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Legal Opinion 2012-008

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Mike Barton; Denise Alexander; Pat Keiley; Heather Kinnear; Laval Means; Jen Gress; Tom Zavitz; Steve King; Kevin Slovarp; Gregg Wood; Jessica Miller; Brian Hensel; Wayne Gravitt; Donna Gaukler; Morgan Valiant; David Shaw; Jackie Corday; Alan White; Chris Odlin; Mark Muir, Police Chief; Mike Brady, Assistant Police Chief; Jason Diehl, Fire Chief; Jeff Brandt, Assistant Fire Chief;

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE August 14, 2012

RE: Municipal Government limited time, place, manner regulations for political signs.

FACTS:

2012 is a federal, state and county election year. Recently there have been multiple inquiries concerning City of Missoula limited regulation of political signs.

ISSUE(S):

1.) Basically what are current City of Missoula limited regulations pertaining to political signs.
2.) Generally what examples exist pertaining to court decisions either upholding or invalidating municipal regulations pertaining to political signs.

CONCLUSIONS:

1.) Pursuant to subsection 20.75.040 (b) MMC the City of Missoula limits political signage dimensions to a maximum of twenty (20) square feet for temporary signage 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 to prohibit political signs being placed in public boulevards and public rights of way.

2.) While the Montana Supreme Court has not specifically addressed municipal limitations pertaining to political signs, The United States Supreme Court and other courts have issued decisions pertaining to municipal regulation of political/free speech signage. Court cases have upheld municipal regulations that prohibit political signage on public property, including utility poles as well as prohibit; political advertising on municipal buses.

There are also court cases that have held some Municipal regulations applied to political signs unconstitutional limitations on free speech. These invalidated municipal regulations unsuccessfully attempted to limit the number of political signs per residence to two signs; attempted to establish a pre-election durational time period for political signs including one instance where both pre and post election time limits were invalidated; invalidated a three foot square foot maximum dimension for political signs; and invalidated an attempted ban on all residential signage not expressly authorized because the ban violated free speech.

LEGAL DISCUSSION:

Initially, it must be noted and emphasized that political signage pertains to free speech. 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)

As a matter of city policy, 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 may not be used for private or commercial purposes unless such use is specifically authorized by this code or a use permit is issued by the City Engineer. A permit for the construction of driveway approaches shall not be issued unless vehicles to be served or serviced can be parked entirely within the private property lines. (Emphasis added)

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. The United States Supreme Court found the challenged ordinance constitutional 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. In addition the United States District Court in the case had found that placing signs on utility poles creates a potential safety hazard.

The United States Supreme Court in Los Angeles v. Vincent, Supr at 791 stated:

"While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S., at 647, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. See, e.g., United States v. Grace, 461 U.S. 171, 177 (1983); **[***792]** Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S., at 654-655; Consolidated Edison Co. v. Public Service Comm'n, 447 U.S., at 535; Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93 (1977). The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public **[**2133]** property is prohibited. To the extent that the posting of signs on pubic property has advantages over these forms of expression, see, e.g., Talley v. California, 362 U.S. 60, 64-65 (1960), there is no reason to believe that these same advantages cannot be obtained through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles…..(Emphasis added)"

In Support of the City of Los Angeles ordinance the United States Supreme Court stated Supr at 787-789:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest in unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id., at 377….

In Kovacs v. Cooper, 336 U.S. 77 (1949), the Court rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance. **[*806]** In upholding an ordinance that is prohibited loud and raucous sound trucks, the Court held that the state had a substantial interest in protecting its citizens from unwelcome noise. In **[***788]** Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the court upheld the city's prohibition of political advertising on its buses, stating that the city was entitled to protect unwilling viewers against intrusive advertising that may interfere with the city's goal of making its buses "rapid, convenient, pleasant, and inexpensive," id., at 302-303 (plurality opinion). (Emphasis added)….

We reaffirm the conclusion of the majority in *Metromedia.* The problem addressed by this ordinance – the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit. "[The] city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." Young v. American Mini Theatres, Inc., 427 U.S., at 71 (plurality opinion). (Emphasis added)….

We turn to the question whether the scope of the restriction on appellees' expressive activity is substantially broader than necessary to protect the City's interest in eliminating visual clutter. The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest. See, e.g., Heffron v. International society for Krishna Consciousness, Inc., 452 U.S. 640, 647-648 (1981); Schad v. Mounta Ephraim, 452 U.S. 61, 68-71 (1981); Carey v. Brown, 447 U.S., at 470-471 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115-117 (1972); Police Department of Chicago v. Mosley, 408 U.S., at 98. The District Court found that the signs prohibited by the ordinance do constitute visual clutter and blight. By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy. (Emphasis added)

In Conclusion, supra at 795 the United States Supreme Court in Los Angeles stated:

"…. The character of the environment affects the quality of life and the value of property in both residential and commercial areas. We hold that on this record these interests are sufficiently substantial to justify this content neutral, impartially administered prohibition against the posting of appellees' temporary signs on public property and that such an application of the ordinance does not create an unacceptable threat to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). (Emphasis added)

These two United States Supreme Court cases pertained to regulations of political signage on public property. There are several other court decisions that 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.

The Ninth Circuit United States Court of Appeals in Baldwin v. Redwood City, 540 F. 2d 1360, 1976 U.S. App. LEXIS 7659 (1976) upheld two aspects of a municipal ordinance regulating political campaign signs; but found most of the challenged ordinance provisions unconstitutional. Both the District Court and the Ninth Circuit declared unconstitutional 1.) a nonrefundable inspection fee of $1.00 for each sign. 2.) An aggregate limit of 64 square feet of signs per candidate or ballot issue and 3.) the summary removal of signs alleged to violate the ordinance.

The Ninth Circuit in Baldwin v. Redwood City did uphold the 16 square foot maximum size for a political sign and the aggregate limit of a total of 80 square feet of political signs per parcel of property stating Supra, at 13.68 We have no difficultly agreeing with the district court that the limitations of individual signs to a maximum area of 16 square feet and the aggregate area of signs on a single parcel to 80 square feet do not offend the First Amendment. (Emphasis added).

Examples of municipal ordinances unsuccessfully attempting to limit political campaign signage include, but are not necessarily limited to the following:

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. 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 the 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 violations. The exemptions form 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 wn 2d 373, 8540 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.

CONCLUSIONS:

1.) Pursuant to subsection 20.75.040 (b) MMC the City of Missoula limits political signage dimensions to a maximum of twenty (20) square feet for temporary signage 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 to prohibit political signs being placed in public boulevards and public rights of way.

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/s/

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