

1. Board Of Selectmen Meeting Materials - 8/7/2023

Documents:

[FY23 AUGUST 7 DAVID RUBINO.PDF](#)

August 7, 2023

VIA EMAIL

Old Lyme Board of Selectmen
52 Lyme Street
Old Lyme Memorial Town Hall
Old Lyme, CT 06371

Re: Political Displays

Dear First Selectman Griswold, Selectman Ward, and Selectwoman Shoemaker,

It has come to my attention that the Board of Selectmen has on its agenda this evening, a discussion of the formation of a "Committee to Establish Process for Use of Town Property." This agenda item seems to have spawned from the conversation at the July 3rd Board of Selectmen meeting regarding the Democratic Town Committee setting up a canopy on public property along the Memorial Day parade route to hand out water, flags and donuts to participants and spectators. I will refrain from speaking of the shameful divisiveness of even entertaining such a discussion. Suffice to say that Old Lyme may be among the only communities I've ever heard of where town leadership is overtly seeking to *disincentivize* groups from showing their support of our fallen veterans.

Regardless, the minutes of that meeting note:

Rules for Use of Town Property – Restrict Political Displays/Activities – David Griswold and Sloan Danenhower. First Selectman Griswold said that there should be a process or policy governing the use of the Town Hall property by members of the public. In addition, he believes it is inappropriate that political signage be allowed, with limited exceptions. He referenced the tent that the Democratic Town Committee erected before the Memorial Day Parade which had the words Democratic Town Committee emblazoned on its side. Selectwoman Shoemaker said a committee should be formed to work on this.

I would assume that the Board has consulted the Town Attorney on this matter. If not, I strongly urge you to do so. Although I am not a Constitutional scholar, the issues presented here are fairly fundamental. I am certain, therefore, that attorney will explain to you the following Constitutional issues that your suggested committee will necessarily be navigating:

1. The area in front of Town Hall is what is known as a "traditional public forum." Traditional public forums are spaces where free speech under the First Amendment of the Constitution has the highest level of protection. The Supreme Court has noted that "use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." (*Hague v. Committee for Industrial Organization* (1939).) In fact, the Court has specifically held that expressive activities in public fora, including displaying signage, is generally allowed. See, *Perry Education Association v. Perry Local Educators' Association* (1983). As such, I would recommend that the Board treads lightly here. This is an outdoor public space – not a conference hall or facility – and the rules governing the two are legally distinct.
2. Unless the minutes are incorrect, a discussion took place about restricting town property to disallow "political signage." To be clear, such a restriction would almost assuredly be deemed

facially unconstitutional and a per se violation of the First Amendment. Restrictions such as the one the Board is contemplating must satisfy a three-prong test outlined by the Supreme Court in *Ward v. Rock Against Racism* (1989). That case held, 1) the regulation must be **content neutral**; 2) it must be narrowly tailored to serve a significant governmental interest; and 3) it must leave open ample alternative channels for communicating the speaker's message. Of greatest significance here is the "content neutrality" requirement. Regulations such as "there can be no political signs" are "content-based" – meaning the intent is to control what is being said. That is simply not allowed. Moreover, the Courts generally look to the intent, context, and history behind regulations even if they appear facially content neutral. So if, for example, the town decided to pass a regulation banning all signs at the Memorial Day parade, that would likely still be unconstitutional since the official recorded history contained in the Board minutes shows that the rationale behind the law was content-based. (It's worth noting that the second and third prongs of the test would likewise be difficult to overcome in this case as it's hard to ascertain what significant government interest suddenly arose in 2023 that wasn't present in years gone by regarding use of the property. In addition, as the parade explicitly assumes people will be lining the route, it is even harder to understand how any regulation, ordinance or permitting requirement could possibly be valid.)

Finally, the facts are particularly strange in this case, where the Old Lyme DTC was not even offering any political messaging, but simply sitting under signage that identified the name of the organization. I will concede that the implied message of this activity could reasonably be read to mean "the Old Lyme DTC supports fallen soldiers." I find it bizarre, however, that the town would have an interest in quashing that message.

So the record is clear, given the impetus behind it, I believe that even forming a committee to discuss this matter would likely add to the ultimate unconstitutionality of the actions being undertaken. I strongly urge the Board of Selectmen to rethink this route, and again suggest that it obtain a formal legal opinion on the matter. These issues are so basic in U.S. jurisprudence that continuing down this path will likely subject the town to costly litigation driven by third parties – litigation that the town would unquestionably lose. Better that it end here.

Connecticut is the Constitution State and Memorial Day is a holiday wherein we celebrate the heroism of those who swore an oath to, and then died, defending that document. For once let's put political divisions aside. As a member of the DTC, I am proud of the veterans who sat under our tent passing out beverages and snacks on Memorial Day. As leaders of the town, I would hope you feel the same.

Respectfully,



David Rubino