CITY ATTORNEYS' OFFICE
CITY HALL, 435 RYMAN
MISSOULA, MT 59802
Phone: (406) 523-4614
Fax: (406) 327-2105

LEGAL OPINION

2002-019

TO: Mike Kadas, Mayor
City Council
Janet Stevens, Chief Administrative Officer
Cindy Klette, OPG Director
Denise Alexander, OPG
Jennie Dixon, OPG
Roy Fyffe, OPG
David Loomis, OPG
Pat Kieley, OPG
Mark Landkammer, OPG
Bob Weaver, Chief of Police
Rusty Wickman, Assistant Chief of Police
Marty Ludemann, Police Captain
Steve Ross, Police Captain
Bob Reid, Police Captain
Donna Gaukler, Parks & Recreation
Gary Salisbury, Parks and Recreation
Bruce Bender, Public Works Director
Steve King, City Engineer
Carl Thompson, Traffic Services Superintendent
Kim Latrielle, Chamber of Commerce
Theresa Cox, Carousel For Missoula

FROM: Jim Nugent, City Attorney

DATE June 27, 2002

RE: Residential political signs a constitutional free speech right/court decisions concerning residential political signs

FACTS:

During this past primary election season there seemed to be more questions than normal from city officials or OPG Staff and citizens with respect to various aspects of political sign regulation. Some of these inquires seemed to be generated arising out of a citizen's expression of concern about a religious sign on a garage residence at 630 Livingston. More recently OPG Staff has

been grappling with the issue of whether OPG can require political signs to be removed after an election has occurred.

ISSUE:

Are political signs potentially subject to some regulation pursuant to a Municipal Sign Ordinance?

CONCLUSION:

The physical characteristics of political signs such as its maximum size, or its location so as not to block visibility of motorists on private property or banning political signs on public property are examples of acceptable political sign regulation. The United States Supreme Court in City of Ladue v. Gilleo (1994) 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed 3d 36; 1994 U. S. Lexis 4448 unanimously indicated that residential "political, religious, or personal message" signs were permitted constitutional free speech rights pursuant to the First Amendment.

There are court cases that have held invalid local government restrictions attempting to limit the number of temporary political signs to two (2) as well as invalidated durational time periods as to when political signs may be allowed.

LEGAL DISCUSSION:

The United States Supreme Court in City of Ladue v. Gilleo (1994), 512 U.S. 43, 114 S. Ct. 2038; 129 L. Ed. 2d 36; 1994 U.S. Lexis 4448 unanimously held unconstitutional a municipal **sign** ordinance that did not allow residential signs that provided "political, religious, or personal messages" holding that the sign ordinance violated the resident's free speech rights pursuant to the First Amendment of the United States Constitution. The City of Ladue, Missouri's Municipal Sign Ordinance prohibited "homeowners from displaying any signs on their property except" residence identification" signs, "for sale" signs, and signs warning of safety hazards".

The United States Supreme Court stated:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and post other problems that legitimately call for regulation. It is common ground that governments may

> regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. (emphasis added)

Gilleo, supra at 48.

However, the United States Supreme Court held the City of Ladue Sign Ordinance unconstitutional stating:

> Here, in contrast, Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows – residential signs play an important role in political campaigns, during which they are displayed to signal the resident's support for conveying complex ideas as do other media, but residential signs, have long been an important and distinct medium of expression. (emphasis added).

Gilleo, supra at 54-55

The United States Supreme Court in City of Ladue, supra at 50 noted that the United States Supreme Court had previously upheld a Los Angeles ordinance that prohibited the posting of signs on public property. See Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 814 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984). The United States Supreme Court in this Los Angeles case rejected as "miss placed" purported public forum principles for placing political campaign signs on public property, such as utility poles.

In addition to Gilleo, supra, other court cases pertaining to invalid attempts to regulate political signs include the following:

1) The United States Court of Appeals for the Fourth Circuit in Arlington County Republican Committee v. Arlington County, Virginia, 983 F.2d 587 (1993) invalidated a county political sign restriction allowing only two temporary signs per residence as being invalid pursuant to the First Amendment of the United States Constitution Free Speech Rights. The Federal Court of Appeals stated Supra at 589 that "we agree with the District Court's conclusion that the two-sign limit provisions impermissibly infringed on the Political Parties' First Amendment guarantee of Freedom of Speech".

The Federal Court stated:

> We agree with the district court that the two-sign limit affects speech rather than conduct. "Communication by signs and poster is virtually pure speech". Baldwin v. Redwood, 540 F.2d 1360, 1366 (9th Cir. 1976), cert. Denied, sub nom. 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.

Arlington County Republican Committee, Supra at 593 – 594.

Later the Federal Court stated:

> In addition, the County's laundry list fails to recognize that the two-sign limit infringes on the rights of two groups: the candidates and the homeowners. Homeowners also express their views by posting signs in their yard. In Vincent, the Court upheld the restraint on public signs in part because the speaker could still "exercise his right to speak and distribute literature in the same place where posting of signs on public property is prohibited. 466 U.S. at 812 (emphasis added). Here, there is no viable alternative to the homeowner on his property.
>
> In summary, we find that the County did not narrowly tailor the two-sign limit to further its interests in promoting aesthetics and traffic safety. In addition, we find that the provision leaves no viable alternative means of political speech. Thus, we find the two-sign limit violated the First Amendment rights of the Political Parties. (emphasis added)

Arlington County Republican Committee, supra at 595.

2) The Supreme Court of Washington held unconstitutional portions of a Tacoma, Washington ordinance that attempted to prohibit political signs any earlier than 60 days before an election. Collier v. City of Tacoma, 854 P. 2d 1046 at 1050-1051 (1993). Court expressed concern that Tacoma ordinance 1) regulated political speech; 2) regulated political speech in a public forum (parks, sidewalks, streets); and 3) regulated based on content of speech and concluded "that Tacoma's durational limitation on pre-election posting of political signs is unconstitutional; because city's regulatory interests in aesthetics and traffic safety were not sufficiently compelling to justify restrictions on a candidate's right to political speech." The specific political

race that generated this lawsuit was a United States Congressional race in which a democratic candidate was challenging 14-year Republican incumbent.

The Washington Supreme Court stated:

> The Tacoma ordinances implicated several concerns in our free speech jurisprudence: regulation of political speech, regulation of political speech in a public forum, and regulation based on the content of the speech. The speech restricted by Tacoma Municipal Code sections 2.05.275 and 6.03.070 is political speech. The code defines "political signs" and restricts the time and place in which such signs may be posted. Wherever the extreme perimeters of protected speech may lie, it is clear the First Amendment protects political speech, see Carey v. Brown, 447 U.S. 455, 467, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980), giving it greater protection over forms of speech. Metromedia, Inc. v. San Diego, 453 U.S. 490, 513, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). The constitutional protection afforded political speech has its "fullest and most urgent application precisely to the conduct of campaigns for political office. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971) (emphasis added)

Collier, supra at 1050.

The Washington Supreme Court in Collier stated:

> 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 restriction. "[D] emocracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgment in this area." Metromedia, 453 U.S. at 519. (emphasis added).

Collier, supra at 1053.

3) The Ohio Supreme Court in City of Painesville Building Department v. Dworken and Bernstein Co., 733 N.E. 2d 1152 (2000] declared a city zoning ordinance limiting the placing of political signs on private property to seventeen (17) days preceding an election and 48 hours after an election unconstitutional. In this Ohio case a law firm had been found guilty of a zoning violation for placing a political sign on the private law firm property in excess of the seventeen (17) days immediately preceding an election.

Initially, the Ohio Supreme Court stated:

> The First Amendment to the United States Constitution provides that "Congress shall make no law *** abridging the freedom of speech ***." The limitation of the First Amendment is applicable to the states and to political subdivision of the states by virtue of the Fourteenth Amendment. Gitlow v. New York (1925), 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138; Lovell v. Griffin (1938), 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949.
>
> The posting of signs displaying political messages is a traditional method of speaking and, indeed, "'communication by signs and posters is virtually pure speech.'" Arlington Cty. Republican Commit. V. Arlington Cty., Virginia (C.A.4, 1993), 983 F.2d 587, 593, quoting Baldwin v. Redwood (C.A.9, 1976), 540 F.2d 1360, 1366. A law regulating a property owner's right to erect a yard sign affects both the owner's and the candidate's First Amendment rights. See Curry v. Prince George's Cty. (D.Md. 1999), 33 F. Supp. 2d 447, 449, 2d 397, 405-406. Moreover, the First Amendment has "its fullest and most urgent application'" to speech uttered during political campaigns. McIntyre v. Ohio Elections Comm. (1995), 514 U.S. 334, 347, 115 S. Ct. 1511, 1519, 131 L. Ed. 2d 426, 440, quoting Buckley v. Valeo (1976), 424 U.S. 1, 14-15, 96 S. Ct. 612, 632, 46 L. Ed. 2d 659, 685. (emphasis added)

City of Painsville Building Department, supra at 1154 – 1155.

After discussing and quoting extensively from the United States Supreme Court case in City of Ladue v. Gilleo, the Ohio Supreme Court in City of Painsville Building Department stated:

> Although the Supreme Court has not considered the issue, the overwhelming majority of courts that have reviewed sign ordinances imposing durational limits for temporary political signs tied to a specific election date have found them to be unconstitutional. Whitton v. Glandstone (C.A.8, 1995), 54 F. 3d. 1400 (ordinance deemed unconstitutional which limited placement

or erection of political signs to thirty days prior to the election to which the sign pertains until seven days after the election); Dimas v. Warren (E.D. Mich. 1996), 939 F. Supp. 554 (ordinance deemed unconstitutional which prohibited posting of political yard signs earlier than forty-five days prior to any election, and ordering removal within seven days after); Orazio v. North Hempstead (E.D.N.Y. 1977), 426 F. Supp. 1144 (holding that no time limit on the display of pre-election political signs is permissible under the First Amendment) ; Antioch v. Candidates' Outdoor Graphic Serv. (N.D.Ca. 1982). 557 F. Supp. 52 (ordinance deemed unconstitutional which limited display of political signs to the period sixty days before election); **Collier v. Tacoma(1993), 121 Wn.2d 737, 854 P.2d 1046** (ordinance deemed unconstitutional which limited posting of political signs to the period sixty days prior to election to seven days after, where no time restriction were imposed on other temporary signs); Curry v. Prince George's Cty., *supra* , 33 F. Supp. 2d 447 (ban on political campaign signs posted on private residences for all but forty-five days before and ten days after an election deemed unconstitutional); see, also, Christensen v. Wheaton, 2000 U.S. Dist. LEXIS 1737 (Feb. 16, 2000), N.D. Ill. No. 99C8426, unreported, 2000 Wl 204225 (granting preliminary injunction enjoining enforcement of ordinance the effect of which was to prohibit the display of political signs for more than thirty days); Knoeffler v. Mamakating (S.D.N.Y. 200), 87 F. Supp. 2d 322, 327 (noting that "durational limits on signs have been repeatedly declared unconstitutional"); Union City Bd. Of Zoning Appeals v. Justice Outdoor Displays, Inc. (1996), 226 Ga. 393, 467 S.E.2d 875 (limitation of political signs to six weeks prior to and one week after election deemed unconstitutional); McCormack v. Clinton Twp. (D.N.J. 1994), 872 F. Supp. 1320 (limitation of political signs to ten days prior to and three days after election deemed unconstitutional). Cf. Waterloo v. Markham (1992), 234 Ill. App. 3d 744, 175 Ill. Dec. 862, 600 N.E. 2d 1320 (ninety-day time limitation for temporary signs not unconstitutional).

Gilleo, supra at 1157.

The Ohio Supreme Court then went on to hold:

We therefore hold that Planning and Zoning Code Section 1135.02(d) of the Codified Ordinances of the city of Painsville, which precludes the posting of political signs except during the period extending seventeen days preceding any primary elections, general election, or special election until forty-eight hours after the election, violates the First Amendment to the United States Constitution and is unconstitutional when applied to prohibit the

> owner of private property from posting on that private property a single political sign outside the durational period set by the ordinance. (emphasis added).

Gilleo, supra at 160.

CONCLUSION:

The physical characteristics of political signs such as its maximum size, or its location so as not to block visibility of motorists on private property or banning political signs on public property are examples of acceptable political sign regulation. The United States Supreme Court in City of Ladue v. Gilleo (1994) 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed 3d 36; 1994 U. S. Lexis 4448 unanimously indicated that residential "political, religious, or personal message" signs were permitted constitutional free speech rights pursuant to the First Amendment.

There are court cases that have held invalid local government restrictions attempting to limit the number of temporary political signs to two (2) or the time period when political signs are allowed to sixty (60) days.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:rmj
pc: City Council File
Election File
Legal Staff