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September 25, 2014

Debra M. Lane  
Assistant Town Manager & Town Clerk  
320 Ocean House Road  
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Cape Elizabeth, ME 04107

## **Re: Political Signs – Cape Elizabeth Sign Ordinance**

Dear Debra,

This letter addresses whether the Cape Elizabeth Sign Ordinance found in Chapter 21 of the Town's Ordinances (the "Sign Ordinance"), as it relates to the placement of political signs on "traffic islands," would hold up to constitutional scrutiny in the event that it is challenged.

In response to the placement of non-political signs on traffic islands in town, you queried: *Can the Town continue to prohibit certain types of signs (political signs) on traffic islands, as has been its practice pursuant to Sign Ordinance?*

A recent Maine court decision indicates that it is likely that the Sign Ordinance, as it pertains to the placement of signs on traffic islands, would not hold up to constitutional scrutiny. As such, we think the ordinance should be revised to provide either that *no signs* are allowed in traffic islands (if the Town intends to limit signs at all within traffic islands in order to serve significant governmental interests such as pedestrian safety and the free flow of traffic), or that both political and nonpolitical signs are allowed in traffic islands.

### **Analysis**

Section 21-2-1 of the Sign Ordinance provides that certain types and sizes of signs shall be allowed in all Zoning Districts without a permit. Subsection 21-2-1(b) provides that:

(b) Temporary signs announcing a non-political campaign, drive, activity or event of a civic, philanthropic, educational or non-profit organization may be erected and maintained for a period not to exceed 30 days prior to the event and removed within three days after the event.

Subsection 21-2-1(c) provides that:

(c) Political signs announcing candidates seeking public office, political parties, and/or political and public issues contained on a ballot may, within the public right-of-way, be erected no earlier than six weeks before an election and must be removed within one week after the election. **No political signs shall be placed on the pavement of a public roadway or bikeway, on traffic islands, nor on Town-owned property except signs authorized by the Town Clerk of Cape Elizabeth to indicate the date, time and place of polling.** Political signs as contemplated in this sub-section shall be limited to eight (8) square feet per exposed face, or 16 square feet in total area, per sign, with the maximum horizontal measurement being four (4) feet. The maximum sign height shall not exceed three and one-half (3 1/2) feet. (emphasis added.)

Subsection 21-2-1(i) provides, in part:

(i) Agricultural operations including pick your own produce and pick your own plants and trees grown on the premises may install a maximum of six (6) off-premises signs for the purpose of directing to the location of the agricultural operation . . . . Off premises agricultural signs may be located within the right of way, in locations which do not interfere with movement or visibility of modes of transportation utilizing the right of way.

It would appear, therefore, that Section 21-2-1 of the Sign Ordinance imposes restrictions on signs (speech) based on the content or message of the sign (i.e. the Sign Ordinance allows for signs with nonpolitical messages such as commercial agricultural operation signs and nonpolitical campaign signs in traffic islands and on other Town-owned property, but does not allow for the placement of political signs in those areas). In light of recent Maine case law, discussed below, this section of the Sign Ordinance would likely be found to be a restraint of speech that violates the First Amendment.

While local governments have greater leeway in regulating commercial signs, restrictions on noncommercial signs, including those that support a candidate or political issue, must be limited to time, place and manner of posting, and must adhere generally to the following criteria:

1. The regulations must be justified without reference to the content of the sign (i.e., content neutral);
2. The regulations must be narrowly tailored to serve a significant governmental interest; and
3. The regulations must leave open ample alternative channels for communication of the information.

See *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293, 82 L.Ed. 2d 221, 227, 104 S.Ct. 3065 (1984).

Generally speaking, laws limiting an individual's right to display political campaign signs face several problems: First, the laws often selectively regulate a specific type of speech on the bases of their content – political campaign speech. In free speech law, content-based regulations are subject to the highest form of judicial review, called strict scrutiny, while content-based restrictions on commercial speech are subject to a lesser form of review. Second, political speech represents the core type of speech the First Amendment was designed to protect. As such, signs with political subject matter are entitled to at least as much, and likely more, protection as commercial signs.

A decision by a federal court sitting in Maine provides guidance as to how a court might review a First Amendment challenge to the Sign Ordinance. In *Cutting v. City of Portland*, 2014 U.S. Dist. LEXIS 17481 (D. Me. Feb. 12, 2014), the United States District Court for the District of Maine reviewed the City of Portland's ordinance as it pertained to restrictions of speech in medians. That Court noted the following:

Different levels of scrutiny apply based on whether the Ordinance is a content-neutral or content-based restriction on free speech. In a traditional public forum, such as the [City of Portland's] medians, 'content-neutral restrictions on the time, place, manner of expression must be narrowly tailored to serve some substantial governmental interest, and must leave open adequate alternative channels of communication.'"

*Id.* (citing *New England Reg'l Council of Carpenters*, 284 F.3d at 20).

In *Cutting*, the Court determined that the Portland ordinance prohibiting speech in medians was subject to *strict scrutiny* as it allowed for the placement of signs bearing a message relating to elections but not other types of political signs, such as a sign relating to economic policy. Noting that content-based regulations "rarely survive constitutional scrutiny," the Court held that the regulation did not pass constitutional muster as it was not "absolutely necessary to serve a compelling interest" and was not "narrowly tailored to the achievement of that end." *Id.* (quoting *McGuire v. Reilly*, 260 F.3d 36, 43 (1<sup>st</sup> Cir. 2001)).

Similar to the ordinance at question in the *Cutting* case, the Cape Elizabeth Sign Ordinance makes a distinction based not on the placement location, or size of the sign, but on the *content* of the sign's subject matter. In other words, the Cape Elizabeth Sign Ordinance prevents signs with a political message from being placed in traffic circles and other public property but allows for the placement of other signs with nonpolitical (and even commercial) messages in those same areas. Although a significant government interest may exist in preventing the placement of signs in traffic islands, it is likely, in light of the *Cutting* decision, that this content-based restriction creates an impermissible restraint on free speech.

A similar result was reached by a federal appellate court in *Whitton v. City of Gladstone*, Missouri, 54 F.3d 1400 (8<sup>th</sup> Cir. 1995). In that case, the federal appeals court decided that provisions of the municipal sign code of a town in Missouri were unconstitutional as that section of the code granted certain forms of commercial speech a greater degree of protection than noncommercial political speech. For example, the limitation did not apply to "for sale" signs that fall into the category of "commercial speech." The justification for the time limitations set on the placement of political signs pursuant to the ordinance in *Whitton* was to curtail traffic dangers

which political signs may pose and to promote esthetic beauty. However, the regulation “differentiated between speakers for reasons unrelated to the legitimate interests that prompted the regulation.” *Id.* At 1407, quoting *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1<sup>st</sup> Cir.), *cert. denied*, 515 U.S. 1103, 115 S.Ct. 2247, 132 L.Ed.2d 255 (1995). The same could be said for the Cape Elizabeth Ordinance as it relates to signs.

In contrast, local legislation that prohibited the posting of *all* signs on public property has often been upheld by the courts. For example, a provision of the zoning code of the Town of Orangetown, New York that prohibited the posting of signs on public property without a permit from the Town Board was upheld as constitutional, even when it was used to prohibit the posting of political signs along public streets. *Abel v. Town of Orangetown*, 724 F.Supp. 232 (S.D. N.Y., 1989). The result may have been different if the law only prohibited the posting of political signs, as is presently the case with the Cape Elizabeth Ordinance.

### **Conclusion and Recommendation**

In summary, the Sign Ordinance, as it relates to the prohibition of political signs on traffic islands and other public rights of way, would likely not hold up to constitutional scrutiny as it impermissibly restrains political speech protected by the First Amendment by ‘favoring’ nonpolitical speech. Not only does the Sign Ordinance impose restrictions on speech based upon the content of the speech, but the restriction does not appear, on its face, to serve a significant governmental interest (or at least be narrowly tailored to serve that interest). If safety or aesthetics are a concern, then the ordinance should be revised to prevent *all* signs – not just political ones. Further, though there is a restriction as to the size of political signs and signs regarding agricultural operations signs are restricted so as not to interfere with the movement or visibility of modes of transportation, there is no such restriction on the size of other nonpolitical signs allowed in all zoning districts without a permit.

We recommend to the Town the following options:

1. Enforce the Ordinance “as written,” i.e. prohibit/remove political signs as per the Ordinance, with the knowledge that if Section 21-2-1(c) of the Sign Ordinance is challenged in the courts it will likely be stricken as being unconstitutional;
2. Do not enforce the Ordinance as it pertains to political signs in traffic circles and other public areas, and allow political signs to be placed in those areas;

In either case, we recommend that the Sign Ordinance be revised to either *allow all signs* in traffic islands and other public areas, or, if there is a significant governmental interest, to *prohibit all signs* in those areas.


The analysis of whether or not an ordinance regulating speech such as the Sign Ordinance passes constitutional scrutiny often involves a fact intensive review by the courts. Note that the Sign Ordinance could also be challenged as it relates to the duration and the placement and removal of political signs, as the question as to the permissibility of such restrictions has been raised in other jurisdictions. This memorandum does not address specifically whether such restrictions would withstand a challenge, as that question is beyond the scope of this Memorandum.

Debra M. Lane  
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Please feel free to call with any questions.

Very truly yours,  
MONAGHAN LEAHY, LLP

By:

  
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John J. Wall, III