

MEMORANDUM

To: MPRB Commissioners

From: Ann E. Walther, Esq.
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Re: Religious Constitutional Issues involving De La Salle Agreement

Date: February 1, 2006

The purpose of this memorandum is to address issues regarding the constitutionality of a Shared Use Agreement between the Park Board and De La Salle, a religious educational facility. The Establishment Clauses of both the United States and the Minnesota Constitution are addressed herein.¹

I. A Shared-Use Agreement with De La Salle would not violate the Establishment Clause of the U.S. Constitution.

The Establishment Clause of the First Amendment to the United States Constitution states that “Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof.” Courts have long held that the Constitution does not require the purpose of every government sanctioned activity be unrelated to religion. *See, e.g. ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 777 (8th Cir. 2005)(“the [Supreme] Court has approved certain government activity that directly or indirectly recognizes the role of religion in our national life. * * * We are required neither to “abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.”)

The traditional test for analyzing whether a particular government action violates the Federal Establishment Clause is that set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), known as the “*Lemon* test.” “Under *Lemon*, government action does not run afoul of the Establishment Clause if it (1) has a secular purpose; (2) does not have the primary or principal effect or of either advancing or inhibiting religion; and (3) does not foster an excessive governmental entanglement with religion.” *American Civil Liberties*

¹ Mr. Barry Clegg emailed the Commissioners on January 18, 2006 claiming that he believed that any agreement between the Park Board and De La Salle would violate the State Constitution. Contrary to Mr. Clegg’s assertion that “the Minnesota issues have not been considered before now,” we have always considered both the State and Federal Constitutions in advising the Board on this issue.

Union of Kentucky v. Mercer County, ___ F.3d ___, 2005 WL 3466545 (6th Cir. Dec. 20, 2005); *See also*, *City of Plattsmouth*, 419 F.3d at 775. Over the years, however, while the Supreme Court has continued to refer to the *Lemon* test it does not necessarily use it or only use parts of it. *See, e.g. McCreary County v. American Civil Liberties Union of Kentucky*, ___ U.S. ___, 125 S.Ct. 2722 , 2736 (2005) wherein the Court relied upon both *Lemon* and *Lynch v. Donnelly*, 465 U.S. 994 (1984)² in striking down a Ten Commandments display. *But see Van Orden v. Perry*, ___ U.S. ___, 125 S.Ct. 2854 (2005), wherein the Court upheld a Ten Commandments display and noted that over the years the *Lemon* factors have become “no more than helpful signposts” and specifically held that in cases involving “passive monuments” the *Lemon* test is not useful. *Id.*

Since the Court has continued to leave open the question of whether the *Lemon* test remains viable (and if so, in what context), lower courts continue to analyze Establishment Clause cases as they see fit. Our state court, while noting that there is some dissatisfaction with the *Lemon* test, still applied it to an Establishment Clause challenge. *Doe v. F.P.*, 667 N.W.2d 493 (Minn. Ct. App. 2003), *rev. denied*. Meanwhile, the federal circuit to which Minnesota belongs has, like the Supreme Court, been less clear on its standard. In *Good News/Good Sports Club v. School District of City of LaDue*, 28 F.3d 1501 (1994), the Eighth Circuit held that “although much maligned, the *Lemon* test controls this court’s analysis of whether governmental activity results in an impermissible establishment of religion.” *Id.* at 1508. However, in 2004, the court noted that while the Supreme Court adopted the *Lemon* test, it “has often found it unnecessary to rely upon *Lemon*” in its later cases. *Warnock v. Archer*, 380 F.3d 1076 (2004). The Eighth Circuit’s most recent pronouncement on the issue was in the *City of Plattsmouth* case, which, like the *McCreary*, *Van Orden*, and *Mercer County* cases involved a Ten Commandments monument. In *Plattsmouth*, the 8th Circuit ruled that the Supreme Court’s decision in *Van Orden* rendered the *Lemon* test no longer useful “in dealing with the sort of passive monument” they were confronting.³ Rather, the Court held that the proper Establishment Clause analysis “in these circumstances” is driven both by the nature of the monument and by our Nation’s history. The court went on to hold that the Plattsmouth monument was permissible under the Establishment Clause. However, the Eighth Circuit made no comment as to whether the *Lemon* test remains the appropriate test when the matter at issue is not a passive monument but rather some other government action and there are no cases that have yet arisen which would lay the issue to rest.

Based upon our interpretation of the *Plattsmouth* case, however, we believe it is still appropriate to use the *Lemon* test to analyze a proposed agreement between the Park Board and De La Salle because such an agreement is not a “passive monument,” and it would be difficult, if not impossible, to attempt to analyze the agreement by using “the nature of the monument and our Nation’s history” test. Furthermore, in a decision post-

² In *Lynch*, Justice O’Conner, in her concurrence, urged the court to adopt a test slightly different from *Lemon*.

³ Other circuits disagree with the 8th Circuit’s interpretation of the Supreme Court’s recent case law as a repudiation of the *Lemon* test. *See, American Civil Liberties Union of Kentucky v. Mercer County*, ___ F.3d ___, 2005 WL 3466545 (6th Cir. Dec. 20, 2005).

dating *Van Orden* and *McCreary*, the Tenth Circuit Court of Appeals recently applied the *Lemon* test to an Establishment Clause case involving a land transaction between the Church of Jesus Christ of Latter Day Saints and Salt Lake City. See *Utah Gospel Mission v. Salt Lake City Corporation*, 425 F.3d 1249 (10th Cir. 2005)(discussed further below). Since this case is more analogous to the issues involved with the De La Salle transaction than would be a case involving a “passive monument,” we believe it lends support for use of the *Lemon* test herein.

As discussed above, the *Lemon* test provides that government action is permissible if it has a secular purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster excessive entanglement. *City of Plattsburgh*, 419 F.3d at 775. Essentially the finding in cases has been that as long as the purpose of the government action is neutral, or non-secular, there is no prohibition from government entering into an agreement with a religious entity. The most analogous case involved the culmination of years of litigation over the sale of public land to the Church of Jesus Christ of Latter Day Saints. In *Utah Gospel Mission v. Salt Lake City Corporation*, 425 F.3d 1249 (10th Cir. 2005), the court upheld both the sale of the land (which resulted in the City and the Church jointly owning the land) and the sale of an easement on the land back to the Church. The court held first that there was secular purpose for the sale of the easement, both because the City was well compensated and because the sale actually resulted in the City’s extricating itself from further litigation over the land. The fact that “some religious purpose may be advanced by the sale does not constitute an establishment of religion given the secular purposes advanced here.” Second, the court held that the primary effect of the sale neither promoted nor inhibited religion. The court noted that “of particular importance within the “effect” prong is whether the challenged policy ensures government ‘neutrality towards religion.’”

[A] governmental action is not “unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden effects under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.

Id. at 1260, citations omitted, emphasis in the original. The court held that the sale of the easement in this case was one of neutrality and equal access—the City did nothing to promote religion; at best it merely enabled the Church to advance itself. *Id.* Finally, turning to the third prong of the *Lemon* test, the Tenth Circuit held that there was no “excessive entanglement” with religion. *Id.* at 1261.

In this case, the Park Board has numerous shared use agreements for its park lands, in particular, several agreements with the Minneapolis School Board for shared use between the School Board and the Park Board for land and facilities that are adjacent to one another. It is our opinion that, provided the Park Board does not enter into a Shared Use Agreement which is completely different (and more favorable than those the Park Board already has) from any of those we have entered in to with non-religious entities, there is no danger that the Park Board will violate the Establishment Clause by agreeing to share its land with adjacent school De La Salle. Indeed, it is our opinion that if the Park Board

refused to enter into an agreement with De La Salle we might violate the *school's* rights under the Establishment Clause, because the Park Board would be refusing to enter into an agreement similar to that it has with the School Board solely because De La Salle is a religious entity.

II. An agreement with De La Salle would likely not violate Article 13 § 2 of the Minnesota Constitution.

The Establishment Clause of the Minnesota Constitution is found at Article 1, § 16 and provides:

The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed: nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent: nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Additionally, the Minnesota Constitution has a specific provision addressing the appropriation or use of public money for sectarian schools. Article 13, § 2,⁴ provides

In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrine, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.

There is very little case law or other legal authority on this provision, and none addressing a shared use of public land and land owned by a religious entity. The original case interpreting Article 13, § 2 is *Americans United Inc. v. Ind. School Dist. No. 622*, 288 Minn. 196, 179 N.W.2d 146 (1970), which involved a challenge to a district's provision of school transportation to children who attended sectarian schools. Relying upon the United States Supreme Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947) the Court held that, just as bussing does not violate the Federal Constitution, it does not violate Article 13, § 2 of the Minnesota Constitution because bussing does not "support" parochial schools and serves the legitimate secular purpose of promoting the safety and welfare of children required to attend school under the State's compulsory attendance law. *Id.*, 288 Minn. at 210, 214, 179 N.W.2d at 154, 156. To the extent that the law benefited religious schools, the Court held such benefit to be "purely incidental and inconsequential." *Id.* The Court noted that they were taking no position on whether direct aid to parochial schools for the immediate health and safety of students

⁴ This is the provision Mr. Clegg cited to in his January 17, 2006 email.

(such as bussing, medical, dental and nursing services, “and perhaps by school lunches”) stands on different footing from subsidies which go the heart of the learning process. *Id.* The Court also “interject[ed] a caveat that the limitations contained in the Minnesota Constitution are substantially more restrictive than those imposed by [the Federal Constitution.]” *Id.*

It was not until the 1990’s that Article 13, § 2 was again before an appellate court. *See, Stark v. Independent School Dist. No. 640*, 123 F.3d 1068 (8th Cir. 1997), *cert. denied* (1998), and *Minnesota Federation of Teachers v. Mammenga*, 500 N.W.2d 136 (Minn. Ct. App. 1993), *rev. denied*. In *Stark*, which held that allowing a religious entity to run a secular school in a public school building that had been closed and then sold to the religious group did not violate Article 13, § 2, the 8th Circuit held that in interpreting Article 13, § 2,

the “fundamental concept” is “that the state may neither advance nor inhibit religion, which * * * defines permissible limits of legislation under * * * state law.”

Id. at 1077, *citing Americans United Inc. v. Independent Sch. Dist. No. 622*, 288 Minn. 196, 179 N.W.2d 146, 157 (1970). The court also cited to *Mammenga*, discussed below, wherein the court held that the establishment clause prohibits benefits and support to schools teaching religious doctrines. Thus, essentially the 8th Circuit held that the same standard for determining whether the Establishment Clause has been violated is applied for determining whether Article 13, § 2 has been violated.

Mammenga, which upheld the right of high school students to elect to attend Bethel College under the Post-Secondary Enrollment Options Act, referred to Article 1, § 16 and Article 13, § 2 as the State’s “establishment clauses” and analyzed the case under both; however, the court relied more on Article 1, § 16 than on Article 13, § 2. *Id.* at 138. In *Mammenga*, the court held that in determining whether the “establishment clauses” have been violated, the court applies a two step inquiry: 1) is the public benefit or support “indirect or incidental” and 2) whether the school is pervasively sectarian. If the first question is answered in the affirmative, then it does not matter if the school is pervasively sectarian; the benefit or support is legal. In this case, De La Salle would likely be considered pervasively sectarian; therefore, the issue would be whether the shared use would be an “indirect or incidental” benefit to the school.

There, the court held that allowing high school students to attend Bethel College, a sectarian college, did not violate Article 13, § 2 because the law under which the students attended Bethel benefited the students, not the college; the law entitled students to attend sectarian *and* non-sectarian schools; the state reimbursed the college for only 42% of the actual cost (meaning that it cost the school to allow the students to attend); and the college ensured that these reimbursements would be used solely for non-sectarian matters.

The *Stark* case is more recent, and appears to interpret Article 13, § 2, relying on state case law, to apply the Federal Establishment Standard—that neutrality is the key.⁵ Moreover, there is a strong argument to be made that athletic fields are “incidental” or “indirect” to De La Salle, particularly since the benefit (*i.e.* athletics) is non-sectarian. Since, however, there is no case law on point, or even similar, to the Park Board’s issue, we cannot say with as much conviction as we have about the Establishment Clause that a Shared Use Agreement would not violate Article 13, § 2 of the Minnesota Constitution.

To date no court has struck down a law under Article 13, § 2. We have been in communication with the Minnesota affiliate of the American Civil Liberties Union (ACLU). We provided Ms. Teresa Nelson, ACLU Associate Legal Counsel, with the draft Reciprocal Use Agreement, and are open to the ACLU’s comments. We are continuing to research the issues raised by Mr. Clegg, Commissioner Young and others and we will keep the Board apprised as to the results of our research.

⁵ *Stark* was cited as authority by the Sixth Circuit in a December 20, 2005 decision involving a challenge to a Ten Commandments display. *American Civil Liberties Union of Kentucky v. Mercer County*, ___ F.3d, ___, 2005 WL 3466545 (6th Cir. 2005).