly newsletter called “The Flinn Report” and maintaining the database for the Illinois Administrative Code, which it does on its website, at www.ilga.gov/commission/jcar/default.htm. From that page, you can find links to “The Flinn Report,” the Code, and many other resources.

In looking at the Code, you will see it is broken down by vague subject areas (Titles), but there is the ability to search for more specific terms. A few subject areas worth nothing are:

1. Elections (Title 26)
2. Emergency Services, Disaster, and Civil Defense (Title 29)
3. Fire Protection (Title 41)
4. Government Contracts, Procurement and Property Management (Title 44)

5. Labor and Employment (Title 56)
6. Social Services (including General Assistance) (Title 89)
7. Transportation (Title 92)

You can spend many hours digging through the existing Code to see what standards may govern a current General Assistance case (89 Ill. Admin. Code. 114) or how IDOT’s Bureau of Local Roads and Streets (92 Ill. Admin. Code 550.30) may be involved in an upcoming improvement project. However, there are times when we may not yet know what is coming or have heard through the grapevine that changes to existing rules are coming. Where do we look to see how rules and regulations are changed or created?

How Are These Rules and Regulations Created?

On the JCAR website, you will find a link to the “Illinois Rulemaking Process.” If you click on that link, you will learn the different types and the procedures which must be followed by a state agency in creating any rule or regulation. While a lot of the work gets done without much input from the ordinary citizen, there is still an opportunity for the public to participate and even suggest rules and regulations.

The status and notice of any pending rule and regulation will be published in what is known as the “Illinois Register,” found at: www.cyberdriveillinois.com/departments/index/register/home.html, which announces hearing dates and public input deadlines.

Conclusions

I often say that members of public bodies are tasked with many duties and responsibilities, including a working understanding of the laws which govern their actions. You already have a strong grasp of those statutes which naturally govern you (Municipal Code, Fire Protection District Code, etc.), and also know that the courts have interpreted

those statutes on numerous occasions. However, I invite you to become more familiar with these “rules and regulations” which can also govern your public body.

I am happy to walk through JCAR and/or the Administrative Code with you and your board(s) at any time.

John M. Redlingshafer is an associate with Heyl, Royster, Voelker & Allen. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. John is the immediate past President of the Illinois Township Attorneys’ Association.



CEMETERY MAINTENANCE DISTRICTS: AN OPTION FOR CARING FOR AN ABANDONED CEMETERY

By **Andrew J. Keyt, Peoria**
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Nearly every governmental entity in Illinois has one within its boundaries. Most of them struggle with how to care for them – from the manpower required to care for them, to the costs and funding for providing for their care. Whether it’s a municipality as large as Chicago, or a rural southern Illinois township, and

ELECTRONIC NEWSLETTERS

In keeping with our firm’s Green Initiative – *Practicing Green* – we are attempting to support the green effort. As a part of this endeavor, we are making our newsletter available electronically. If you would like to receive our newsletter via e-mail, please send your request to newsletters@heyloyster.com.

just about every township, county, and municipality in between, governmental entities have been struggling with them for years. What to do with them? How to care for them? And, most important, how to pay for it. What is this mystery problem – cemeteries.

Most governmental entities have cemeteries within their boundaries. While a number of them are private cemeteries – whether owned by a religious entity or for profit business – there are two types of cemeteries that governmental entities worry about. Abandoned cemeteries and governmentally owned cemeteries. Governmentally owned cemeteries tend to have existed for decades, continue to be utilized, and active, and are generally well cared for. It is the abandoned cemetery that causes some of the worst problems. The abandoned cemetery may not have a clear owner, may have an apathetic owner, may have citizens at your doorstep, and maybe all of the above. Of all those issues, the biggest is that the governmental entity may not have any funds to care for these abandoned cemeteries. Some governmental entities choose to expend their own funds to care for these cemeteries. While a viable option it can become expensive for a municipality, township, or county to continually expend funds for the care of abandoned cemeteries, particularly those with buildings to maintain. Another option exists. This is the establishment of a cemetery maintenance district.

There are two fundamental advantages to utilizing a cemetery maintenance district to care for a cemetery. First, the funding allowed under the Cemetery Maintenance District Act is a .06% tax rate, which can be used in addition to any funds dedicated by a township, municipality or county. Second, the responsibility of care can be transferred to a different agency, freeing up your valuable time and energy to concentrate on other matters.

What is a cemetery maintenance district – it is a separate governmental entity. How does a cemetery maintenance district get established? Below are the steps taken in setting up a Cemetery Maintenance District.

Step 1: Determine the area desired to be included in the District. The more taxable income that can be

generated the better, so attempt to include a mix of zoning districts from industrial, commercial and residential properties if possible. Do not draw a boundary encompassing only a cemetery as it will not provide any taxable income.

Step 2: Determine an appropriate district name. This is not complex, but try not to choose a name already taken by another district.

Step 3: Determine the number of legal voters within the proposed district. If there are fewer than 100 voters in the proposed district, a majority of signatures are needed on the petition to create a cemetery maintenance district. If more than 100 voters reside within the proposed district, then at least 50 signatures are needed. As a matter of procedure, it will be helpful to attach a detailed legal description and map of the boundaries with the petitions so that the map may be viewed by signatories.

Step 4: Filing the petition and notice of hearing. The Petition to Establish a Cemetery Maintenance District must be filed with the circuit clerk. After the petition has been filed, a judge will be assigned to oversee the matter. The judge may adjust the boundaries. The court publishes notice of the hearing in the local newspaper, but if that is not possible or no weekly newspaper exists, then notice may occur by posting the notices in a minimum of 10 conspicuous places at least 20 days prior to the hearing date.

Step 5: Any voter within the proposed district may be heard regarding the establishment of the district. The court may alter the boundaries at any time prior the results being sent to the clerk.

Step 6: Should the measure pass, the court will memorialize the official boundaries within the order.

Step 7: General election law controls the election on establishment of a cemetery maintenance district.

Step 8: The mere fact that the electors vote in favor of establishing the district does not mean the district has been established. The court must send the order to the county clerk to make the results official.

Step 9: The appointments to the Cemetery Maintenance District can be done by a variety of entities. If the district lies wholly within a township, the township will make the appointments (within 20 days of certi-

fication of the election results. The cemetery maintenance district may incur up to \$50,000 of indebtedness, level a .06% tax, and accept gifts. The district cannot issue bonds, however. Each trustee may only be paid \$50.00 per year.

This is a rough guide to establishing a Cemetery Maintenance District, and any entity considering such an option should consult with their attorneys before beginning the process. Also, it is important to note that while you may be a proponent of the district, a local governmental entity may not utilize funds to help establish the district or engage in voter persuasion.

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RELIGIOUS SYMBOLS IN CEMETERIES: WHEN CEMETERY DECORATIONS CROSS THE LINE OF CONSTITUTIONAL VIOLATIONS

By **Stacy E. Crabtree, Peoria**
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We have all heard of cases where a municipality or other government entity is challenged for displaying a religious symbol on public property in violation of the First Amendment of the United States Constitution. But what if that government entity happens to be a public cemetery? Would that religious symbol fare better in a cemetery, which is arguably one of the most common places to see religious symbols other than a church?

Housed in the First Amendment of the United States Constitution, the Establishment Clause states “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I. This limitation applies to the “legislative power of the States and their political subdivisions” as well due to the Fourteenth Amendment. *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 301 (2000). Therefore, public cemeteries are not immune from the Establishment Clause requirements.

Keep in mind that the First Amendment limits government action, not action of private persons. *People v. DiGuida*, 152 Ill.2d 104, 120-21 (1992). Therefore, a private person’s display of a religious symbol at a grave site is not subject to the Establishment Clause. In fact, the display of religious symbols such as crosses and stars of David on grave sites constitute religious speech protected under the Free Speech Clause of the First Amendment. *Warner v. City of Boca Raton*, 64 F.Supp.2d 1272, 1290 (S.D. Fla. 1999). The issue of when cemetery action may infringe on a private person’s right to religious speech is outside the scope of this article. Therefore, any time this article references the display of a religious symbol, it should be assumed that display is by the government actor, not a private person.

The United States Supreme Court announced that the core value underlying the Establishment Clause is “neutrality between religion and religion, and between religion and nonreligion.” *McCreary Cty., Kentucky v. ACLU*, 545 U.S. 844, 860 (2005); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The test most often used by courts in an effort to determine whether a government action upholds this value of neutrality or violates the Establishment Clause is the “Lemon Test,” so cleverly named after the U.S. Supreme Court decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The first prong requires government action to have a secular purpose. *Id.* at 612. The second prong requires that the primary effect of the government action neither furthers nor inhibits religion. Lastly, the third prong requires that the action not foster an excessive entanglement of government and religion. *Id.* at 613. Government action must satisfy all three

prongs to avoid violating the Establishment Clause. With respect to the third prong, a government entity's mere display of a religious symbol generally requires minimal ongoing, day-to-day interaction with the church. See *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). Consequently, the third prong has posed very few issues for government entities in religious symbol or display cases.

We can gain some insight to our issue of religious symbols in cemeteries by looking at some of the U.S. Supreme Court's decisions related to Christmas decorations. In 1984, the Supreme Court held the placement of a nativity scene with other Christmas decorations served the purpose of celebrating the holiday season and therefore did not violate the Establishment Clause. *Lynch*, 465 U.S. at 680-81.

Five years later, the U.S. Supreme Court held the display of a menorah in front of a county building did not violate the Establishment Clause because it was placed next to secular symbols such as a Christmas tree and sign extolling liberty thereby avoiding the appearance of Judaism endorsement. *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989). Similar to the *Lynch* case, the Court found the display to be secular recognition of the holiday season. *Id.* However, the Court acknowledged that "not all proclamations of Christian faith located on government property are permitted by the Establishment Clause." *Id.* at 612. In *Allegheny*, the Court also decided that a nativity scene in front of the county courthouse did violate the Establishment Clause. *Id.* at 601-02. An angel in the scene held a banner which read "Gloria in Excelsis Deo" (which means "glory to God in the highest"), and the scene was predominantly displayed in front of any other decoration. *Id.* at 598. Consequently, the court found the display of the nativity scene endorsed a religious message. *Id.* at 601.

So we learn from these Christmas cases that the display of religious symbols at Christmas time may serve the secular purpose of celebrating the holiday season. In other words, a government entity can avoid running afoul of the first prong of the Lemon Test (i.e. government action must have a secular

purpose) when religious symbols displayed have developed a secular meaning aside from their religious meaning. But be wary of the second prong of the Lemon Test. If the display is predominantly of one particular religion, a court may be more likely to find an unconstitutional endorsement of that religion.

Government action in cemeteries is also subject to the Lemon Test. *Birdine v. Moreland*, 579 F.Supp. 412, 416 (N.D. Ga. 1983). In Georgia, a statue of Jesus proposed to be part of a cemetery memorial failed to satisfy the Lemon Test because the deceased could have been adequately memorialized without the use of a purely Christian religious symbol. Therefore, the court concluded the statue did not serve a secular purpose as required under the first prong of the Lemon Test.

Does it make any difference if that religious symbol is a cross? A common argument is that crosses have developed a secular meaning as commemoration of the deceased separate from any religious meaning. Although the U.S. Supreme Court has not yet decided the issue of whether a memorial cross contradicts the Establishment Clause, the Court has acknowledged (but again, did not rule) that a cross placed on federal land in the Mojave National Preserve by private persons was to commemorate those who died in World War I and not necessarily to promote a Christian message. *Salazar v. Buono*, 130 S.Ct. 1803, 1817 (2010). Supreme Court Justice Kennedy pointed out that that cross remained in the Preserve for nearly seventy years, becoming "entwined in the public consciousness" as a war memorial. Justice Kennedy went on to say, "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs." *Id.* at 1818.

But do not find too much comfort Justice Kennedy's comments in *Salazar*. Other courts have ruled on whether a cross can serve a secular purpose in commemorating the deceased. Last year the Ninth Circuit Court of Appeals was faced with the issue as to whether a cross on federal land that was twenty-nine feet tall violated the Establishment Clause. *Trunk v.*

City of San Diego, 629 F.3d 1099 (9th Cir. 2011). That court was quick to dismiss the argument that a cross erected on public land conveyed a secular message simply because it was a memorial. *Id.* at 1111-12. In its reasoning, the Ninth Circuit said it did not have any evidence “that the cross has been widely embraced by’ – or even applied to – ‘non-Christians as a secular symbol of death’ or of sacrifice in military service.” *Id.* at 1116 (quoting *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1162 (10th Cir. 2010)). It should be noted that the combination of a cross with a star of David has not fared any better when presented as memorials. See *Greater Houston Chapter of ACLU v. Eckels*, 589 F.Supp. 222, 241 (S.D. Tex. 1984) (holding the display of three crosses and a star of David at a war memorial in a public park as a violation of the Establishment Clause).

In conclusion, the governing body of a public cemetery, whether it be a maintenance district, authority, or some other government entity should be cautious of any religious symbols it may choose to display in the cemetery. Remember, this only pertains to symbols displayed by the government entity, not by private persons on grave sites. Even where the government entity’s intent behind a religious symbol may be secular, such as commemoration of the deceased, that religious symbol is prone to be found an endorsement of religion and therefore in violation of the Establishment Clause...at least until the U.S. Supreme Court may decide otherwise.

Stacy E. Crabtree is an associate with Heyl Royster. She concentrates her practice on governmental affairs as well as tort litigation and representation of corporate and individual clients in the areas of commercial and contract law.



On February 2, 2012 PA 097-679 was signed into law amending the Cemetery Oversight Act. While most public entities will qualify for a partial exemption or full exemption from the law, you must apply for the appropriate exemption, and the process for that application is found in the Illinois Register. There is a limited window to apply for these exemptions, and a fee for doing so. If you need assistance in making an application for a partial or full exemption contact Andy Keyt or John Redlingshafer in the Peoria office of Heyl Royster.

Heyl Royster Governmental Go-To Guide Form Book

Our Go-To Guide allows any public official to have a quick resource for important questions they may face in their day-to-day governance. For example,

- How do we go into closed session under the Open Meetings Act?
- When should I respond to a Freedom of Information Act request?
- What should a Prevailing Wage Act ordinance say?

Moreover, our Guide also provides you with templates to ensure your compliance with annual posting requirements and ordinances. Available templates include:

- Annual Freedom of Information Act postings;
- Ordinance on Adopting Rules for Public Comments and Electronic Attendance at Meetings; and
- Many, many more.

For more information contact Sheri Kyle at skyle@heyloyster.com or (309) 676-0400.

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The statutes and other materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted.

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