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ADVERTISING: Political

CONSTITUTIONAL LAW: Freedom of speech

ORDINANCE: Regulation of political advertising signs

Municipal ordinances prohibiting the placement of temporary political advertising signs without trespass or violation of any other law are invalid as an unconstitutional interference with freedom of speech.

Opinion No. 4777 May 7, 1973.

Honorable John F. Markes
State Representative
The Capitol
Lansing, Michigan

Directing my attention to certain ordinances of the City of Livonia that prohibit the placing of signs within the City of Livonia, except in connection with a lawfully established use, you have requested my opinion as to whether such ordinances may constitutionally prohibit placement of political advertising signs. We are here concerned only with the prohibition of signs which are placed without any question of trespass, that is, either by a person owning or controlling the property on which the sign is placed or by one having the consent of such a person.

The blanket prohibition against the placement of any such signs established by these ordinances raises important questions under the First and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 5 of the Michigan Constitution of 1963.

The Constitution of the United States declares that:

> "Congress shall make no law . . . abridging the freedom of speech, . . ."
>
> [US Const, Am I]

It has been held that:

> "The liberty of speech and press secured from Federal abridgment by the First Amendment to the Federal Constitution has been carried over and made a part of the fundamental personal rights and liberties secured from State abridgment by the Fourteenth Amendment. . . ."
> [*Book Tower Garage, Inc.* v *Local No. 415, International Union, U.A.W.A. (C.I.O.)*, 295 Mich 580, 586 (1940)]

The relevant provision of the Michigan Constitution is equally broad. It provides that:

> "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."
>
> [Const 1963, art 1, § 5]

Our research has revealed no Michigan case which interprets these provisions in relation to the precise question raised here.[1] However, some guidance may be derived from the *Book Tower Garage* case cited above and from numerous other Michigan cases recognizing and protecting the right peacefully to picket a business establishment involved in a labor dispute. [See for example, *Sweet* v *Local 552, Barbers & Beauticians Union, AFL-CIO,* 365 Mich 79, 112 NW2d 218 (1961); *Davidson* v *Michigan State Carpenters Council,* 356 Mich 557, 97 NW2d 11 (1959); *People* v *Bashaw,* 295 Mich 503, 295 NW 242 (1940)]. Picketing conducted on a public sidewalk adjacent to a business represents a greater interference with interests which the State might legitimately seek to protect than does the placement of a temporary political advertisement on a homeowner's front lawn. Where the Supreme Court has recognized and protected the right of peaceful picketing, it must be assumed that they would take a similar position in relation to the placement of political advertising.

A decision in line with this analysis has been reached by the Ohio Supreme Court in the case of *Peltz* v *City of South Euclid,* 11 Ohio 2d 128, 228 NE2d 320 (1967). While this case does not represent binding authority in Michigan, it is a well considered opinion precisely on point and in the absence of a controlling Michigan case it must be considered highly persuasive. A copy of the Court's opinion in this case is attached for your information. The Ohio Supreme Court followed the *Peltz* decision in *Pace* v *Walton Hills,* 238 NE2d 542 (1968).

I conclude that it is inconsistent with the freedom of speech and expression guaranteed to all citizens by the First and Fourteenth Amendments to the Constitution of the United States and by Article I, Section 5 of the Michigan Constitution of 1963 for a municipality to prohibit the placement of temporary political signs in the absence of any trespass or other unlawful act. However, as the Supreme Court of Ohio noted in *Peltz,* the regulation of commercial advertising is to be distinguished from legislation inhibited by the First Amendment.

FRANK J. KELLEY,
Attorney General.

Attachment

PELTZ, APPELLANT, v. CITY OF SOUTH EUCLID, APPELLEE.

[Cite as Peltz v. South Euclid, 11 Ohio St. 2d 128.]

Declaratory judgments—Right to declaration of rights or penalties under ordinance—Appeal—Appellate court, upon reversal, may remand or render final judgment, when—Municipal corporations—Ordinance prohibiting political signs, unconstitutional.

1. Where a municipal ordinance imposing criminal penalties upon a contemplated act will be enforced against a person if he proceeds with that act, such person has standing to test the validity, construction and

[1] See, however, 2 OAG 1957-58, No 3004, p 274 (October 20, 1958) ruling that a city zoning ordinance that permits only real estate, trespassing, safety or caution signs on residential lots is unconstitutional.

application of such ordinance by an action for declaratory judgment, and it is unnecessary to demonstrate the existence of an actual controversy for such a person to incur a violation of the ordinance. (Section 2721.03, Revised Code.) (*Wilson* v. *Cincinnati,* 171 Ohio St. 104, approved and followed.)

2. Where a lower court dismisses an action on the erroneous ground that the plaintiff lacks standing, an appellate court may, upon reversal of such erroneous judgment, remand the cause to the lower court for further proceedings, or, if the substantive question is of sufficient importance to merit a determination as soon as possible, render such judgment as that court should have rendered. (Paragraph three of the syllabus of *Neil* v. *Neil,* 38 Ohio St. 558, approved and followed.)
3. A municipal corporation's absolute prohibition to the use of political signs is violative of Section 11, Article I of the Constitution of Ohio, and the First and Fourteenth Amendments to the Constitution of the United States.
4. A municipal corporation's interest in aesthetics and traffic safety does not justify an absolute prohibition of political signs.

Statement of the Case.

(No. 40416—Decided July 12, 1967.)

APPEAL as of right from the Court of Appeals for Cuyahoga County upon substantial constitutional questions and pursuant to the allowance of a motion to certify the record.

Plaintiff brought this action against the city of South Euclid in the Common Pleas Court of Cuyahoga County for a declaratory judgment and injunctive relief pursuant to Section 2721.03, Revised Code,[1] seeking to have the court declare unconstitutional defendant's ordinance No. 18-63 enacted "to eliminate political signs."[2] The ordinance prohibits all political signs up-

[1] Section 2721.03, Revised Code: "Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in Section 119.01 of the Revised Code, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under such instrument, constitutional provision, statute, rule, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."

[2] Ordinance No. 18-63 of the city of South Euclid is a negative ordinance, proscribing all signs that are not specifically permitted by it. It is entitled, "an ordinance amending the zoning code of the codified ordinances of the city of South Euclid, particularly Section 733.05 of Chapter 33 and Section 755.08 of Chapter 55, so as to eliminate political signs."

It was stipulated that "political signs, as referred to in the foregoing ordinances, include any sign which would be visible to passing traffic announcing, advocating, promoting or otherwise commenting upon a political candidate or a political subject or issue, except those political signs or vehicles not exceeding a total of one square foot in area, permitted under Section 501.07 of the codified ordinances of the city of South Euclid," and that "political signs, as referred to in the foregoing ordinances, include, as a matter of legislative intention, political signs attached to real property."

on penalty of up to $500 a day whether on public or private property, or whether they are reasonable in size, appearance and content. The parties have stipulated that the ordinance was enacted to abate a potential traffic hazard and the unsightliness resulting from the widespread use of these signs.[3] Prior thereto political signs were permitted for a period of not more than 30 days before and ten days after an election.

Plaintiff appears as a resident, citizen, property owner and duly nominated candidate for the office of Senator of the state of Ohio for Cuyahoga County in the general election of November 3, 1964. He also intends to run for political office in the future. But for the prohibitions of the ordinance in question, which the municipal authorities have publicly announced their intention to enforce, plaintiff stipulates he would erect and maintain on the front lawn of his property in the defendant municipality a political sign one foot square, briefly stating his position on a political question.

On November 17, 1964, the case was heard by the trial court on an agreed stipulation of facts. That court held that the question of the constitutional validity of the ordinance was moot and that plaintiff lacked sufficient interest and standing to raise the question since the election had been conducted and concluded on November 3, 1964. The Court of Appeals affirmed.

Opinion, per SCHNEIDER, J.

Mr. Bernard A. Berkman, Mr. Joshua J. Kancelbaum, Mr. Michael T. Honahan, Mr. Herbert B. Levine and *Mr. A. B. Glickman,* for appellant.

Mr. Robert E. Jaffe, director of law, for appellee.

SCHNEIDER, J. We disagree with South Euclid's contention (and the judgments of the lower courts) that the plaintiff has insufficient standing for declaratory relief under Section 2721.03, Revised Code, and for a determination of the validity of the ordinance in question. *Wilson* v. *Cincinnati,* 171 Ohio St. 104. A violation of the ordinance is punishable as a misdemeanor, and a conviction may lead to a fine up to $500 for each day of violation. The validity, construction and application of criminal statutes and ordinances are appropriate subjects for a declaratory judgment action.

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[3] It was further stipulated that "the ordinances * * * were enacted in response to the following * * *:

"(a) At election times political signs were widely employed.

"(b) Such signs were often unattractive even when freshly erected and unspoiled.

"(c) Such signs were often permitted by the owners of the signs or the premises on which they stood to remain for an unreasonable period of time after the election to which they pertained.

"(d) Such signs were often neglected and permitted to become torn and unsightly.

"(e) Such signs were frequently defaced by vandals.

"(f) Such signs were often affixed to public property and had to be removed at public expense.

"(g) Signs were erected on main thoroughfares and at street intersections, as well as on residential lawns, and created a potential traffic hazard.

"(h) In consequence of the foregoing conditions, elections were generally accompanied by widespread unsightly litter and mess."

Dill v. *Hamilton, Judge,* 137 Neb. 723, 291 N. W. 62, 129 A. L. R. 743, and annotation following at 751.

It was not necessary for the plaintiff, in order to demonstrate the existence of an actual controversy, to place a political sign on his property in violation of the ordinance. Plaintiff's intended action was not speculative nor was defendant's threat hypothetical. If plaintiff had acted, the ordinance would have been applied to his disadvantage. Thus, the record establishes the existence of an actual controversy "between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Evers* v. *Dwyer,* 358 U. S. 202, 3 L. Ed. 2d 222, 79 S. Ct. 178.

Moreover, the controversy did not disappear after the election of November 3, 1964, which, although eliminating plaintiff as a candidate, did not eliminate the justiciability of plaintiff's constitutional right as a citizen, resident, and property owner to erect signs for other candidates and issues in the future. It is not stipulated that his sign would urge his own candidacy, but only that it would state "his position on a political question."

Plaintiff filed his petition in the Common Pleas Court on August 20, 1964. For a period of almost three years he has sought a declaration of his rights under the ordinance. Future delay would engender further appeals perhaps lasting through another general election.

We pass to the merits of the controversy under the rule announced in the third paragraph of the syllabus of *Neil* v. *Neil,* 38 Ohio St. 558:

"3. Where the District Court dismisses a proceeding in error on the erroneous ground that the judgment complained of is not reviewable, the Supreme Court is vested with discretion, on reversal of such erroneous order, to remand the cause to the District Court for further proceedings, or render such judgment as that court should have rendered."

An ordinance proscribing all political signs within municipal boundaries is countermanded by Section 11, Article I of the Constitution of Ohio, and the First and Fourteenth Amendments to the Constitution of the United States. The former reads in part:

"Every citizen may *freely* speak, write, and *publish his sentiments on all subjects,* being responsible for the abuse of the right; *and no law shall be passed to restrain or abridge the liberty of speech, or of the press.*" (Emphasis added.) "The press" encompasses every publication which constitutes a vehicle for information and opinion. *Lovell* v. *Griffin,* 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666.

Euclid v. *Ambler Realty Co.,* 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct. 114, is referred to for the proposition that a municipality may place restrictions on the use of private property. That case held that the exclusion of buildings devoted to business, trade and industry from residential districts must bear a rational relation to the health and safety of the community. This court formulated the same doctrine in *Pritz* v. *Messer,* 112 Ohio St. 628; *Curtiss* v. *Cleveland,* 170 Ohio St. 127; and *Benjamin* v. *Columbus,* 167 Ohio St. 103.

In *Curtiss,* the standard set forth (in paragraph four of the syllabus) was that "the benefit to the public health, safety, morals or general wel-

fare from zoning use limitations must be sufficient to *reasonably outweigh the loss* to the landowner in order to justify zoning legislation causing such loss by limiting such owner's right to use his property." (Emphasis added.) There the loss was pecuniary. Here the loss is far more grave. The ordinance in question sweeps away the right of a property owner to express his opinion on his own property. Defendant's interest in aesthetics does not reasonably outweigh the loss of plaintiff's liberty of speech.

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion (p. 160) * * *. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. * * * As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."

Schneider v. *State (Irvington),* 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146.

There are numerous devices available to a municipality other than outright prohibition to combat the nuisances which might flow from the use of political signs. A municipality is not powerless to enact and enforce reasonable regulations directed against those responsible for littering the streets or private property. It may enact ordinances prohibiting the attachment of political posters to public property and permitting recovery of the cost of removal of such posters. *Brayton* v. *Anchorage* (Alaska), 386 P. 2d 832. It may not, on the other hand, enforce a wholesale prohibition against them.

The ordinance is not saved by its purpose to eliminate traffic hazards on main thoroughfares and at street intersections. The proscription is against *all* political signs, irrespective of location. Even the regulation of traffic may not be attempted by means which invade explicit constitutional liberties. *Natl. Assn. for Advancement of Colored People* v. *Alabama,* 377 U. S. 288, 12 L. Ed. 2d 325, 84 S. Ct. 1302. There is nothing in this record to convince us that a political sign is a greater traffic hazard than all the other features of the landscape which, purposely or not, tempt the attention of drivers. Furthermore, it is difficult to conceive that a political sign, reasonable in size, structure and appearance, would constitute a hazard greater than "bumper stickers" which are expressly permitted by another ordinance of South Euclid, and which, by definition, are not restricted to a specific locality.

We find no support for the ordinance in *Ghaster Properties, Inc.,* v. *Preston, Dir.,* 176 Ohio St. 425, which, in prohibiting billboards adjacent to the interstate highway system, dismissed the contention that the right of free speech was infringed. See, also, *U. S. Advertising Corp.* v. *Raritan,* 11 N. J. 144, 93 A. 2d 362, and *Valentine, Police Commr.,* v. *Chrestensen,* 316 U. S. 52, 86 L. Ed. 1262, 62 S. Ct. 920. The regulation of commercial advertising is to be distinguished from legislation inhibited by Article I of the Constitution.

It is therefore adjudged that Ordinance No. 18-63 of the city of South Euclid, to the extent that it prohibits the use of all political signs, violates Section 11, Article I of the Constitution of the state of Ohio, as well as the First and Fourteenth Amendments to the Constitution of the United States. Furthermore, pursuant to Section 2721.09, Revised Code, the city of South Euclid is permanently enjoined from enforcing the ordinance to the extent of its constitutional infirmity. *American Cancer Society, Inc.*, v. *Dayton*, 160 Ohio St. 114; *Curtiss* v. *Cleveland, supra* (170 Ohio St. 127).

Judgment reversed.

TAFT, C. J. MATTHIAS, HERBERT and BROWN, JJ., concur.

730515.1

UNITED STATES CONSTITUTION: Power of Congress over ratification of proposed amendment

LEGISLATURE: Rescission of ratification by

The question whether the state legislature, having ratified a proposed constitutional amendment, may rescind its action is a political question for determination by Congress.

Opinion No. 4779 May 15, 1973.

Josephine D. Hunsinger
House of Representatives
State Capitol
Lansing, Michigan

You have requested my opinion on whether or not a state, after ratifying a proposed Amendment of the United States Constitution (specifically the Equal Rights Amendment), can withdraw that ratification. Article V of the United States Constitution provides as follows:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . ."

[4] Section 2721.09, Revised Code: "Whenever necessary or proper, further relief based on a declaratory judgment or decree previously granted may be given. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application is sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith."