

MEMORANDUM

To: Maria Delatorre, City Attorney

From: Examinee

Date: February 24, 2026

Re: Measure 15 — must the City Council adopt the ordinance?

ISSUE MAP (highlighted fact -> takeaway)

Highlighted phrase = the operative text; the teal arrow = the takeaway. Cite the Library authorities by name. Relevant government action = the City's initial denial.

Interpretive key (Walker 201(h)): 'shall'/'must' = mandatory; 'should'/'may' = precatory → *the single word decides Issues 1 and 2 opposite ways.*

Issue 1 (Flag Code 7(c),(e),(f)): all use 'should' → *precatory, NOT a legal bar.*

Issue 2 (Fr. Gov. Code 436 + Mil. & Vet. Code 617): both use 'shall' → *mandatory, so state law DOES bar flying any flag above the U.S. flag.*

Measure 15: a local initiative conflicting with state law is preempted (Mastai/Mancini); cities are creatures of the state → *unenforceable.*

Issue 3 (Shurtleff): flag on the City Hall building pole = government speech (no history of private flags there, public sees the City speaking, full City control) → *First Amendment does NOT compel it.*

Overall → *the Council need not, and may not, adopt the ordinance; advise that it is unenforceable.*

Issue 1: Does the U.S. Flag Code bar flying the Earth Flag above the U.S. flag?

Under Walker's Treatise §201(h), the words 'shall' or 'must' are mandatory, while 'should' or 'may' are precatory, permissive but not mandatory. The relevant Flag Code provisions, 4 U.S.C. §7(c), (e), and (f), each use the word 'should': no other flag 'should' be placed above the U.S. flag (§7(c)), and the U.S. flag 'should' be at the highest point or 'should always be at the peak' (§7(e), (f)).

Because the Flag Code speaks only in precatory 'should' terms, its directions are recommendations, not legal commands. The argument that 'always' in §7(f) implies a mandate is unpersuasive: had Congress intended a bar, it would have written 'shall,' as it did elsewhere. So the Flag Code does not legally prohibit flying the Earth Flag above the U.S. flag.

Therefore, Issue 1: the U.S. Flag Code does not bar flying the Earth Flag above the U.S. flag, because its provisions are precatory rather than mandatory.

Issue 2: Does Franklin law bar it, and is Measure 15 enforceable?

Franklin state law uses mandatory 'shall'. Franklin State Government Code §436 provides that at all times the national flag 'shall' be placed in the position of first honor, and Franklin Military and Veterans' Code §617 provides that no other flag 'shall' be placed above the U.S. flag. Under Walker §201(h) these are mandatory, so Franklin law bars flying the Earth Flag above the U.S. flag.

Measure 15 is a local ballot initiative that would compel the

Rule. Walker §201(h): 'should/may' = precatory; 'shall/must' = mandatory.

Apply. Flag Code §7(c),(e),(f) all say 'should' → advisory.

Rebut. 'always' does not convert 'should' into 'shall.'

Rule. §436 + §617 say 'shall' → mandatory bar. Mastai: local initiative cannot contradict state law.

Apply. Measure 15 conflicts head-on with the mandatory state statutes.

Cite. §436, §617; Art. 4 §1; Mastai/Mancini.

opposite. Although Article 4, §1 of the Franklin Constitution reserves the initiative power to the people, a local initiative is preempted where the state has fully covered the subject or shown a paramount state concern. *Mastai v. Ross* holds that cities are creatures of the state and that a local initiative, whatever its source, cannot be contrary to state statute (Mancini). Here the state has expressly and mandatorily regulated the U.S. flag's position, and Measure 15 directly conflicts with §436 and §617, so it is preempted.

Therefore, Issue 2: Franklin state law bars flying the Earth Flag above the U.S. flag, and Measure 15 is preempted and unenforceable.

Issue 3: Does the First Amendment require allowing the flag above the U.S. flag?

When the government opens a forum for private expression, viewpoint discrimination is barred; but when the government speaks for itself, it may choose its own message and need not give airtime to all views. *Shurtleff v. City of Boston* uses a holistic inquiry, the history of the expression, the public's perception of who is speaking, and the extent of the government's control, to tell the two apart.

Shurtleff is distinguishable. There, Boston had a long history of letting private groups raise their own flags on a Plaza flagpole with no control, so the display was private speech and refusal was viewpoint discrimination. Here, FDE wants to fly the Earth Flag on the center flagpole atop City Hall itself, where the City has always flown the U.S. flag and never allowed a private flag; the public would read a flag atop City Hall as the City's own message; and the City fully controls that pole. Flying flags on the City Hall building pole is therefore government speech, so the City may decline FDE's flag. That the Plaza is a public forum does not help FDE, because Rule 4.2 makes clear that City Hall itself is not part of the Plaza; FDE may display its flag at its Plaza event, just not above the U.S. flag on the City Hall pole.

Therefore, Issue 3: the First Amendment does not require the City to let FDE fly the Earth Flag above the U.S. flag, because the City Hall flagpole display is government speech.

Overall conclusion: advice to the City Council

The three issues converge. The Flag Code does not bar the display, but Franklin's mandatory statutes do, and they preempt Measure 15, so the ordinance would be unenforceable and invalid; the First Amendment does not compel the City to fly the flag because the City Hall flagpole is government speech.

Therefore, advise the City Council that it is not required to adopt the ordinance described in Measure 15, and indeed should not,

Rule. Government speech (*Shurtleff*): history + public perception + control.

Apply. City Hall pole: always the U.S. flag, no private history, full control → the City speaks.

Forum. Plaza is a forum, but Rule 4.2: City Hall is not the Plaza.

Bottom line. Council need not, and may not, adopt the ordinance.

Why. State-law bar + preemption control; Flag Code and First Amendment do not change the result.

because the ordinance conflicts with mandatory Franklin law and
is unenforceable.