

Council Business Meeting

September 6, 2022

Agenda Item	Resolution 2022-27 Establishing a Policy for Commemorative Flags at City Facilities by Adding it to the Current City Street Pendant Policy	
From	Douglas M. McGeary	Acting City Attorney
Contact	Doug.mcgeary@ashland.or.us ; 541-552-2091	

SUMMARY

The City Council adopted a resolution on May 4, 2021, that included the proclaiming of Juneteenth as an annual day of municipal commemoration. As part of its commemoration the City Ashland currently flies Juneteenth commemorative flags on the Plaza near City Hall, and at the Council Chambers/Ashland Police Department on East Main Street. This item is to establish a City policy for flying commemorative flags at City Facilities by adding it to the current City policy for pennants on City property or in public rights-of-way.

The proposed policy clarifies that flags or pennants displayed on City property or in public rights-of-way are intended as an expression of the City's official sentiments. Commemorative flags or pennants on City property may only be authorized by the City Council and is governmental speech as defined by U.S. Supreme Court rulings. The City's flagpoles and street poles are not intended to be a forum for free expression by the public. The use of flagpoles and street poles are for commemorating or recognizing important national, state or local individuals, events, or community priorities. Flags or pennants will not advertise or promote commercial products or services, or religious, political or unofficial social viewpoints, nor promote or advertise gambling. The City will not use its flag poles, street poles or other facilities to sponsor the expression of a third party. The policy designates that commemorative flags are to be flown on City flagpoles at the Plaza near City Hall, and at the Council Chambers/Ashland Police Department. It authorizes the City Manager to procure appropriate and commercially available flags from available funding to be flown at the authorized locations for the following City Council authorized commemorative days/periods:

- Martin Luther King, Jr. Day – U.S. National Holiday; Third Monday of January each year
- Cesar Chavez Day – U.S. national day of commemoration/observance; March 31st each year
- Juneteenth – U.S. National Holiday; June 19th each year
- Pride Month – City of Ashland commemoration/observance; month of June each year
- Indigenous Peoples Day – Oregon State and U.S. national day of commemoration/observance; Second Monday in October each year
- Pride and Our Community Day – City of Ashland commemoration/observance; TBD annually (Second Saturday in October each year)

ACTIONS, OPTIONS & POTENTIAL MOTIONS

Approve Resolutions 2022-27 establishing the City of Ashland's policy for commemorative flags and for street pennants to be displayed at City facilities and in public rights-of-way and designating approved days or periods of commemoration.

STAFF RECOMMENDATION

Staff recommends adoption of Resolution 2022-27 adding a commemorative flag policy to the street pennant policy.

FISCAL IMPACTS

It is anticipated that adding additional flag commemorative dates at the Plaza near City Hall, and the Council Chambers/Police Station on East Main Street will require nominal expenditures to purchase flags, assuming the selected commemoration days are limited in number and have commemorative flags that are recognized as appropriate for the intended use that are readily available commercially for purchase.

POLICIES, PLANS & GOALS SUPPORTED

Resolution 2021-01, Section 1.B proclaiming Juneteenth as an annual day of municipal commemoration.
Resolution 2013-27 Directing City Administrator to Establish Standards for Street Pennants
Resolution 2010-32 Amending Minimum Standards for Functional Items - Pennants

BACKGROUND AND ADDITIONAL INFORMATION

The issue of use of the city's flags and pennant policy has arisen again after a recent Supreme Court of the United States (SCOTUS) ruling, *Shurtleff v. City of Boston*, 596 U.S. (2022). The *Shurtleff* case concerned the city of Boston's practice of allowing the public to fly flags on city poles but in this particular case the city denied a Christian group from flying a flag on Constitution Day. The group claimed its purpose for flying their flag was "to enhance the understanding of the country's Judeo-Christian moral heritage". The case went up through appeals evaluated under Establishment Clause doctrine despite the complaint presenting only a First Amendment free speech violation. SCOTUS simply agreed with the plaintiff that "the city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech".

As noted, *Shurtleff's* issues of speech were also conflated with issues involving the 1st Amendment Establishment Clause pertaining to religion. Although not dealt with directly by the majority in *Shurtleff*, the issue was discussed in a concurring opinion that later appeared as underlying authority in a subsequent case, *Kennedy v. Bremerton School District*, 597 U.S. (2022). The *Kennedy* case now interprets the Establishment Clause much more strictly to protect religious expression. This is an important development because the city will need to develop flag and banner policies that take both these new interpretations for free speech and religious expression into account.

Boston apparently did not have a well-established policy limiting the use of its flagpoles. Public entity policies, including for the City of Ashland, will need to establish clear rules of what flags are to be presented on their poles and when. To that end the city will want to differentiate between government speech and public forum. The more liberal a policy that the city applies to allow use of their flag poles (or a showing of a lack of "meaningful involvement in the selection of flags or the crafting of their messages"), the more it will be subject to a Boston outcome under *Shurtleff*. That is, under *Shurtleff*, a policy and practice that allows public speech use of its flag poles cannot be restricted to only those uses dictated or supported by the

city. Allowing public speech use of city flag poles means that any and all public speech uses must be tolerated and allowed.

Review Of Current City Pennant Policy & Guidelines

The city’s current pennant policy appears to comply or fall within the meaningful involvement in the selection of flags or the crafting of their messages and the related *Kennedy* restrictions on government activity effecting the public’s use of city property. The pennant policy can be updated to include commemorative flags at city facilities. It specifically states that “[p]ennants may not advertise or promote commercial products or services, or religious, political, or social viewpoints,” and thereby provides the city protection from claims of favoritism and historically controversial subject matter. However, *Kennedy* and other recent decisions of SCOTUS have shown that the court is beginning to interpret even more strictly against government action which inhibit or injure the free practice of religious expression, but it is highly doubtful that would affect our policy as carefully written.

The city’s policy restricts displays in specific areas or places which affect aesthetics and safety. They provide criteria for sizing, permanence, manner of displays, and maintenance which again all remain neutral and relate to important government interests to protect against litter, aesthetic degradation, and overall health concerns.

With pennants, the ordinance again appears content neutral and design oriented, and yet detailed enough to craft a message for public purposes while establishing criteria to steer away from promoting personal or singular information messaging. In this regard, the city appears to be establishing a “meaningful involvement in the selection of flags or the crafting of their messages” which the majority in *Shurtleff* agreed was necessary.

Resolution 2022-27 proposes to expand the current pennant policy to include commemorative flags at City facilities or on its flag poles for governmental speech that avoids an unintended consequence of creating a policy or practice that creates a private forum that would, in turn, obligate the city to allow any and all other private speech uses at city facilities or flag poles.

REFERENCES & ATTACHMENTS

Attached: Resolution 2022-27 – Resolution Establishing Commemorative Flag and Street Pennant Program Standards, Draft - Aug. 12, 2022

RESOLUTION NO. 2022-27

**RESOLUTION ESTABLISHING COMMEMORATIVE
FLAG AND STREET PENNANT PROGRAM STANDARDS**

RECITALS:

- A. **Whereas**, the citizens of Ashland have a strong history of community engagement in local, state and national issues; and
- B. **Whereas**, it is appropriate for the City of Ashland to reflect its community engagement by appropriately commemorating important individuals, events, and social priorities; and
- C. **Whereas**, it is important that commemorations by the City of Ashland comport with established legal norms for the expression of governmental speech; and
- D. **Whereas**, the City Council wishes to establish policies for use of City facility flag poles and for street pennant displays in its public spaces, including rights of way, for governmental speech recognized by the City of Ashland; and

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ASHLAND,
OREGON, RESOLVES AS FOLLOWS:**

**SECTION 1. Commemorative Flag and Street Pendant Program Standards
Established**

Commemorative Flag and Street Pennant Program Standards are hereby established for the City of Ashland as contained in this resolution.

SECTION 2. Program Overview

The intent of the City of Ashland Flag and Street Pennant Program is to commemorate and express community values, add color and excitement to the city's streetscape, promote the general economic interests of the community through the promotion of cultural and seasonal activities that enhance the economic viability and overall vitality of the community.

The display of flags, pennants or any other similar objects on city property is symbolic and intended as an expression by the City, and therefore the City seeks to establish clear guidelines regarding the display of flags or pennants on City facilities that is fully intentional as to control of the message and a reflection of particular city-endorsed values or causes.

Unless otherwise specifically provided, the use of the term "flags or pennants" will hereafter refer to all ceremonial or commemorative or informational flags and pennants

or banners discussed herein and the reference to either a flag, pennant or banner is a reference to and is equally applicable to each descriptor.

SECTION 3. Program Scope & Eligibility Criteria

Eligible flags or pennants are those that, through the application process, match the above stated overall philosophy of the Program.

Flags or pennants displayed are intended as an expression of the City's official sentiments. The City's flagpoles and street poles are not intended to be a forum for free expression by the public. Flags or pennants will not advertise or promote commercial products or services, or religious, political or unofficial social viewpoints, nor promote or advertise gambling. The City will not use its flag poles, street poles or other facilities to sponsor the expression of a third party.

A request for a display of flags or pennants shall be supported by at least two members of the City Council who may place it on a City Council meeting's agenda for consideration by the Council. All requests to display flags or pennants must be listed as a "Regular Item" on the Council agenda. Council must present requests to display flags or pennants at least ninety (90) days prior to the date requested for their display. A Council resolution authorizing the display of flags or pennants must be approved by a majority vote of the City Council and will direct staff to ensure that the flags or pennants comply with this policy as herein provided.

- With the exception of the Downtown Zone, eligible entities for requests are limited to governmental agencies, including the Ashland School District and Southern Oregon University or the City of Ashland, including its approved designee's, such as the Ashland Chamber of Commerce.
- Eligible entities in the Downtown Zone include governmental agencies, as well as recipients of Economic and Cultural Development Grants from the City of Ashland. The City of Ashland, and no other entity, may place small pennants on pedestrian scale light poles on the downtown plaza and may place such pennants for a term exceeding two months.
- In addition to official holidays, "official social viewpoints" will be those associated with or commemorative of national, state, regional or municipally recognized and respected events, priorities, or persons.
- Permit applications by eligible entities must be submitted 60 days prior to the requested installation date with permit review and approval completed by the City Manager a minimum of 30 days in advance of the installation date. Exceptions may be made to the policy concerning the approval timeline by the City Manager at his/her discretion.
- Installation of pennants is limited to the pennant zones displayed on the City's Pennant Placement Zone Map. The zones are associated with arterial (major) streets

and proximity to major commercial, educational and cultural districts and are designated as follows:

- ❖ Downtown Zone
- ❖ North Ashland Entrance Zone
- ❖ South Ashland Entrance Zone with Exit 14 overpass
- ❖ Siskiyou Educational Zone
- ❖ A/4th Street Zone
- ❖ Winburn Way Zone

SECTION 4. Flag and Pennant Content Criteria

With respect to commemorative flags alone, the following are proclaimed as official commemorations of respected events, priorities, or persons:

- Martin Luther King, Jr. Day – U.S. National Holiday; Third Monday of January each year
- Cesar Chavez Day – U.S. national day of commemoration/observance; March 31st each year
- Juneteenth – U.S. National Holiday; June 19th each year
- Pride Month – City of Ashland commemoration/observance; month of June each year
- Indigenous Peoples Day – Oregon State and U.S. national day of commemoration/observance; Second Monday in October each year
- Progressive Pride Day – City of Ashland commemoration/observance; TBD annually (second Saturday in October each year)

The City Manager will identify and purchase flags for official commemorations from funding available for such use to be flown at city facilities that are appropriate to honor the occasion and that are generally commercially available. In the event a flag is not commercially available, the City Manager may find reasonable alternatives.

Commemorative flags will be flown only at the following locations:

- Plaza near City Hall
- City Council Chambers/Ashland Police Department

Pennants must contain some graphic element (photo, illustration, etc.) and may not consist of only text. Pennants may not include the following:

- Phone numbers
- Web addresses
- Directives (turn left here, etc)
- Business names/logo's

The pennant material and graphic content color palette does not include neon or other overly bright colors. Refer to the Street Pennant Guidelines for suggestions and recommendations for maximizing the aesthetic and communication impact of the proposed pennant(s)

SECTION 5. Pennant Installation

Street Pole Options

There are two types of poles and one other location where pennants may be installed; the large overhead street lights (cobras) and the shorter pedestrian scale light poles (Sternbergs) and the fence on the Exit 14 overpass. The A St/4th St Zone is limited to small pennant installation (see pennant construction specifications for details), while all other zones allow only large pennant installation.

Many of the larger streetlights are fitted with double horizontal brackets for pennant installation. Others do not have the necessary brackets for hanging pennants.

Approved permit requests for pennant installation on poles without existing brackets may include a onetime bracket purchase by the applicant and installation fee and will require 4 to 6 weeks prior to installation for ordering and installing the new brackets.

Pennant Duration

Although the city continuously reserves the right to limit the duration of any flag or pennant display as it deems reasonable or in the city's interest, the Downtown Zone Map contains two designated locations for short term pennant installations (less than two months) with the remainder reserved for long term installations (greater than six months). All other zones allow only long term installations. The Downtown Zone is also limited to a maximum of three unique pennant messages at any time to maintain visual compatibility throughout the zone.

The short term event permit holder is responsible for the removal and reinstallation of the existing pennant in their approved location and any coordination required to accomplish the task.

The City of Ashland reserves the right to exclude specific pole locations for certain periods of time for other non-pennant City/Community Uses, such as holiday decorations.

Installation/Removal Requirements

Installation and removal of the individual pennants are the responsibility of the permit holder. Any contractor hired to install/remove pennants must meet the pre-qualification requirements of the City of Ashland Public Works Dept and may be required to obtain Oregon Department of Transportation (ODOT) lane closure permits depending on the location and method of installation/removal.

Pennants must be removed by the applicant on or before the expiration date of the permit. Applicants may be charged with removal costs if not removed by the date listed on the permit and may not be eligible for future pennant installation approval.

Pennant Construction Specifications

There are two approved pennant sizes: a larger size for the overhead street lights and a smaller size for the pedestrian scale lights. Pennant installation must be consistent with

the street light type, i.e. a small pennant will not be approved to be installed on the large overhead street light.

- Large Pennant Size - 136" in height, 48" in width, 4" pockets for connection with bracket *
- Small Pennant Size - 36" in height, 18" in width, 2" pockets for connection with bracket *

*See the City's Street Pennant Guidelines for illustration details

All approved pennants shall be manufactured/constructed to withstand wind gust at 20lbs per square inch using large format ink jet printing on two sides of heavy duty material approved and listed for indoor/outdoor use. A listing of pennant manufacturers used by previous pennant applicants will be generated and maintained by the City of Ashland for future applicant reference.

Maintenance Standards

Pennants must at all times be maintained in a visually appealing manner, which is the sole responsibility of the permit holder. Pennants in disrepair must be maintained, replaced, or repaired. An individual pennant is defined as in disrepair when it is loose, frayed, torn, fallen, discolored or faded

The City, at its discretion, may contact permit holders requesting they repair or remove pennants that are not adequately maintained. Additionally, the City has the authority to remove any pennants that it determines pose a safety risk to the public, with our without prior notice, with costs of such actions being billed to the applicant.

Application Information

The Applicant must have Commercial General Liability (CGL) Insurance with minimum limits of \$500,000 per occurrence, \$1,000,000 aggregate. By endorsement, the CGL policy shall name the City of Ashland, its agents, directors, officers, employees and volunteers as additional insureds. The additional insured endorsement must provide primary and non-contributory coverage. A certificate of insurance with the additional insured endorsement must be provided and approved by the City of Ashland prior to banner installation.

An application fee of \$125 is due at the time of permit application submittal and will be refunded if the permit is not approved. The bracket purchase and installation charge (if applicable) will be collected prior to issuance of the permit and is not required at the time of submittal.

Permit applications are required to be submitted 60 days prior to the requested installation date. Permit review shall be completed by the City Administrator (or designee) within 30 days of submittal, providing the applicant time to arrange an approved installer and obtain right of way permits if required prior to the requested installation date.

Upon approval, the applicant will be notified by phone or e-mail and be required to sign an agreement with the City of Ashland.

Application Submittal Requirements

1. Complete Street Pole Pennant application (attached)
2. Certificate of liability insurance
3. Color copy/rendering of the proposed pennant graphics
4. Application Fee

Mail the completed packet or deliver to:

**City of Ashland – Administration
20 East Main St
Ashland, OR 97520**

Applications can also be submitted by e-mail to administration@ashland.or.us

SECTION 6. This resolution is effective upon adoption.

ADOPTED by the City Council this _____ day of _____, 2022.

ATTEST:

Melissa Huhtala, City Recorder

SIGNED and APPROVED this _____ day of _____, 2022.

Julie Akins, Mayor

Reviewed as to form:

Doug McGearry, Interim City Attorney