The Constitutional Regulation of Political Signs During the Election Season

by William D. Brinton and Rachel Cocciolo



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It has long been established that the public welfare includes aesthetic values, and a municipality may legitimately exercise its police powers to advance aesthetics.[1] A local government's right or duty to regulate signage, however, is subject to the constitutional constraints imposed by the First Amendment and implemented through the Fourteenth Amendment.[2]

The proliferation of sign clutter during the election season is a legitimate aesthetic concern.[3] One municipality's ordinance notes that election signs "are unreinforced paper products... particularly susceptible to the effects of the elements," and that, without reasonable regulation, a community "could be inundated by their profusion prior to elections and by their litter after elections."[4] The First Amendment comes into play as local officials address the location, number, and physical attributes of temporary election signs, which fall within the broader category of political signs.[5] In preparing ordinances to regulate this type of sign, municipal lawyers are generally faced with two primary concerns: first, temporary election signs on public rights-of-way, highway medians, utility poles, street furniture and other public property,[6] and second, temporary election signs on private property.

Temporary Election Signs on Public Property

Most sign clutter arises from the placement of election signs on public rights-of-way or other public property adjoining streets and highways. Federal laws and regulations, enforced by the state, disallow the placement of political or election signs on federal rights-of-way. Typically, state law will also prevent the placement of temporary election signs on state roads and rights-of-way,[7] and will prohibit a municipality from permitting any sign along a state roadway in violation of state law.[8] Consequently, nearly all sign codes contain provisions that expressly prohibit signs, other than official signs (e.g., traffic control devices, as regulated by the federal *Manual on Uniform Traffic Control Devices* or the state counterpart[9]) on such property.

In 1984, in the seminal case of *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, the United States Supreme Court upheld an ordinance that prohibited the posting of signs on specified public property (including sidewalks, crosswalks, lamp posts, utility or telephone poles, and others).[10] The case arose after a group of supporters of a candidate running for city council and a sign company challenged a Los Angeles ordinance, both facially and as applied. The Court rejected the facial overbreadth challenge after finding that the challengers had failed to demonstrate a realistic danger that the ordinance would significantly compromise recognized First Amendment protections of individuals not before the Court. In doing so, the Court reaffirmed that the problem addressed by the ordinance—the visual assault presented by an accumulation of signs posted on public property—constituted a significant evil within the City's power to prohibit.[11] Further, it determined that visual blight was not merely a byproduct of the activity, but was created by the medium of the expression itself.[12]

The Court also noted that the validity of the aesthetic interest in eliminating signs on public property was not compromised by failing to extend the

ban to private property, because the fact that there might be visual clutter created by other sources of blight was not a limiting factor.[13] Accepting the City's position that it could "decide that the esthetic interest in avoiding 'visual clutter' justifie[d] a removal of signs creating or *increasing* that clutter,"[14] the Court assumed that the ordinance diminished the total quantity of the challengers' speech,[15] but recognized, also, the existence of alternative modes of communication.[16] Several years earlier, a state appellate court addressed a similar blanket prohibition neutrally directed against inanimate modes of expression, distinguishable from handheld or personally-attended messages, on public property.[17] The court observed, "Thousands of tattered derelict signs from past elections testify to the difficulty of protecting public property from unsightly signs even where laws forbid public posting."[18]

Temporary Election Signs on Private Property

Clearly, municipalities may not enact a total prohibition on the display of temporary election signs.[19] Temporary election signs are generally allowed as *additional* signs to accommodate core political speech prior to an election, and municipalities generally do not restrict any lawfully-erected permanent sign from changing its message to a political or election message at any time, either through a prudent "message substitution" clause (discussed below) or otherwise.[20]

When an allowance of temporary election signs is described in a sign code, the code should be clear that the allowance of such signs prior to an election is in addition to the display of other permitted election and political messages on existing permanent signs. Otherwise, a court might construe the provisions as establishing an overall limit on political speech everywhere, despite the absence of any intent to so limit that speech. For example, the U.S. Court of Appeals for the Eleventh Circuit held, in *Café Erotica of Fla., Inc. v. St. Johns County*, that limiting signs that displayed political messages to a smaller size than signs which displayed other types of messages constituted content discrimination.[21]

Regulating temporary election signs posted on private property is often problematic for two reasons. Many ordinances have not been regularly updated to take into account court decisions that impact this area of regulation; second, as already noted, some courts fail to understand that regulatory provisions addressing temporary election signs pertain to the allowance of additional political signs during the election season. The issues of duration, size and height, and the number of temporary election signs are the most debated. A secondary issue is "message substitution" for existing signage.[22]

Duration. Durational limits, often contained in obsolete or unenforced ordinances, prohibit the display of temporary election signs until a specified time period before an election. Courts generally strike down such limits. In recognition of binding precedent precluding such pre-election limitations, municipal counsel are well advised to delete such provisions from sign ordinances. However, courts generally uphold durational limits that require temporary election signs to be removed five, seven, or ten days *following* an election. While the proliferation of temporary election signs might justify a shorter time frame for their removal than the limit set for other temporary signs (e.g., "for sale" or "grand opening" signs), it is prudent to consider a consistent removal period for all such temporary signs after the event concludes, as otherwise, the durational limit may be challenged as a content-based regulation.[23]

Size and Height. Size and height limitations for temporary election signs are generally controlled by the zoning district in which they are displayed, usually with a reduced height and size requirement for residential districts, and a larger height and size being allowed in non-residential districts.[24] It would be prudent to adopt size and height limitations for temporary election signs that are identical to the dimensional limitations for other temporary sign types. Size limits should be large enough to permit viewing by both passersby in vehicles and those on foot.[25]

Size limitations on temporary election signs sometimes involve an aggregate sign area. This approach may have a practical impact on the number of signs, as discussed below. In *Baldwin v. Redwood City*,[26] the U.S. Court of Appeals for the Ninth Circuit upheld limitations on individual temporary political campaign signs to a maximum area of 16 square feet, with an aggregate sign area of 80 square feet on a single parcel. The court noted that neither limitation significantly deterred the exercise of First Amendment rights, and both limitations contributed to the appearance of the community and furthered other legitimate municipal interests.[27] In order to defeat a challenge to size restrictions, a municipality must make a showing that justifies such restrictions.[28] However, the U.S. Court of Appeals for the Sixth Circuit recently recognized that general size and height restrictions advance significant government interests in aesthetics and traffic safety, such that a municipality

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need not prove that those interests actually motivated the enactment of the restrictions.[29]

Number. Regulating the number of temporary election signs that may appear on a parcel of private property is perhaps the most problematic issue. The U.S. Court of Appeals for the Fourth Circuit, in *Arlington County Republican Committee v. Arlington County*, held that one such restriction infringed on political speech rights in violation of the First Amendment.[30] The County limited the number of election signs allowed to two, forcing property owners to choose among the candidates they supported in their sign displays. To avoid a similar pitfall, a sign ordinance may provide a size limitation per sign, but increase the aggregate sign area allowed per parcel during election time. In order to allow for the opportunity to express support for every hypothetical candidate or ballot issue, an ordinance may provide for just that opportunity, even if the display of such a large number of temporary election signs would rarely, if ever, occur in actual practice.

One Minnesota municipality's approach, allowing residents to post one noncommercial opinion sign year-round (for any length of time), and additional campaign or noncommercial opinion signs during the election season, was upheld by the court: the restriction was content-neutral and there were alternative means available for residents to express their opinions, such as handbills, picketing, and letters.[31] The regulation used by this municipality would seem to be the best approach.

Insofar as the larger category of political signs is concerned, the U.S. Supreme Court made it clear in *City of Ladue v. Gilleo* that a residential property owner must be allowed at least modest signage as a medium of expression.[32] In that case, the City had completely foreclosed the opportunity to display any political, religious, or personal message sign (even a window sign smaller than one square foot) on Ms. Gilleo's property. This restriction was clearly unconstitutional and, following the Court's decision, the City amended its code to allow for one noncommercial (political, religious, or other similar noncommercial message) sign, up to four square feet in size per side, per lot.[33] In addition, a lot was entitled to one temporary election sign per individual candidate or issue.[34]

If Jimmy's Seafood has a lawfully-erected sign structure with a commercial message, "Eat at Jimmy's," and the proprietor wishes to change the message to "Welcome Home Troops" or "Save the Whales," the proprietor can do so in the absence of any express prohibition to the contrary.

"Message Substitution" Clauses. This subject has been addressed in previous articles in this publication,[35] but the codification of the actual practice of allowing the substitution of a noncommercial message for a commercial message continues to be an issue that every municipal lawyer should understand. If Jimmy's Seafood has a lawfully-erected sign structure with a commercial message, "Eat at Jimmy's," and the proprietor wishes to change the message to "Welcome Home Troops" or "Save the Whales," the proprietor can do so in the absence of any express prohibition to the contrary. (In fact, such substitution is not uncommon.)

To ensure that a misunderstanding does not arise over any perceived preference for commercial speech, it is wise to codify the practice by adopting an express "message substitution" clause. This is relevant to an election cycle inasmuch as the hypothetical proprietor already has the ability to substitute a noncommercial political or election message. Sign code provisions that expressly allow for the display of one or more signs with a noncommercial topic on a parcel are helpful in demonstrating that provisions permitting the display of temporary election signs are in *addition* to the rights already allowed.

Permits or Fees. It is rare to find a provision that requires a permit or a fee to post a temporary election sign, because such a provision would certainly be unconstitutional in almost any context. To the extent that such a provision exists, it is usually the case that it is obsolete and not enforced. Like other obsolete provisions, it should be removed from a sign code as expeditiously as possible.

Conclusion

In summary, here is a short checklist of issues that every municipality should consider when it comes to political speech and election signs:

- Is there a message substitution clause in the sign code? If not, one should be adopted.
- Are residential properties allowed at least one moderately-sized sign to display noncommercial messages throughout the year? If not, such a right should be extended to residential properties, at least.
- Does the code contain a durational restriction on the display, before an election, of temporary election signs? If so, consider whether this should be deleted.
- Are the height and size limitations for temporary election signs consistent with the same limitations for other temporary sign types, such as "for sale" signs? If not, consider modifications imposing limitations that do not distinguish between sign types, thereby reducing the possibility of claims that the limitations are unconstitutional.
- Is there a restriction on the number or aggregate size of temporary election signs that may be displayed on a parcel, so as to require the owner or occupant to choose among the candidates or issues to support because of the sign restriction? If so, consider an amendment that would eliminate this problem.

- Is there a prohibition on handheld political or other noncommercial signs that may be displayed on or along public sidewalks, parks or other areas that are traditional public forums? If so, eliminate the restriction.

In regulating political campaign and election signs, cities and counties must seek to achieve a fair and necessary balance between the public's interest in the full and vigorous debate of election issues and the community's interest in public order, cleanliness, and community aesthetics. Insulate your municipality from legal challenges by reviewing the sign ordinance in your jurisdiction for constitutional defects, and monitor the cases in this area.

Notes

1. Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984); Berman v. Parker, 348 U.S. 26, 32-33 (1954).
2. U.S. Const. amends. I, XIV. Municipal ordinances adopted under state authority constitute state action and are within the prohibition of the Fourteenth Amendment. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938).
3. "[T]hey proliferate like weeds during election cycles. Few of them are items of beauty. This absence of visual appeal combined with their numbers make them real eyesores in otherwise attractive residential communities.... They are frequently blown or thrown into the street, creating driver safety and trash disposal problems. They therefore are a prime target of those who wish to eliminate visual clutter from their community's environment in the interests of beauty, and perhaps also of safety." Jules B. Gerard, *Evolving Voices in Land Use Law: Election Signs and Time Limits*, 3 Wash. U.J.L. & Pol. 379, 380 (2000).
4. San Jose, cal. Code ch. 23.04, § 23.04.700 (2001).
5. "The former [elections signs] are doubtless a subcategory of the latter [political signs]." *Id.*
6. Another scenario arises when handheld election signs are displayed by persons on or along a public sidewalk or another traditional public forum. A municipality may not prohibit noncommercial political speech in such locations when the signs are handheld or personally attended. For a discussion of traditional public fora in the context of attended versus unattended signs, see *Knights of Columbus, Council # 94 v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001) (pertaining to the placement of an *unattended* structure on the historic Battle Green) and *Wells v. City and County of Denver,* 257 F.3d 1132 (10th Cir. 2001) (the placement of unattended private displays on the steps of a city building).
7. *See, e.g,* Fla. Stat. § 479.11 (West 2010). It states: "479.11. Specified signs prohibited.—No sign shall be erected, used, operated, or maintained: * * * (8) Which is located upon the right-of-way of any highway on the State Highway System, interstate highway system, or federal-aid primary highway system."
8. *See, e.g,* Fla. Stat. § 479.15 (West 2010). This states: "479.15. Harmony of regulations.—(1) No zoning board or commission or other public officer or agency shall issue a permit to erect any sign which is prohibited under the provisions of this chapter or the rules of the department, nor shall the department issue a permit for any sign which is prohibited by any other public board, officer, or agency in the lawful exercise of its powers. "
9. The federal *Manual on Uniform Traffic Control Devices* (MUTCD) is available online at http://mutcd.fhwa.dot.gov (last accessed Sept. 13, 2010). For information on MUTCD and Traffic Control Devices Information by State, see http://mutcd.fhwa.dot.gov/resources/state_info/index.htm (last accessed Sept. 13, 2010).
10. 466 U.S. 789, 792, n.1 (1984).
11. *Id.* at 807. The Court noted that this was the conclusion reached by the majority in *Metromedia v. City of San Diego,* 453 U.S. 490 (1981).
12. *Id.* at 810.
13. *Id.* at 811.
14. *Id.* at 816-17.
15. *Id.* at 803, n.23.
16. *Id.* at 812.
17. Sussli v. City of San Mateo, 120 Cal. App.3d 1 (Cal. Ct. App. 1981).
18. *Id.* at 9-10. The court added, "Without such laws one foresees an absolute end to the already eroded aesthetic integrity of public places in a tidal wave of publicly sponsored graffiti." *Id.*
19. Such a prohibition not only runs afoul of the U.S. Constitution, but also State constitutions. Peltz v. City of South Euclid, 228 N.E.2d 320, 323-324 (Ohio 1967); State v. Miller, 416 A.2d 821, 826 (N.J. 1980). In *Peltz*, the Ohio Supreme Court ruled that a total ban on political signs violated First and Fourteenth Amendment rights, as well as Section 11, Article I of the Constitution of the State of Ohio, but found that ordinances prohibiting the attachment of political posters to public property, and permitting recovery of the cost of removal of such posters, were permissible. The court in *Miller* noted that political speech occupies a preferred position in our system of constitutionally-protected interests, and that a municipal ordinance's restrictions amounted to an absolute ban on political speech.
20. Sometimes, there is confusion as to what is allowed under a municipal code where the court record is not abundantly clear. For example, in *Café Erotica of Florida, Inc. v. St. Johns County, Florida,* 360 F.3d 1274, 1294-95 (11th Cir. 2004), large commercial billboards could display noncommercial messages, including political messages, at all times, and the County allowed message substitution. While the majority opinion did not recognize this fact, the minority opinion pointed out that the code allowed for political or commercial messages, and that other signs bearing commercial messages were allowed in addition to billboards, but were limited to 32 square feet in size. This decision is a classic example of the need to effectively convey what temporary election signs are allowed in *addition* to what is already allowed.
21. *Id.* at 1289.
22. Unfortunately, some courts and counsel overlook the fact that a noncommercial message (including a political message) may be substituted in place of a commercial message, either by codification of the message substitution practice, or by virtue of the fact that most jurisdictions do not actually

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Control (Dec. 31, 2007), available at: http://www.nasphv.org/Documents/RabiesCompendium.pdf (last visited Aug. 10, 2010).
16. American Veterinary Medical Association, *AVMA Guidelines on Euthanasia* (June 2007), available at: http://www.avma.org/issues/animal_welfare/euthanasia.pdf (last visited Aug. 10, 2010).
17. M.D. Merck, Veterinary Forensics: Animal Cruelty Investigations (Blackwell Publishing 2007); J.E. Cooper & M.E. Cooper, Introduction to Veterinary and Comparative Forensic Medicine (Blackwell Publishing 2007).
18. Press Release, ASPCA, *ASPCA and University of Florida Announce Plans to Launch ASPCA Veterinary Forensic Sciences Program* (Jan. 15, 2009), available at: http://www.aspca.org/pressroom/press-releases/011509.html (last visited Aug. 10, 2010).
19. For more information on the International Veterinary Forensics Sciences Association, see its website at: http://www.ivfsa.org.
20. See the Association of Prosecuting Attorneys' webpage on *Animal Cruelty and Animal Fighting*, available at: http://www.apainc.org (last visited Aug. 10, 2010).
21. See the Animal Legal Defense Fund's website page on Pleadings and Briefs, available at: http://www.aldf.org/article.php?list=type&type=141 (last visited Aug. 10, 2010).
22. S.K. Otto, Animal Protection Laws of the United States and Canada (5th ed. 2010). The Michigan State University College of Law, Animal Legal & Historical Web Center lists animal laws by state. The site is available at: http://www.animallaw.info.
23. The Brambell Report, December 1965 (HMSO London, ISBN 0 10 850286 4).
24. The Farm Animal Welfare Council refined the original concept into the Five Freedoms. See its website at http://www.fawc.org.uk/freedoms.htm (last visited Aug. 10, 2010).
25. *Supra* note 14.
26. U.S. Department of Agriculture, Office of Inspector General Western Region, *Audit Report Aphis Animal Care Program Inspection And Enforcement Activities*, Report No. 33002-3-SF (Sept. 2005), available at: http://www.usda.gov/oig/webdocs/33002-03-SF.pdf (last visited Aug. 10, 2010).
27. G.J. Patronek, L. Loar, & J.N. Nathanson (eds), Animal Hoarding: Strategies for Interdisciplinary Interventions to Help People, Animals, and Communities at Risk (HARC: Boston 2006).
28. Animal Legal Defense Fund, *Animal Hoarding Case Study: Vicki Kittles*, available at: http://www.aldf.org/article.php?id=1301 (last visited Aug. 10, 2010).
29. Animal Legal Defense Fund, *Animal Legal Defense Fund Model Animal Protection Laws*, available at: http://www.aldf.org/downloads/ALDF_Model_Laws_v15_0.pdf (last visited Aug. 10, 2010).
30. Animal Legal Defense Fund, *Animal Neglect Facts*, available at: http://www.aldf.org/article.php?id=1299 (last visited Aug. 10, 2010). ML

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prohibit the substitution of messages on a lawfully erected sign.
23. A good discussion of durational limits for election signs is contained in Jules B. Gerard, *Evolving Voices in Land Use Law: Election Signs and Time Limits*, 3 Wash. U.J.L. & Pol. 379 (2000). In summary, durational limitations prior to an election are frequently struck down, while durational limitations following an election are almost always upheld.
24. Smaller sign sizes, such as three or four square feet per side, are typical for residential areas, while larger sign sizes (12, 16, or 24 square feet per side) are typical for non-residential areas. The speed limit of the adjoining roadways may be a factor in establishing size limitations, but in most circumstances, the size limitations should mirror the size limitations for other temporary sign types.
25. State v. Miller, 416 A.2d 821, 828 (N.J. 1980).
26. 540 F.2d 1360 (9th Cir. 1976), *cert. denied sub nom., Leipzig v. Baldwin*, 431 U.S. 913 (1977).
27. *Id.* at 1368-69.
28. Verrilli v. Concord, 548 F.2d 262, 266 (9th Cir. 1977) (sign ordinance restrictions invalidated, in part, as the city "failed in its burden of proof to identify any legitimate interests to justify the restraints imposed... or to show that such interests could not be 'protected by less restrictive provisions,'" adding that the court would not take judicial notice that the experiences of the City here were the same as those in *Baldwin v. Redwood City).*
29. Midwest Media Property, LLC v. City of Erlanger, Ky., 342 Fed. Appx. 133 (6th Cir. 2009).
30. 983 F.2d 587 (4th Cir. 1993).
31. Brayton v. City of New Brighton, 519 N.W.2d 243, 247 (Minn. Ct. App. 1994), *cert. denied,* 514 U.S. 1036 (1995).
32. 512 U.S. 43 (1994). "[The City] has totally foreclosed that medium [residential signs] 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 part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression." 512 U.S. at 54-55.
33. *See* Doc. 23-58 in *Bowden v. Town of Cary*, Case 5:09-cv-00504-FL, in the United States District Court for the Eastern District of North Carolina, at Ladue Code Section 130-5(a)(2).
34. Ladue Code Section 130-5(a)(5).
35. William D. Brinton, Randal M. Morrison, and Robin M. Wolpert, *Deterring and Defeating the Sign Code Shakedown: Best Practices for Drafting a Constitutional Sign Ordinance,* Municipal Lawyer, Vol. 48, No. 1, pp. 9-10 (January/February 2007); Randal M. Morrison, *Regulating Election Signs,* Municipal Lawyer, Vol. 49, No. 4, pp. 17-18, 36 (July/August 2008). An excellent resource for sign law is Randal Morrison's website, www.signlaw.com. ML