

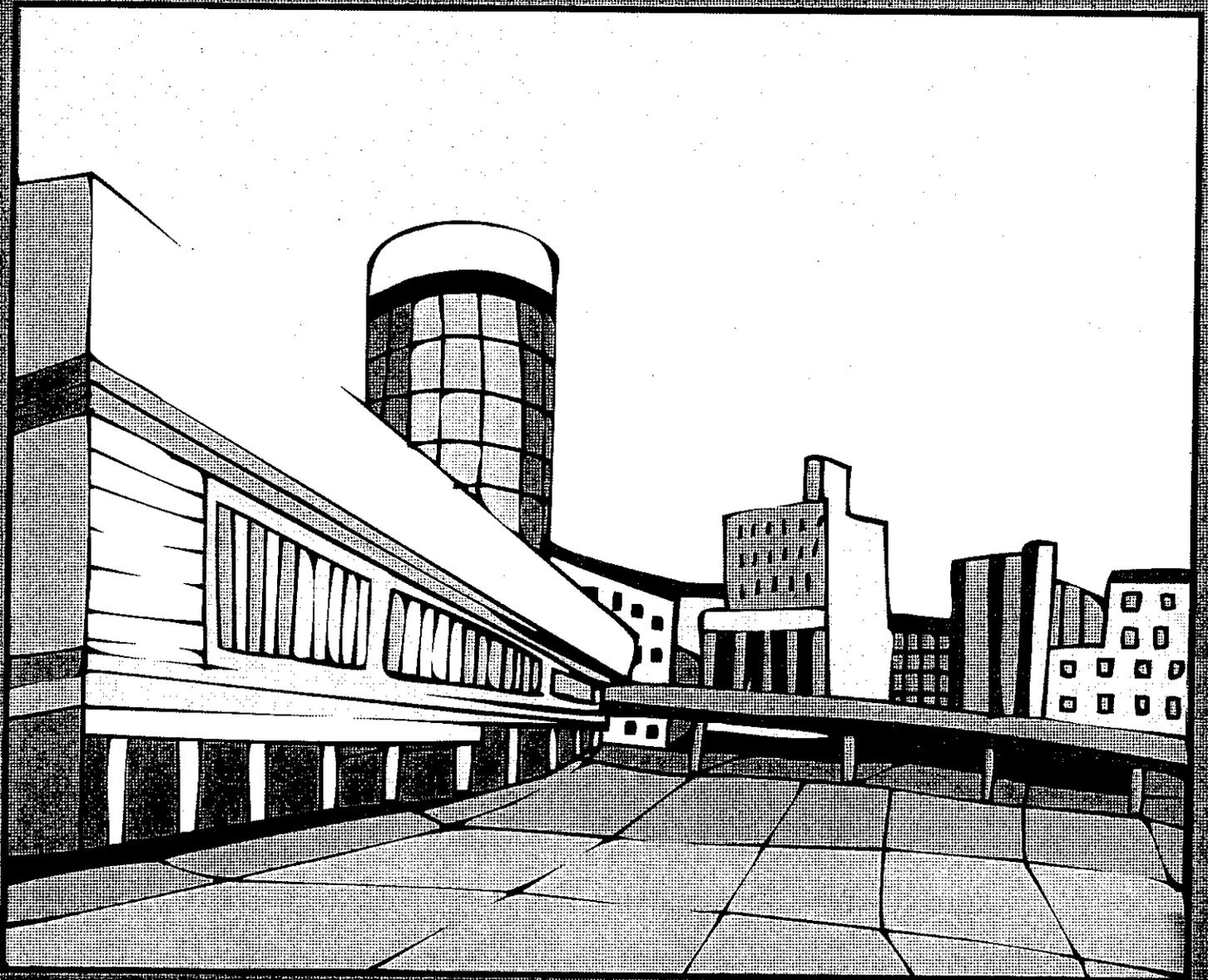
TO: Mayor and Members of Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
DATE: July 26, 2005
SUBJECT: Municipal Sign Regulations v. the First Amendment

Enclosed please find a feature article titled *Municipal Sign Regulations v. the First Amendment*. I was asked to write this article for the 2005 Municipal Law Issue of Laches, which is the publication of the Oakland County Bar Association. Since proposed revisions to Troy's sign ordinance appear as a City Council agenda item, I thought that the article was timely and may be helpful.

As always, if you have any questions concerning the above, please let me know.

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Municipal Sign Regulations v. the First Amendment

by Lori Grigg Bluhm

Recently, our office had the opportunity to revisit the tenuous balance between the rights of a municipality to regulate for health, safety and welfare reasons and the individual's constitutional First Amendment right to free speech. In a presumably unprecedented move, a George W. Bush political sign was temporarily housed at the offices of the American Civil Liberties Union (ACLU). The sign was acquired through a Troy resident, who had placed the sign in his yard just after George W. Bush was nominated for president at the Republican National Convention in 2004. When the building inspection official asked the resident to remove the sign since it didn't comply with the then-existing City of Troy regulations, the resident contacted the ACLU, who filed a lawsuit on his behalf. The ACLU also challenged the political sign regulations of several other municipalities throughout the state of Michigan.

The Michigan Legislature enacted election consolidation, which is likely to result in more candidates or ballot issues for each election. This increase may now create issues in some Michigan jurisdictions. Several communities have not revisited their sign ordinances in years. I was recently invited to discuss our political sign case with the Michigan Association of Code Enforcement Officials. After being barraged with questions at this meeting, it was evident that there is some ambiguity concerning the appropriate or legal limits of regulation for local political sign ordinances, which is not surprising in light of the existing case law on the matter, which is sometimes contradictory.

It is clear that local municipalities have authority to enact regulations under the police powers. As stated in the

plurality opinion in *Young v. American Mini Theatres, Inc.*,¹ "(T)he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young* recognized that the First Amendment does not guarantee a right to communicate one's views at all times and places or in any manner.

However, a municipality must also comply with the constitutional free speech provisions of the First Amendment to the U.S. Constitution, which fiercely protects political and religious speech. Most residents of a municipality satisfactorily achieve the balance between free speech and the preservation of property values, and are mindful and considerate of the impact of their actions in the neighborhood. They will ensure that any signs on their property will be placed in a manner that promotes aesthetics and safety and maintains the existing property values. However, municipalities are constantly receiving requests to enact more stringent regulations on residential properties. These requests are usually motivated by the neighbors of an absentee landowner who is unaware that his property is littered or cluttered and therefore unaware of the negative impact to adjoining properties. In a minority of cases, the requests are motivated by the person who exuberantly maximizes any opportunity to create distress for their neighbors. The proliferation of signs on residential property, the litter caused by the failure to remove signs within a reasonable time, or the posting of signs that are not suited for existing weather conditions are examples of how one resident's exercise of an unlimited right to

(continued on page 23)

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display signage on their property can negatively impact a neighbor's residential property.

A municipality cannot absolutely ban signs on residential property, since these forms of speech are afforded great reverence. According to *City of Ladue v. Gilleo*,² yard signs are a "venerable means of communication that is both unique and important... (R)esidential signs have long been an important and distinct medium of expression."³ Residential signs are a medium for political, religious or personal messages, as well as commercial messages. However, if there is a proliferation of yard signs, or aesthetic or safety concerns about the manner and placement of signs, then residents are left without any viable means to restrict this conduct that diminishes the surrounding properties. Therefore, the municipality is relied upon to enact regulations that are consistent with the First Amendment to the U.S. Constitution, which guarantees the freedom of speech. Historically, there have been many municipalities that addressed this matter by adopting content-neutral restrictions on the number of allowable signs or the size of allowable signs. For many communities, there is an additional allowance for additional signage during an election cycle, in recognition of the venerated right of political speech. This allowance has been justified on the basis that the regulations are not based on the

viewpoint of the message. In other words, the government is not expressing an animus toward the message contained on the sign. For example, municipalities cannot enact restrictions that prohibit residential signs for one political party, candidate or issue while allowing the signs of the opposition. In light of the recent case law, however, municipalities should exercise caution when they separate political sign regulations from other types of sign regulations. Municipalities that treat political signs different than other signs on residential properties will face challenges that the regulation is an unconstitutional content-based restriction on free speech.

Content-Based Challenges

The freedom of speech can be limited by time, place and manner restrictions. The rational basis test is set forth in *Perry Education Association v. Perry Local Educator's Association*⁴ and requires any restrictions to be content-neutral, narrowly tailored to further a substantial government interest, and must leave open ample alternative means for communicating the desired message. A definition of content neutrality is found in *Members of the City Council of the City of Los Angeles et. al. v. Taxpayers for Vincent*.⁵ In that case, temporary signs – including political signs – were prohibited from being posted on public property, such as utility poles. The U.S. Supreme Court stated, in pertinent part:

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(T)here are some purported interests – such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas – that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others... (citations omitted)... That general rule has no application to this case, for there is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral – indeed it is silent – concerning any speaker’s point of view, and the District Court’s findings indicate that it has been applied to appellees and others in an evenhanded manner. (p. 2128)

This rule is succinctly stated in *Ward v. Rock Against Racism*,⁶ where the U.S. Supreme Court declared “the principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”⁷ *Ward* has been cited by almost every U.S. Supreme Court opinion that discusses First Amendment issues.

Under this rule, it could be permissible to distinguish on the basis of categories of speech. It is permissible to adopt more stringent regulations for the category of commercial speech than for non-commercial speech. Regulations of political signs should also be permissible, as long as the opportunity to display ideological messages, such as political signs, are equal to or greater than the opportunity to display commercial signs on a property. However, the more recent trend in determining content neutrality is whether a person needs to look at the message on a sign to determine whether it is permitted. In *City of Cincinnati v. Discovery Network*,⁸ the City of Cincinnati wanted to reduce the number of news racks on public streets, and therefore they banned all commercial racks in the city. Newspaper racks were allowed, however. Since the regulation required persons to look inside the news rack to see whether it could remain on public property, the U.S. Supreme Court held that this was content-based. The Court also held that there was not a justification for the distinction between commercial speech and non-commercial speech, other than the city’s insufficient articulation that “commercial speech has low value.”⁹

In *Boos v. Barry*,¹⁰ there was an absolute ban on persons carrying signs in front of foreign embassies that were critical of foreign governments. However, signs that were supportive of foreign governments were permitted, which led to the Court’s determination that this regulation was content-based. The focus was on the message, rather than the category of speech (political). In *Boos*, the articulated

purpose of the regulation was to “protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments.”¹¹ According to the majority opinion in *Boos*, “a regulation that does not favor either side of a political controversy is nonetheless impermissible because the First Amendment’s hostility to content-based regulation extends ... to a prohibition of public discussion on an entire topic.”¹²

Satisfying the Narrowly Tailored Prong

Even when a political sign regulation is content-based, it may still be constitutional if the restriction is necessary to serve a compelling state interest and it is narrowly drawn to achieve those ends.¹³ Regulations for each municipality are different, and each municipal attorney is encouraged to review their own ordinances to determine whether there is an articulated compelling state interest and whether the regulations are narrow enough to achieve the compelling state interest(s). This review would most beneficially occur in the non-political season, rather than being a last-minute response to a request filed by a political opponent in the middle of a heated election.

In support of their challenge to our ordinance, the ACLU relies on a non-binding Fourth Circuit case, *Arlington County Republican Committee v. Arlington County, Virginia*,¹⁴ that strikes an ordinance that set a limit of two political signs per

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house, and held that this regulation was unduly restrictive. The Court also determined that other means of communication, including hand billing or canvassing, involved too much time or expense and therefore were insufficient.

In the Sixth Circuit, the case most often cited as a challenge to any Michigan political sign regulation is the 1996 opinion of Judge Anna Diggs Taylor of the Eastern District of Michigan, *Dimas v. Warren*.¹⁵ In *Dimas*, the plaintiff challenged Warren's prohibition on political signs more than 45 days prior to an election, and also the limitation on the number of signs to one per candidate. Judge Taylor invalidated these portions of Warren's sign ordinance as unconstitutional, since they were content-based restrictions that were not narrowly tailored to further the significant government interests of neighborhood aesthetics, property values or traffic safety, and they did not leave open alternative channels for the communication of the message. However, in 1997, in lieu of an appeal to the Sixth Circuit Court of Appeals, the City of Warren and the ACLU negotiated a consent judgment. According to this consent judgment, Warren has the following regulations for political signs: 1) Temporary election signs are allowed on private property as of the date of the election filing date for the elected office sought. For all other elections and referendums without filing deadlines, the temporary election signs shall not be erected more than 60 days prior to the

earliest election date. All election signs must be removed within seven days after the final election, and within seven days after any primary election for those candidates who will not go on to the final election. 2) Residents are permitted up to two signs per candidate and per issue viewpoint, per lot frontage. 3) Up to three opinion signs are permitted on each residential lot for an unlimited duration. These signs shall be limited to a maximum of four square feet per sign. 4) The maximum allowable size of election signs along residential roads is six square feet, and up to sixteen square feet along collector roads and major thoroughfares. 5) Window signs are permitted for residential properties. 6) Violation of the political sign ordinance provisions is a municipal civil infraction, punishable by a maximum fine of \$100. Prior to citation, a warning notice and seven days to cure shall be provided to political candidates who have failed to timely remove their political signs. This notice shall indicate the precise location of the offending sign(s).

The provisions of this consent judgment provide some guidance for municipalities that are reviewing their sign ordinances. However, it may not satisfy the demands of each community. However, at a minimum, if a municipality treats political signs differently than other categories of signs, the justification should be more than just safety and aesthetics. In a recent opinion from the Eastern District of Michigan, Judge David Lawson has opined, "although 'safety' and 'aesthetics' are substantial government interests, they are not compelling enough to justify content-based restriction of fully protected, non-commercial speech."¹⁶

Lori Grigg Bluhm is the City Attorney for the City of Troy. She received her B.A. from Albion College in 1989, and her J.D. in 1992 from Wayne State University. She recently achieved the designation as a Local Government Fellow from the International Municipal Lawyer's Association. She is currently the Secretary/Treasurer of the Public Corporation Section of the State Bar of Michigan. She is also a member of the Real Property Section of the State Bar of Michigan, a member of the Michigan Association of Municipal Attorneys, a member of the International Municipal Lawyer's Association and a member of the American Bar Association (State and Local Government Law Section). She is a past chair of the Oakland County Bar Association's Municipal Law Committee and the Public Service Committee. She practices municipal law exclusively, representing her sole client, the City of Troy.

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Footnotes

- 1 427 U.S. 50, 71; 96 S. Ct. 2440; 49 L.Ed.2d 310 (1976).
- 2 512 U.S. 43, 114 S. Ct. 2038, 129 L.Ed.2d 36 (1994).
- 3 *Id* at 54.
- 4 460 U.S. 37, 44 (1983).
- 5 466 U.S. 789, 104 S. Ct. 2118, 80 L.Ed. 2d 772 (1984).
- 6 491 U.S. 781, 109 S.Ct.2746, 105 L.Ed.2d 661 (1989).
- 7 *Id* at 2745.
- 8 507 U.S. 410, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993).
- 9 *Id* at 1517.
- 10 485 U.S. 312, 108 S. Ct. 1157, 99 L.Ed.2d 333 (1988).
- 11 *Id* at 1164.
- 12 *Id* at 319 (quotations omitted).
- 13 *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L.Ed.2d 800 (1981).
- 14 983 F.2d 587 (4th Circuit, 1993).
- 15 939 F. Supp. 554 (E.D. Michigan 1996).
- 16 *King Entertainment, Inc. v. Thomas Township*, 215 F. Supp.2d 891, 910 (E.D. Mich. 2002).