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Legal Opinion 2015-029

TO: Mayor John Engen; City Council; Dale Bickel; Denise Alexander; Laval Means; Jen Gress; Tom Zavitz; Kevin Slovarp; Gregg Wood; Jessica Miller; Brian Hensel; Wayne Gravitt; Donna Gaukler; Morgan Valiant; Alan White; Chris Odlin; Mike Brady; Scott Hoffman; Richard Stepper; Laurie Clark; Mike Colyer; Jason Diehl; and Jeff Brandt

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE September 1, 2015

RE: Numerous court decisions have invalidated durational time limits imposed on political signage, especially prior to elections.

FACTS:

Several citizens, including Missoula County State Legislators, expressed legal concerns pertaining to the City of Missoula's zoning sign regulations potentially unlawfully imposing durational time limits on political signage.

ISSUE:

Generally what are court rulings pertaining to durational time limits for political signs holding?

CONCLUSION:

Numerous courts have invalidated durational time limits for political signage as invalid restrictions on protected free speech. Currently, pursuant to subsection 20.75.040 (d)(6) MMC the City of Missoula attempts to limit political signage dimensions to a maximum of twenty (20) square feet identifying it as temporary signage that is to be removed upon completion of the activity. The City of Missoula also does not allow political signs on city properties such as parks, trails, open space, conservation lands, city building sites, etc. Further pursuant to Section 12.12.190 the city also does not allow public rights of way to be used for private or commercial purposes and thereby prohibits political signs being placed in public boulevards and public rights of way.

LEGAL DISCUSSION:

The First Amendment to the United States Constitution through the Fourteenth Amendment prohibits laws abridging freedom of speech. Noncommercial political or ideological signs are within the scope of the United States Constitution First Amendment protections and often are held to be entitled to greater constitutional protection than commercial speech. See The Law of Zoning and Planning Zithguler Section 7.13 page 17-33. Courts have referred to political speech involving communication by signs and posters as being virtually pure speech. Arlington County Republican Committee v. Arlington County 983 F. 2d 587, 598, 1993 U.S. App. LEXIS 29.

Pursuant to subsection 20.75.040(D)(6) Missoula Municipal Code of the City of Missoula Zoning Ordinance the City of Missoula places a twenty (20) square foot maximum dimensional size limit on political signage pursuant to the city sign ordinance. This zoning ordinance provision states:

20.75.040 Signs Allowed Without a Sign Permit

The following signs are allowed without a permit and are not counted toward the applicable limits on the number or area of signs allowed. In order to be exempt from sign permit requirements, such signs may not be directly illuminated, cause glare, or cast light onto adjacent property:

- A. Address and nameplate signs on all buildings, not exceeding 4 square feet in area;
- B. Directional signs—up to six per business with none exceeding 6 square feet in area. Commercial messages may comprise no more than 50% of the area of any directional sign;
- C. Temporary signs protecting private property or identifying property hazards; and
- D. The following temporary signs, provided they are removed upon completion of the activity (in real estate, “completion” means closing) or activity identified on the sign:
 1. Identifying the location of garage and yard sales, not exceeding 6 square feet in area;
 2. Advertising property for sale, lease or rent, including open-house directional signs, not exceeding 6 square feet in area in residential zoning districts or 32 square feet in area in nonresidential districts. (Larger signs in nonresidential zoning districts may be erected in compliance with the area limitations and permit requirements of the subject zoning district);

3. Contractor, developer, or construction-project identification signs, not exceeding 32 square feet in area;
4. Notices posted by public agencies (i.e., notice of proposed rezoning);
5. Public utility signs and safety signs required by law;
6. Political signs located on private property, limited to a maximum of 20 square feet in area per sign;
7. Signs located on private property that are not visible from any public right-of-way or public lands;
8. Seasonal signs and holiday decorations erected for periods of time not exceeding the customary duration of general celebration;
9. Barber-pole signs not exceeding 4 feet in height or 6 square feet in area, attached to a building;
10. Incidental signs not exceeding 2 square feet in area, subject to 20.75.070D; and
11. National register district identification signs. (Emphasis added)

The city ordinance language pertaining to removing temporary signs “upon completion of the activity” is a source of legal concern to several Missoula citizens and state legislators. Especially with respect to the time period between a primary election and a general election. The City sign ordinance language is vague and ambiguous pertaining to that specific issues with respect to the time periods between a primary and general election. Further, the city does not allow political signs to be located or placed on city property, vehicles or equipment, such as public parks, trails, conservation lands, city building sites, etc. In addition, pursuant to Section 12.12.190 MMC the city does not allow political signage on public right of ways, including boulevards located within the public rights of way, pursuant to a general prohibition on private or commercial use of city public rights of way. Section 12.12.190 MMC states:

12.12.190 City rights-of-way – vehicles to be parked within private property lines.

City rights-of-way shall not be used for private or commercial purposes unless the use is specifically authorized by this code or the Development Services staff. A permit for the construction of new driveway approach(es) shall not be issued unless vehicles to be served or serviced can be parked entirely within the private property lines and meets all applicable requirements of MMC Title 12 and/or MMC Title 20 - Zoning.

The city of Missoula also makes it unlawful pursuant to Section 9.38.010 MMC to post, attach, affix, etc., any bill, poster, card etc. to any pole, lamp post, etc.

The United States Supreme Court in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) upheld a city’s prohibition of political advertising on its buses. A decade later the United States Supreme Court in Members of the City Council of City of Los Angeles v. Taxpayers for Vincent, 466 US 789 104 S. Ct. 2118, 80 L. Ed. 2d 772, 1984 U.S. LEXIS 83 (1984) upheld a

Municipal ordinance prohibiting posting of signs (including political campaign signs) on public property, including utility poles. Determining that the City of Los Angeles interest in avoiding visual clutter was sufficiently substantiated to provide an acceptable justification for a content – neutral prohibition against the posting of signs on public property.

Several other court decisions have invalidated and declared unconstitutional municipal ordinances that attempt to regulate political speech signage on private property as well as invalidated ordinances that attempt to impose durational time limits, especially pre-election time limits on political speech signage.

Examples of Court cases that have invalidated local government regulations attempting to impose durational time limits on political signage include: 1) *Collier v. City of Tacoma*, 121 Wash. 2d 737, 854 P 2d 1046, 1993 Wash. Lexis 139 (1993), (pre-election durational time period unconstitutional); 2) *City of Antioch v. Candidates' Outdoor Graphic Service*, 557 F. Supp. 52 (N.D. Cal. 1982) (60 day limit on display of political signs unconstitutional since commercial signs not similarly restricted); 3) *McCormack v. Township of Clinton*, 872 F. Supp. 1320 (D.N.J. 1994) (Federal District Court enjoined enforcement of ordinance that prohibited display of political signs more than ten (10) days prior to or three days after the relevant political event); 4) *Whitton v. City of Gladstone, MO.*, 54 F 3d 1400 (8th Cir. 1995) (Struck down City of Gladstone ordinance prohibiting display of political election signs more than thirty (30) days prior to election or more than seven (7) days after election; 5) 4675 E. 2d 875 (1996) (Striking down a prohibition against permanent political signs in residential districts and a provision placing a time limit on political signs in districts where no such time limit would apply to commercial signs; and 6) *McFadden v. City of Bridgeport*, 422 F. Supp. 2d 659 (no D. West Virginia 2006) (holding invalid ordinance prohibiting posting of political and temporary signs more than 30 days before and 48 hours after event.)

While pre-event, pre-election durational time limits are not supported by court decisions, some courts might uphold post event, or with respect to political signs, post-campaign or post-election signage as long as there is a reasonable time period allowed for removal of the signage. Further, with respect to political campaign or political event signage regulations must recognize that the political campaign is not over after the primary election for political candidates that advance to the general election. See *Collier v. City of Tacoma*. Rathkopf's The Law of Zoning and Planning Zagler, Volume 2, Section 7.21, pages 17-58 to 17-60.

The Ninth Circuit did recognize a 10 day post-election removal requirement in *Baldwin v. Redwood City*, 540 F. 2d 1360 (9th Cir. 1976). It is also important to note that the Ninth Circuit in *Desert Outdoor Advertising Inc. v. City of Moreno Valley* 103 F 3d 814 (9th Cir. 1996) held a city sign ordinance unconstitutional because the ordinance imposed greater restrictions on noncommercial signs. Earlier this year the United States Supreme Court in *Reed v. Gilbert* (6/18/2015) 576 U.S. stated that content based laws – those that target speech based on the communicative content – are presumptively unconstitutional and may be justified only if the government provides and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. The *Reed v. Gilbert* court went on to state that a speech

regulation targeted at specific subject matter is content based even if it does not discriminate among view points within that subject matter.

Examples of leading court cases involving a variety of general political signage limitations that Courts invalidated include:

1. Arlington County Republican Committee v. Arlington County, 983 F. 2d587, 1993 U.S. App. LEXIS 29 (1993) held that a county law limiting temporary signage to two signs was unconstitutional. The United States Court of Appeals stated supra at 593-594 that:

(We agree) with the district court that the two-sign limit affects speech rather than conduct. “Communication by signs and posters is virtually pure speech.” Baldwin v. Redwood, 540 F. 2d 1360, 1366 (9th Cir. 1976), cert. denied, sub norm. [*594] Leipzig v. Baldwin, 431 U.S. 913, 97 S. Ct. 2173, 53 L. Ed. 2d 223 (1977) (footnote omitted). In addition, we agree that the two-sign limit infringes on this speech by preventing homeowners from expressing support for more than two candidates when there are numerous contested elections. Also, if two voters living within the same household support opposing candidates, the two-sign limit significantly restricts their ability to express support through sign posting. (Emphasis added)

2. In Gilleo v. City of Ladue (Missouri) 774 F. Supp 1559, 1991 U.S. District LEXIS 1356 (1991) the court issued an order granting a preliminary injunction enjoining the City of Ladue from enforcing a local ordinance that banned all signs in residential areas that were not expressly authorized by the City Council. Plaintiff Margaret Gilleo had placed a 24” X 36” sign in her front yard, reading “Say No to War in the Persian Gulf. Call Congress Now.” When informed that her sign was illegal she applied for a variance. The city council unanimously denied Gilleo’s request for a variation from a local ordinance that forbade all signs not expressly authorized. She then placed the sign in a second story window of her residence, which also was not acceptable to the City of Ladue. Gilleo challenged the constitutionality of the ordinance on First Amendment grounds.

The Court held that the ordinance clearly infringed Gilleo’s freedom of speech because the general prohibition was a ban on all noncommercial speech and, specifically, on political or issue-related signs such as Gilleo sought to erect in her yard. A consideration of the exemptions to the general prohibition of the ordinance confirmed that the infringement rose to the level of a constitutional violation. The exemptions from the ordinance, which attempted to regulate signs in the city, lacked content-neutrality and thereby rendered the ordinance unconstitutional on its face.

The court stated Supra at 1561. Government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972). However, signs, like billboards, combine communicative and noncommunicative aspects, and government has a legitimate interest in regulating noncommunicative aspects. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). Regulations concerning the time, place, and manner or speech are permissible if they advance a

significant government interest, if they are justified without reference to the content, and if they leave open alternative means of communicating the information. Id. at 516.
(Emphasis added)

3. The Washington Supreme Court in Collier v. City of Tacoma 121 Wash. 2d 735, 854 2d 1046, 1993 Wash. LEXIS 139 (1993) held that the pre-election durational time period portion of the Tacoma ordinance was unconstitutional, indicating that Plaintiff's right to political speech outweighed defendant's right to regulatory interests in aesthetics and traffic safety.

The Washington Supreme Court stated supra at 1053.... Although the Tacoma ordinances are viewpoint neutral, they define and regulate a specific subject matter – political speech. This content-based distinction, while viewpoint neutral, is particularly problematic because it inevitably favors certain groups of candidates over others. The incumbent, for example, has already acquired name familiarity and therefore benefits greatly from Tacoma's restriction on political signs. The underfunded challenger, on the other hand, who relies on the inexpensive yard sign to get his message before the public is at a disadvantage. We conclude, therefore that while aesthetic interests are legitimate goals, they require careful scrutiny when weighed against free speech interests because their subjective nature creates a high risk of impermissible speech restrictions. "Democracy stands on a stronger footing when courts protect First Amendment judgments in this area". Metromedia, 453 U.S. at 519. (Emphasis added)

4. In Whitton v. City of Gladstone, Missouri 832 F. Supp. 1329, 1993 U.S. Dist. LEXIS 13026 (1993) the court declared unconstitutional both a thirty (30) day pre-election durational time limit as well as a seven (7) day post election durational time limit for placement and removal of political campaign signs.

The Court stated Supra at 1333-1334 in part:

Section 25-45 of the New Sign Ordinance prohibits a residential or commercial owner from placing a political sign on his or her property more than thirty days before an election to which the sign pertains and requires the sign be removed within seven days of the election. Section 25-45, in essence, constitutes a complete ban on posting political signs which is temporarily lifted thirty days before an election and reinstated after an election takes place. City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52, 55 (ND. Cal. 1982). The posting of political signs constitutes speech. **Arlington County Republican Comm. v. Arlington County, 983 F. 2d 587, 593-94 (4th Cir. 1993); [**9]** Baldwin v. Redwood City, 540 F. 2d 1360, 1366 (9th Cir. 1976), cert denied, 431 U.S. 913, 97 S. Ct. 2173, 53 L. Ed. 2d 223 (1977). Section 24-45 burdens speech,....(emphasis added)

Further, a political sign that states "Whitton is Honest" or "Pro-Choice" is impermissible if an election on the candidate or issue is not pending, but is permissible if an election [*1334] is pending within thirty-days, from the posting of the signs. Again, what distinguishes between an impermissible and a permissible sign rests upon the content of the sign. See, Burson, 119 L. Ed. 2d at 13 ("Whether individuals may exercise their free

speech rights near polling places depends entirely on whether their speech is related to a political campaign.). (Emphasis added)

5. In Tierney v. City of Methuen, 12 Mass. L. Rep. 340; 2000 Mass. Super. LEXIS 4000 (2000) a political candidate successfully challenged an ordinance that placed a three (3) square foot maximum dimensional limit on political signs. The ordinance's maximum dimensional limit constituted discriminating treatment with respect to political signs compared to other types of temporary signs.

The City of Missoula sign ordinance provision pertaining to removal of temporary signs is somewhat ambiguous and is especially a concern with respect to political signs after a primary election. Further, with the United States Supreme Court decision (6/18/2015) in Reed v. Gilbert there also could be legal concerns about the City of Missoula's treatment of noncommercial signs compared to commercial signs.

CONCLUSION:

Numerous courts have invalidated durational time limits for political signage as invalid restrictions on protected free speech. Currently, pursuant to subsection 20.75.040 (d)(6) MMC the City of Missoula attempts to limit political signage dimensions to a maximum of twenty (20) square feet identifying it as temporary signage that is to be removed upon completion of the activity. The City of Missoula also does not allow political signs on city properties such as parks, trails, open space, conservation lands, city building sites, etc. Further pursuant to Section 12.12.190 the city also does not allow public rights of way to be used for private or commercial purposes and thereby prohibits political signs being placed in public boulevards and public rights of way.

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/s/ _____
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