



HENRY McMASTER  
ATTORNEY GENERAL

November 23, 2010

Michael D. Smith, Town Administrator  
Town of Cheraw  
Post Office Box 219  
Cheraw, South Carolina 29520

Dear Mr. Smith:

We received your letter requesting an opinion of this Office as to the validity of an ordinance enacted by the Town of Cheraw (the "Town"). In your letter, you provided the following information:

The Town of Cheraw currently has an ordinance pertaining to political signs and when they can be placed in yards of residences. The current code maintains that no campaign signs can be erected more than 30 days prior to an election and have to be taken down no later than 7 days following an election.

#### **Law/Analysis**

When addressing the validity of an ordinance, we begin with the presumption that the ordinance is valid. See Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional."). "Moreover, only a court, not this Office, may declare an ordinance unconstitutional." Op. S.C. Atty. Gen., April 9, 2010.

Although we found no South Carolina case law governing the validity of durational limitations on political signs, this Office issued an opinion in 2008 addressing this issue. Op. S.C. Atty. Gen., January 22, 2008. In that opinion, we considered the constitutionality of an ordinance enacted by the town of Summerville prohibiting the display of political campaign signs more than 30 days prior to an election. Id. We began with the presumption that the ordinance is constitutional. Id. However, we noted that "some courts do not afford a municipal ordinance (or statute) the usual presumption of validity in situations in which First Amendment rights are implicated thereby." Id. (citing Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd., 276 F.3d 876, 879 (6th Cir. 2002)).

With that caveat in mind, we looked at several federal court decisions in analyzing the question of whether a local government may restrict the time frame in which a political sign may be displayed. Id. We first looked at the Supreme Court’s decision in City of Ladue v. Gilleo, 512 U.S. 43 (1994). Id. In regard to that decision, we stated:

In City of Ladue, the United States Supreme Court invalidated an ordinance which banned all residential signs but those falling within one of ten exceptions. The Supreme Court acknowledged that, while signs are protected by the Free Speech Clause of the First Amendment, such signs “pose distinctive problems that are subject to municipalities’ police powers.” Said the Court,

[u]nlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose 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.

512 U.S. at 48. Relying principally upon its decision in Linmark Associates Inc. v. Willingboro, 431 U.S. 85 (1977), which had held that Linmark’s interest in maintaining a stable, racially integrated neighborhood was not sufficient to uphold a prohibition of residential “For Sale” signs, the Court in Ladue concluded that “[t]he impact on free communication of Ladue’s broad sign prohibition, moreover, is manifestly greater than in Linmark.” In the Court’s view, “... 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.” Id. at 54. Rejecting the City’s argument that the Ordinance “is a mere regulation of the time, place, or manner’ of speech” because residents possess alternative means of presenting their message, the Court found that “[i]n this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.” Id. at 56.

Id.

We acknowledged that the Court in City of Ladue did not specifically address the constitutionality of a time restriction on the display of political signs, but we noted that several other federal and state courts rely on Ladue to conclude that these types of temporal ordinances violate the

First Amendment. Id. One example explained in our opinion was the Northern District of West Virginia's decision in McFadden v. City of Bridgeport, 422 F.Supp.2d 659 (N.D.W.Va. 2006). Id. We explained that decision as follows:

[I]n McFadden v. City of Bridgeport, supra, the District Court addressed the constitutionality of an ordinance which allowed unpermitted political signs only 30 days prior to an election and 48 hours thereafter. The Court concluded that this provision "is content-based since the Ordinance's temporal restrictions apply only to limited categories of signs based on what those signs say ..." and because "the City's asserted interests in regulating temporary and political signs are not compelling." 422 F.Supp.2d at 662. Rejecting the argument that the Ordinance was "content-neutral because its [City's] interests in aesthetics and traffic safety are not related to the content of the temporary [and political] signs," the Court noted that the Town

provides no evidence that signs carrying political messages and signs relating to specific events give rise to adverse secondary effects that differ in any way from similarly constructed signs carrying messages Bridgeport allows to be permanently displayed. Political signs and other signs defined as temporary by the City of Bridgeport are regulated differently from other signs based on what they say. Section 1325.07 of Bridgeport's sign ordinance is a content-based regulation of speech.

422 F.Supp.2d at 674. (emphasis added). Moreover, in the McFadden Court's view, the City's asserted interests justifying imposing of the restrictions - aesthetics and traffic safety - were "not compelling, and ... not the least restrictive alternatives available to achieve those interests." Accordingly, the Court concluded that the Ordinance "is an impermissible content-based regulation of speech that facially violates the First Amendment of the Constitution." Id. at 675.

Id. We also noted an Ohio state court decision finding an ordinance temporal ordinance unconstitutional. Id. (citing City of Painesville Bldg. Dep't v. Dworkin & Berstein, 733 N.E.2d 1152 (Ohio 2000)).

Based on our research, we concluded as follows:

It is our opinion that the political sign portion of the Summerville Ordinance is constitutionally suspect under the First Amendment. The Ordinance restricts the time in which political signs may be freely displayed (30 days prior to an election) while placing no such time constraints upon other types of signs (e.g. "For Sale") which may be displayed at any time without a permit. While the United States Supreme Court has not specifically addressed the validity of durational restrictions upon political signs, such as are imposed by the Summerville Ordinance, a number of lower federal courts, as well as state courts, have read City of Ladue, supra as sufficiently broad to strike down such provisions. These courts have concluded that such temporal restrictions upon political signs, but not upon other types of signs, are content-based, and that the interests served by such restrictions (aesthetics or traffic control) are not compelling interests pursuant to the state or local government's police power. Moreover, these courts conclude that placing time restrictions upon the display of political signs is not the least restrictive alternative available to achieve these interests. As the Ohio Supreme Court concluded in the Painesville case, courts have characterized ordinances which impose a time restriction upon when political signs may be displayed "as imposing the equivalent of a year round ban on political signs posting, which is simply temporarily suspended for the prescribed period surrounding an election." 733 N.E.2d at 1158.

While it is our opinion that this restriction in the Ordinance is constitutionally suspect, we reiterate that only a court may declare the ordinance either facially unconstitutional or unconstitutional as applied. And only a court may prevent enforcement of such ordinance. As we reiterate, it is solely within the province of the courts, not this Office, to declare an act or an ordinance constitutionally invalid.

Id.

This Office recognizes a long-standing rule that we will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Op. S.C. Atty. Gen., March 4, 2009. We believe our 2008 opinion is well reasoned and we have not found any changes in the applicable law since that opinion. In addition, we discovered another court decision supporting the conclusion reached in our 2008 opinion. In Sugarman v. Village of Chester, 192 F.Supp. 2d 282 (S.D.N.Y. 2002), the District Court for the Southern District of New York considered the constitutionality of several municipal ordinances imposing durational and other constraints on political signs. The Court explained that municipalities "may not single out political signs for

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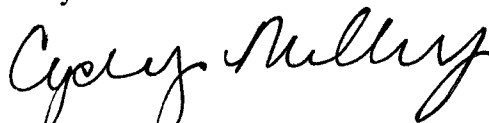
differential treatment.” Id. at 297. Moreover, the Court quoted language from its decision in Knoeffler v. Town of Mamakating, 87 F.Supp.2d 322, 333 (S.D.N.Y. 2000) stating: “Content-based ‘durational limits on signs have been repeatedly declared unconstitutional.’” Id. The Court found the durational limitations were based on the content of the sign and that the municipalities failed to demonstrate a compelling interest for these limitations. Id. Thus, the Court found the durational limitation unconstitutional under the First Amendment. Id.

### Conclusion

Based on the authority cited in our 2008 opinion and further supported by the Court’s holding in Sugarman, we believe our courts would find an ordinance that restricts the duration in which a political sign may be posted, when similar signs are not restricted, violative of the First Amendment. However, as noted above, only a court, not this Office, may declare an ordinance unconstitutional. As such, we advise that the ordinance referenced in your letter remains valid and enforceable until a court rules otherwise.

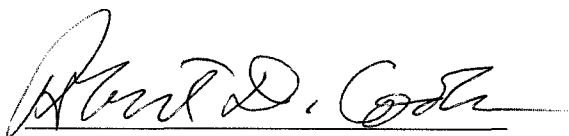
Very truly yours,

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