the MANAGER

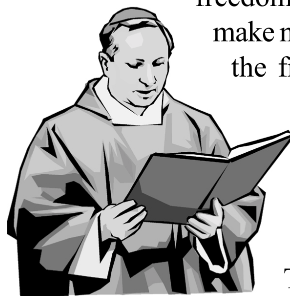
SUMMER 2006 Published by Massamont Insurance Agency, Inc.

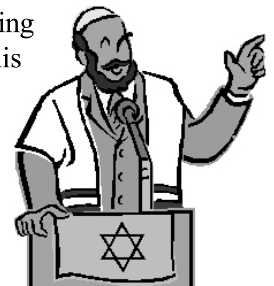
Public Buildings & Premises

Religion and the Constitution

Can a public building or public grounds be used for religious purposes? Communities across America have struggled with this issue for more than half a century. Most people have a moderate view on this subject, exhibiting a modicum of restraint and tolerance. After all, this is America. But being moderate is not necessarily being compliant with the law and the Constitution.

Our founding fathers and those who followed them left the issue of separation of church and state vague, perhaps intentionally. On the one hand they placed in the Constitution the concept of freedom of religion. The First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …." The natural reading of this brief statement is that the federal government cannot specify an official religion, nor can the government prohibit anyone from having his or her own beliefs or practicing a particular manner of worship.





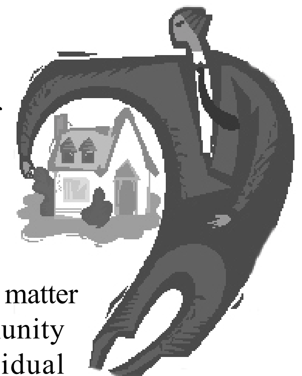
The First Amendment says nothing about the states and

☛ pg 3

Eminent Domain

Much Action, Little Real Change

Following the 2005 U.S. Supreme Court decision in *Kelo vs. City of New London*, eminent domain has become a hot topic from coast to coast. Eminent domain is a big issue in the flood-ravaged New Orleans area. The issues nationwide are residential and commercial private property rights, economic development, tax revenues, local needs, neighborhood blight, minority and elderly housing rights, and fairness. Eminent domain will remain a hot legal and political topic because economic development and the need of communities to enhance their tax revenues continue to compete with the interests of private property owners. According to the AARP, an advocacy group for senior citizens, it is "a matter of balancing community interests and individual rights."



Eminent domain arises from the Fifth and Fourteenth Amendments to the U.S.

☛ pg 5

INSIDE THIS ISSUE:

Religion and the Constitution 1
Eminent Domain 1
Happenings 2
Contact Us 2

Happenings!

Wall of Hope banner was presented by Massamont Insurance Agency together with Hartford Steam Boiler Inspection and Insurance Company to the Relay For Life of Franklin County, a fund raiser for the American Cancer Society.

During the Relay for Life, held June 9 and 10, the banner was signed by more than 1300 participants. The banner will be displayed in Washington D.C. on September 19th during "The Celebration on the Hill'" a campaign to raise awareness for cancer research funding.

Photographed with the banner are members of Massamont's underwriting team. Left to right: Tara Broderick and son Kole, Ann Roemer of Hartford Steam Boiler, Sue Mercer, Rachel Roy, Kathy Poissant, Christi Guardiola, Julie Kosuda, Christie Amstein, Heather Gmyrek, Jennifer Peterson, Merle Samson, Van Schenck.

Come Visit Us at Upcoming Trade Shows:

Connecticut Conference of Municipalities Annual Convention
Tuesday, October 3, 2006
Crowne Plaza Hotel & Conference Center
Cromwell, Connecticut

Vermont League of Cities and Towns Town Fair
Thursday, October 5, 2006
Barre, Vermont

Would you like to be on our mailing list?

Want more info on our programs? Contact:

Patrick Connors
Massamont Insurance Agency, Inc.
800.444.3916 ext 640
email: pconnors@massamontinsurance.com

Religion and the Constitution, cont'd from page 1

what they can or cannot do. The Fourteenth Amendment, written after the Civil War, says in part, "no state shall … deprive any person of life, liberty, or property without due process of law …." In 1947 the U.S. Supreme Court held in *Everson v. Board of Education* that the First Amendment specifies religion as one of those liberties. Therefore, not only must Congress abide by the restrictions in the First Amendment, but so too must the states and local governments.

On the other hand, the Constitution does not say that statements of faith are banned from public buildings, public places, or government property. Hence, it has to this day been acceptable under law to have "In God We Trust" on our coins and currency, to display the Ten Commandments in the U.S. Supreme Court Building, and for officials to use the Bible in the courtroom. It has been acceptable for citizens to wear modest religious symbols in public places, including schools, and for the military to have chaplains.

The *Everson* case is as poignant today as it was six decades ago. In that case the Court said:
"The Establishment of Religion clause means at least this: Neither a state nor the federal government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion…. Neither a state nor the federal government may, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa. In the words of (Thomas) Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

Interpretations of the Constitution

Not everyone, however, is religious, has faith, or is tolerant of those that do or of religions other than their own. Private citizens and organizations have raised the issue of separation of state and religion in many states and communities and before the courts. Can a municipality sponsor a crèche or a Chanukah menorah? Can Christmas lights be placed in a public park? Can a religious group rent space in a public building? Are these acts a violation of the U.S. Constitution? These questions are behind the spate of lawsuits that have burdened many communities with expensive lawsuits and community-relations problems regardless of which side of the issue public officials take publicly.

The courts have created legal tests to help them frame religious issues within the construction of the Constitution.

The rules have been changing in the last several decades as case law develops. A consensus seems to have evolved that provides a brighter light separating church and

☛ pg 4

Religion is a liberty granted by the First and Fourteenth Amendments to the U.S. Constitution. Neither Congress nor the states can deny any individual or group the freedom to practice or to not practice religion. In matters of religion, governments in the U.S. must take a position of neutrality.

Religion and the Constitution, cont'd from page 3

state in the use of public facilities. In Massachusetts and Connecticut, and in many other states, state and local governments are allowed to rent or lease space in public buildings or on public property to religious organizations or private groups, or otherwise to permit the use of municipal facilities by such organizations or groups for non-religious purposes if the event is open to the general public.

Government may neither advance nor inhibit the practice of religion.

In some municipalities, religious groups are banned entirely from using municipal facilities in the incorrect belief that to do otherwise is to violate the First Amendment. The Constitution only requires neutrality (see below). Others hold the opposite view, that the First Amendment prohibits municipalities from denying religious organizations the use of public premises if such use is allowed non-religious groups.

Case law implies that it is not the nature of the group that can be discriminately banned; it is the purpose that can be limited. *[Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981)].* This principle is in compliance with the so-called "Lemon test" (Lemon v. Kurtzman): that government action must have a bona fide secular purpose, that the primary effect is not that of advancing or inhibiting religion, and that religion and government are not entwined.

Some Supreme Court justices have developed and used other tests to determine if there is a violation of the Constitution. The "endorsement test," which was proposed by Justice Sandra Day O'Connor, examines to what extent, if any, an act of government amounts to an endorsement of religion, or, more to the point, whether adherence or non-adherence to a specific religious belief gives the

☛ pg 6

In recent years the U.S. Supreme Court has entertained four theories to test the constitutionality of various government actions in cases involving the use of government facilities or government funding by religious organizations. They are the:

Lemon test, Endorsement test,
Neutrality test, and Coercion test

Eminent Domain, cont'd from page 1

Constitution. The Fifth Amendment grants government the power to take private property for "public use" upon payment of just compensation, and the Fourteenth Amendment extends that right to state and local governments. But for more than a century, says David Barron, a Harvard Law School professor, public use has come to mean "public purpose."

Over many decades, "public use," the term used in the U.S. Constitution, has come to include "public purpose."

Eminent domain has frequently been used to achieve urban redevelopment and revitalization, terms sometimes used as euphemisms for eradicating blighted or depressed properties. Where renewal rights have been granted to private developers, increased jobs and tax revenues assuredly followed. For the cities, that has meant a triple win: the removal of unattractive – and often unsafe – neighborhoods, and significant increases in tax revenue and jobs.

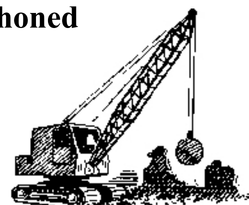
In the New London case, the Connecticut courts said that private homes could be demolished for private development if that would significantly add to the city's tax revenue and thus benefit the general public. The Supreme Court's 5-4 ruling supported the state courts and confirmed that the taking was not unconstitutional. The Supreme Court also said the states are free to ban the practice of eminent domain or to limit the application of the practice. In a concurring opinion, in what otherwise might have been a swing vote against the City of New London, Justice Anthony Kennedy stated that, in the *Kelo* case, the development was not "of primary benefit to … the developer." In other words, the primary benefit must be to the public although a benefit may also accrue to a developer or other private interest. This is an important distinction.

Prior to *Kelo*, eight states prohibited the use of eminent

☛ pg 8

The *Kelo v. City of New London* case is being replicated in Norwood, Ohio. In this suburb of Cincinnati, 99 homes and small businesses have been virtually demolished to make way for a $125 million shopping center under the guise of uprooting blight. Not everyone has conceded, and the case has gone to the state's highest court.

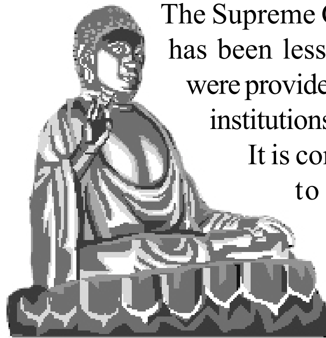
According to Newsweek (George Will, April 24, 2006, pg 94), "From 1998 through 2002, state and local governments seized or threatened to seize more than 10,000 homes, businesses, churches and pieces of land, not for "public use" but to enrich private interests, some of (which) … can be siphoned away by taxes."



Religion and the Constitution, cont'd from page 4

individual a superior or inferior position in the political community. In some respects, it is similar to the "Lemon test." This test has been used in legal cases involving expression, such as religious wording over the doors to public buildings or prayers spoken at graduation ceremonies.

A third test is sometimes used in legal cases involving government funding. The "neutrality test" permits government funding of education in religious schools to the same extent that such funding is provided to public schools – provided there is no favoritism of one religious entity over any other. It is this principle that underlies President George Bush's faith-based initiatives. The focus is often on the control of the funds and equal treatment regardless of faith.



The Supreme Court in recent rulings has been less critical of funds that were provided indirectly to religious institutions than of direct funding. It is constitutional, according to the Court, to give government funds to parents or non-denominational third parties as long as those parties ultimately control the final disposition of the funds. In *Susan Zelman v. Doris Simmons-Harris et al., (536 US SupCt 00-1751, 2002)*, the U.S. Supreme Court said that the government's role in this failed Cleveland, Ohio, school district case ended when it disbursed benefits to a broad class of citizens (parents) based on financial need that permitted those "individuals to exercise genuine choice among options public and private, secular and religious." The Court ruled that the government's decision as to who received the funds was neutral with regard to religion, even though 82 percent of the participating private schools in the program had a religious affiliation.

Public displays of religious images are generally acceptable if there is a secular message as well.

Finally, there is the "coercion test" that would allow, for example, a Nativity scene on school or town property if the act of the government neither provides direct aid to religion in a manner that establishes a state church nor coerces people to participate in religion against their will. Under these criteria, a national Christmas tree can be erected on the White House lawn if other religions have equal access to display religious symbols and if no one is coerced or led to believe that they will be discriminated against because they do not participate in any related ceremony. The majority of justices have not adopted this test.

Public Displays of Religious Works

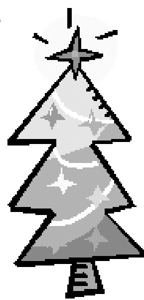
Case law on religious art and religious displays is less clear than is the case law governing the use of public buildings by religious groups or the indirect use of public funds by religious organizations. However, most courts have ruled that the posting or positioning in public facilities or on public property of religious texts, such as the Ten Commandments, is unconstitutional if they are displayed alone and without explanation or context (Alabama, Indiana, Tennessee, Texas, Utah). When displayed as part of a large collection of works illustrating the evolution of ideas or documenting historical events, most courts have found that the displays do not violate the Establishment Clause of the Constitution.

Displays of crèches, menorahs, and other religious symbols usually fall under the purview of the

☛ next page

Religion and the Constitution, cont'd from page 6

"Lemon test," wherein the confrontation in most cases is whether the government has as a purpose the advancement of religion, in which case the display will usually fail to meet this legality test. If the display is contextually secular, it will generally pass legal muster. A municipality can do this by including secular holiday symbols with the religious ones, including one or more signs confirming the secular purpose of the display (e.g., "This feast of lights celebrates our freedom and liberty"), or by incorporating symbols from several religions along with a secular message.



Safety and Liability

As with any permitted user, various use conditions may be imposed on a religious group, depending on state or municipal laws, bylaws, and regulations and on local policies. In general, these conditions or restrictions should be no more burdensome for religious organizations than for other groups, subject to the several legal tests described above.

Most municipalities require organizations to have a general liability policy or to waive their rights to seek redress from the municipality in the event there is personal injury or personal property damage. Often, written permits are required.

The municipality may require that the local fire and police departments review the permit and that the user meet all conditions specified in the permit, such as a prohibition against open flames and pyrotechnics, in the interest of public safety. The permit may or may not specify that a police or fire detail be present. In some instances the agreement may specify that a town employee or other designated person will monitor attendees for under-aged drinking, noise, or non-appropriate parking. The agreement may require a survey to ensure that the proper fire detection and suppression equipment are on site during the event, and that there is no unauthorized use of cooking equipment or theatrical lighting.

The liability and safety issues regarding the use of public facilities by religious groups are no different than those for non-religious groups. There are other issues, such as zoning – especially with regard to appropriate use – that may create Establishment Clause questions. Where there are questions of appropriate use or potential violations of the First or Fourteenth Amendments to the Constitution or possible violations of state or municipal laws or regulations, those concerns should be referred to town counsel before any permit or exemption is granted, a zoning bylaw is enacted, or a contract is signed. //

Displays of crèches, menorahs, and other religious symbols usually fall under the purview of the "Lemon test," wherein the confrontation in most cases is whether the government has as a purpose the advancement of religion...

Eminent Domain, cont'd from page 5

domain for economic development except to remove blight. They are Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina, and Washington. Since *Kelo*, Alabama has outlawed takings like *Kelo* and South Dakota has enacted into law a restriction limiting eminent domain to public projects.

Although at least fourteen states have passed laws restricting the use of eminent domain since *Kelo*, most allow it for the conversion of blighted property. In addition to Alabama and South Dakota, the states that have enacted new laws are: Colorado, Delaware, Georgia, Idaho, Indiana, Kentucky, Michigan, Ohio, Texas, Utah, West Virginia, and Wisconsin. All told, more than 40 states have proposed changes in their laws since *Kelo*.

The U.S. House of Representatives passed a bill that would cut off federal funds for projects that used eminent domain to benefit private development. The House bill has not been enacted into law and Congress is unlikely to enact any significant restrictions to the current use of eminent domain to achieve various public purposes.

Although the Supreme Court and several states have narrowed the conditions for eminent domain, unpopular property takings, especially for private economic development, continue to raise the probability of expensive litigation. As the states establish stricter, more descriptive standards for the taking of private property, there should be a decrease in municipal litigation. //

Published by Massamont Insurance Agency, Inc., to Actively Participate with Public Officials in Protecting Their Communities and Schools

Note: Any coverages described in this newsletter are summarized and subject to terms, conditions and exclusions printed in policies. References to specific policy language, terms or conditions should not be construed as binding. Refer to policy forms for specifics on the coverages and limits. All coverages are subject to state law, which may vary materially from the stated information.