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Flag Model Policy

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Model Flag Policy

Overview

This model policy is intended to help guide how municipal legislative bodies (e.g. selectboards, city councils, village trustees, prudential committees, etc.) display flags on municipal property. Not every municipality needs a flag policy. If your municipality doesn't change which flags it displays and doesn't receive requests to fly flags, then it probably doesn't need to adopt a policy. Note that this policy is different from a sign ordinance or sign zoning regulation, as it only applies to flags displayed on municipal property.

Importantly, *this* policy incorporates the constitutional law principle known as the **government-speech** doctrine which allows the legislative body as the government to speak without limitation by the First Amendment's Free Speech Clause. The Free Speech Clause of the 1st Amendment to the U.S. Constitution restricts the government's authority to regulate private speech, but not what the government itself can say. Although the government must still abide by other constitutional principles (e.g. the Establishment Clause prohibits government speech from endorsing religion), according to the U.S. Supreme Court, "(w)hen the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. That must be true for government to work." *Shurtleff v. City of Boston, Massachusetts*, 596 U.S. 243 at 251 (2022). This means that the legislative body, as speaker, can express its own opinions, and in doing so, favor or disfavor certain points of view.

According to this principle and pursuant to this policy, legislative bodies don't have to entertain requests to display flags on municipal property from citizens or outside groups. Rather, legislative bodies have the sole and full discretion to decide all aspects of flag displays.

The objective of this flag policy is to allow legislative bodies to display flags on municipal property according to their own established standards, without opening flag displays to outside third parties. The purpose of this policy is to preserve municipal flags as displays of government speech and not turn its flagpoles into an open forum for all manner of private speech. By adopting this policy, municipalities make clear that they wish to speak for themselves when raising a flag, not for anyone else.

Note: Prior to adopting this policy, please read our summary of this United States Supreme Court case on the constitutional limits of government flag regulation (blue Links box) and why having a government speech flag policy is so important.

It's key to remember that even with this policy in place, legislative bodies must still ***implement it*** to ensure that flag displays are actively controlled by the municipality. That's because government speech is established through three factors, viewed holistically:

1. the history of the speech/forum at issue
2. the public's perception of the speech, and
3. whether the municipality has actively controlled and shaped the speech.

The best way to demonstrate a municipality is actively shaping or controlling speech is for it to adopt and closely follow a flag flying policy. Straying from its policy or ceding control over which and how flags are displayed could turn the municipality's flag display into a public forum for private speakers.

Additionally, it's important to note that the display of some flags and banners (especially those erected over a highway right-of-way) may also have to abide by the State's sign law, see Chapter 21, Title 10 of Vermont Statues Annotated. Also review the overview by the State of Vermont Travel Information Council in the blue links box.

Alternatively, a municipality could have a policy that creates a forum for free expression by the public, but it needs to be aware that doing so will put it in a position of having to decide which flags to fly and which to not, which could subject it to scrutiny by the courts, which is why we've not created such a model. Adopting such a policy would also likely have the unintended consequence, at some point, of forcing the municipality to fly a flag whose message some, or all the members of the legislative body, don't agree with it, including those it deems inappropriate or offensive (e.g. flags promoting Nazis or the Ku Klux Klan, etc.). A municipality considering developing a flag policy open to citizen speech will need to consult with its town attorney prior to its adoption.

Customizing this Model Policy

Your municipality is responsible for editing this document so that it reflects the practices and policies adopted by your legislative body in conformance with federal and state requirements. Opportunities for customization are bracketed and marked with italic text. **Guidance** text marked in **bold** should be removed before adoption.

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