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July 28, 2014

Katherine A. Kelly-Regan, Town Clerk
Town of Granby
215 West State Street
Granby, MA 01033

RE: Granby Special Town Meeting of March 10, 2014 - Case # 7078
Warrant Articles # 1-20 (Zoning)

Dear Ms. Kelly-Regan:

Article 17 – Article 17 deletes the existing Section 5.5, "Sign Bylaw" and inserts new text in its place. We approve all but a portion of Article 17 (see pp. 2-3) and offer several comments for the Town's consideration. [1]

I. Applicable Law.

The use of signs containing both commercial and noncommercial speech is an important method of free speech. City of Ladue v. Gilleo, 512 U.S. 43 (1994). However, municipalities are not without authority to regulate signs. In Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), the Supreme Court considered the constitutionality of a municipal sign ordinance. In doing so, the Court articulated three constitutional principles, which continue to provide the starting point for analyzing a municipality's regulation of signs.

First, a municipality may legitimately choose to prefer onsite commercial messages to offsite commercial messages. In reviewing San Diego's sign ordinance, a majority of the Court held that "San Diego has obviously chosen to value one kind of commercial speech – onsite advertising – more than another kind of commercial speech – offsite advertising. . . . We do not reject that judgment. . . . [O]ffsite commercial billboards may be prohibited while onsite commercial billboards are permitted." Id. at 512. Note, however, that it may be impermissible to regulate differently onsite and offsite *noncommercial* speech. *See* Ackerley Comm. of Mass., Inc. v. City of Cambridge, 88 F.3d 33, 37 (1st Cir. 1996) (striking down ordinance that

[1] In a decision dated July 1, 2014 we approved Articles 1-16 and 18-20.

impermissibly drew "a line between two types of *noncommercial* speech – onsite and offsite messages"). "An onsite sign carries a message that bears some relationship to the activities conducted on the premises where the sign is located. . . . An offsite sign . . . carries a message unrelated to its particular location." Ackerley Comm. of Mass., Inc. v. City of Somerville, 878 F.2d 513, 513-14 n.1 (1st Cir. 1989).

Second, wherever signs displaying commercial messages are allowed, identical signs displaying noncommercial messages must also be allowed. "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." Metromedia, 453 U.S. at 513 (plurality opinion). "In other words, if the owner of Joe's Hardware wants to replace his "Joe's Hardware" sign with a sign saying "No Nukes," he must be allowed to do so." Ackerley Comm. of Mass., Inc. v. City of Somerville, 878 F.2d 513, 517 (1st Cir. 1989). It is impermissible to regulate noncommercial speech more restrictively than commercial speech. *See* Tauber v. Town of Longmeadow, 695 F. Supp. 1358, 1361 (D. Mass. 1988) ("By favoring commercial speech over noncommercial speech, the Longmeadow bylaws clearly violate the First Amendment of the Constitution."); *see also* Matthews v. Needham, 764 F. 2d 58 (1st Cir. 1985) (invalidating a by-law that prohibited posting of most outdoor signs, including political signs, but included exceptions for certain types of commercial signs related to charitable and religious institutions) and Tierney v. Methuen, 2000 WL 1371128 (Mass. Super. Sept.1, 2000) (invalidating a sign ordinance to the extent that it imposed size limits on political signs that were not also imposed on other types of signs.)

Third, a municipality may not distinguish among different types of noncommercial speech or regulate some types of noncommercial speech more restrictively than other types. "Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. . . . With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse . . . ." Metromedia, 453 U.S. at 514-15 (plurality opinion).

II. Specific Comments on Granby's Sign By-law.

1. Section 5.58, Signs Permitted without a Town Sign Permit.

Section 5.58 (14) provides that temporary political signs are permitted without a sign permit provided that the signs comply with certain conditions, including those discussed below.

a. *Location Restriction.*

Section 5.58 (14) (i), provides in Residential Districts, such signs:...

(e) **may not be displayed on a building or structure unless said building or structure is the headquarters or chief office of the candidate or organization (said wall sign shall conform to the wall**

sign criteria for that Zoning District within which it is located)

(f) **may only be permitted to be placed on a building which is not the headquarters or chief office of the candidate or organization, when the Building Inspector determines that, because of the size of the lot's setback area and the location of the building lot, such a sign cannot be adequately displaced on the ground itself**

We disapprove and delete the text in underline and bold in Section 5.58 (14) (i) (e) and (f) regarding the allowed location of political wall signs because it regulates political signs more stringently than non-political signs. (**Disapproval # 1 of 1**).

Section 5.58 (14) (i) (e) and (f) prohibit political wall signs in the residential district unless they are placed on the building or structure which is "the headquarters or chief office of the candidate or organization." However, in Section 5.59 (1) (iii) the Town allows wall signs in the residential district with no location restrictions, as follows: "One (1) non flashing, non-illuminated wall or free standing sign identifying a school, church, public park or other permitted use. . . ." Because wall signs of a political nature are allowed only on certain buildings, but wall signs of a non-political nature are allowed anywhere in the residential district, the by-law impermissibly burdens political speech. *See* Matthews v. Needham, 764 F.2d 58, 61 (1st Cir. 1985) (town by-law which prohibited political signs, but allowed commercial signs, on residential property was facially unconstitutional); Tauber v. Longmeadow, 695 F. Supp. 1358, 1361 (D. Mass. 1988) (bylaw which favored commercial speech over non-commercial speech violated First Amendment). For this reason, we disapprove and delete the text in underline and bold above (see Section 5.58 (14) (i) (e) and (f)).

b. *Limit on Number of Signs.*

In residential districts, political signs are limited to "one sign per candidate/cause per lot frontage" and in business and industrial districts political signs are limited to "one ground sign and one wall sign per candidate/cause per lot frontage." In Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993), the court held that an ordinance that limited the number of temporary signs that could be posted on private property to two, unconstitutionally infringed residents' First Amendment rights. The court stated, "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, 983 F.2d at 594. Although the Granby by-law avoids the specific problem addressed in Arlington County Republican Committee, since its limit is one sign "per candidate/cause," these sections of the by-law may be too limiting when it comes to public questions or issues. For example, even if there is only one public question on the ballot, several persons living in the same household may wish to express different opinions on the ballot question. We strongly urge the Town to consult with Town Counsel on this issue so that the Town does not infringe upon voters' constitutional rights.

c. *Durational Limits.*

In all districts, temporary political signs are limited to a display of three months prior to the event, three months total in any calendar year, and must be taken down within three days following the event. The legitimacy of durational limits, particularly as applied to pre-election political signs, is doubtful. "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." Painesville Bldg. Dep't v. Dworken & Bernstein Co., 733 N.E. 2d 1152, 1157 (Ohio, 2000) (holding that limiting display of political signs to seventeen days before and two days after election was unconstitutional). Numerous courts in other jurisdictions have held that the application of durational limits to political signs is unconstitutional.[2] For example, in Antioch v. Candidates' Outdoor Graphic Service, 557 F. Supp. 52 (N.D. Cal. 1982), the court considered an ordinance that allowed candidates' political signs to be displayed only within sixty days prior to an election. Analyzing the ordinance as a year-round ban that was temporarily suspended for sixty days before each election, the court held that the ordinance restricted the expression of political speech in a constitutionally impermissible manner. While Massachusetts courts have not specifically address the validity of durational limits,[3] one Massachusetts court has provided the following guidance:

> This Court is not convinced that a thirty-or sixty day durational limit is *per se* unconstitutional (although upon consideration of the issue, the Court believes that a thirty day limit would be less likely to survive review). However, the Court does agree with the Antioch court that before a town may impose a durational limitation on aesthetic grounds, "it must show that it is 'serious[ly] and comprehensively addressing aesthetic concerns with respect to its environment.'"

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[2] See, e.g., Whitton v. City of Gladstone, 54 F. 3d 1400 (8th Cir. 1995) (limiting political signs to thirty days before and seven days after election held unconstitutional); Dimas v. City of Warren, 939 F. Supp. 554 (E.D. Mich. 1996) (limiting political signs to forty-five days before and seven days after election held unconstitutional); McCormack v. Clinton Township, 872 F. Supp. 1320 (D.N.J. 1994) (enjoining ordinance limiting display of political sings to ten days before and three days after election); Antioch v. Candidates' Outdoor Graphic Service, 557 F. Supp. 52 (N.D. Cal. 1982) (sixty-day pre-election limit unconstitutional); Orazio v. Town of North Hempstead, 426 F. Supp. 1144, 1149 (E.D.N.Y. 1977) ("no time limit on the display of pre-election political signs is constitutionally permissible under the First Amendment"); Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc., 467 S.E. 2nd 875 (Ga. 1996) (limiting display of political signs to six weeks before and one week after election held unconstitutional content-based restriction); Collier v. City of Tacoma, 854 P. 2d 1046 (Wash. 1993) (sixty-day pre-election limit on display of political signs held unconstitutional). Cf. Messer v. City of Douglasville, 975 F. 2d 1505 (11th Cir. 1992) (upholding requirement that political signs be removed within ten days following election); Sugarman v. Village of Chester, 192 F. Supp. 2d 282 (S.D.N.Y. 2002) (requiring removal of temporary political signs within twenty days after election not unconstitutional); City of Waterloo v. Markham, 600 N.E. 2d 1320 (Ill. App. Ct. 1992) (ninety-day limit on display of temporary signs not unconstitutional).

[3] In 1980, the First Circuit Court of Appeals struck down a state law that, inter alia, limited the display of political billboards to three weeks prior to an election. See John Donnelly & Sons v. Campbell, 639 F. 2d 6, 15 (1st Cir. 1980) ("we doubt that three weeks is enough time to publicize a campaign, particularly for the little-known or unpopular candidate, cause, with the greatest need for exposure"). However, the degree to which the durational limit motivated the court's decision is not clear.

Tauber v. Town of Longmeadow, 695 F. Supp. 1358, 1362 (1988) quoting Antioch, 557 F. Supp. at 60. The durational limits established in Section 5.58 (14) (iii) (a) (c)(d) and (e) may be subject to a constitutional challenge in court, the outcome of which cannot be predicted with certainty. We urge the Town to consult with Town Counsel to consider the constitutionality of the durational limits in the by-law.

2. Section 5.581, Prohibited Signs.

a. *Billboards.*

Section 5.581 (8) prohibits "[b]illboards or other advertising signs. Fixed or portable display shall be prohibited in all districts." The power to regulate billboards is generally granted to the Outdoor Advertising Board [4] pursuant to G.L. c. 93, §§ 29 – 33. General Laws Chapter 93, Section 29 authorizes the OAA to "make, amend or repeal rules and regulations for the proper control and restriction of billboards, signs and other advertising devices . . . ..on public ways or on private property within public view of any highway, public park or reservation." The Legislature granted to the Outdoor Advertising Board the power to grant permits for such billboards after 30 days written notice to the town of the permit application and proposed billboard location. G.L. c. 93, § 29. However, G.L. c. 93, § 29 also grants to cities and towns the power to further regulate billboards, in addition to the regulation by the Outdoor Advertising Board, as follows (emphasis supplied):

> Cities and towns may further regulate and restrict said billboards, signs or other devices within their respective limits by ordinance or by-law, *not inconsistent with sections twenty-nine to thirty-three, inclusive, or with said rules and regulations.*

It is not inconsistent with the provisions of G.L. c. 93, §§ 29 – 33 or the rules and regulations of the Outdoor Advertising Board for a town to regulate billboards in the town, even to the extent of a complete ban on billboards such as the Town of Granby has adopted. *See* John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 215 (1975) (town by-law which had effect of prohibiting off-premises signs, was consistent with G.L. c. 93, §§ 29 – 33, which explicitly provides for local regulation of billboards). However, the Town cannot apply this section of the by-law to any billboard which comes within the jurisdiction of the OOA, as established by G.L. c. 93, § 29. We recommend the Town consult with Town Counsel when applying this portion of the by-law.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the

[4]The Board is now known as the Office of Outdoor Advertising ("OOA") within the Massachusetts Department of Transportation. *See* http://www.massdot.state.ma.us/highway/Departments/OutdoorAdvertising.aspx; 711 C.M.R. 3.01 et seq. (effective Nov 2, 2009)

date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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