STATE OF MICHIGAN

IN THE 63RD DISTRICT COURT FOR THE COUNTY OF KENT

GAINES CHARTER TOWNSHIP,

Plaintiff,

v

VERNON VERDUIN,

Defendant.
_____/

Case No. 13A-00152-ON

Hon. Steven R. Servaas

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PLAINTIFF GAINES CHARTER TOWNSHIP'S POST-HEARING BRIEF

I. INTRODUCTION

The facts of this case are undisputed. On January 18, 2013, Gaines Charter Township (the "Township") issued a municipal civil infraction citation to Defendant Vernon Verduin, alleging that Mr. Verduin was displaying a sign on his property in violation of Section 17.4(J) of the Gaines Charter Township Zoning Ordinance ("Zoning Ordinance"). Section 17.4(J) of the Zoning Ordinance provides that political signs are permitted in all zoning districts in the Township, but states in relevant part that political signs "shall not be larger than 20 square feet...." **Exhibit 1.**[1]

[1] The citation issued to Mr. Verduin initially referenced Section 17.5(J), which was simply a clerical error. The ticket was amended at the March 22, 2013 formal hearing, without objection, to allege a violation of Section 17.4(J). There was never any question which provision Defendant was alleged to have violated, as the ticket clearly said "Political sign greater than 20 sq. ft."

The sign at issue in this case is a large, temporary, banner-type sign displayed on the side of a tractor trailer on Mr. Verduin's property. The sign is shown here:

See **Exhibit 2.**[2] According to Mr. Verduin, the tractor trailer is approximately 44 feet long and eight feet high and, therefore, has approximately 350 feet of surface area on the side on which the sign is displayed. Mr. Verduin's property is located in a residential zoning district in the Township, and is clearly visible from state highway M-6. **Exhibit 3.**

The testimony in this matter established that this enforcement action stemmed from citizen complaints received by the Township. Mr. Verduin acknowledged at the hearing that he received two notices from the Township regarding the size of the sign prior to receiving the citation in this matter, and that he had an opportunity to express his opinion regarding the Township's sign ordinance to the Township Board.

[2] Mr. Verduin testified at the March 22, 2013 hearing regarding another political sign on his property that he had previously displayed in close proximity to the above sign. Mr. Verduin did not receive a citation for the other sign, as it was not visible on January 18, 2013 when the citation was issued for the above sign. However, it should be noted that immediately following the March 22, 2013 hearing, after the Court took this matter under advisement, Mr. Verduin moved and began displaying the second sign adjacent to the sign at issue. See **Exhibit 4.**

This Court held a formal hearing on March 22, 2013, at which both parties presented evidence and oral argument. At the hearing, Mr. Verduin asserted as his defense that the sign at issue is not a political sign and, therefore, is not subject to the 20-square-foot limitation in Section 17.4(J) of the Zoning Ordinance. Since Mr. Verduin's "not a political sign" defense was articulated for the first time at the March 22, 2013 hearing, the Court invited the Township to submit a post-hearing brief responding to Mr. Verduin's argument.

II. LAW AND ANALYSIS

At the outset, it is important to emphasize that this is not a case about censorship. This case does not involve a prohibition on political signs. Nor does it involve censorship in the context of a prior restraint on speech, which is an argument often raised when a person challenges a municipal sign permitting or licensing scheme. In such cases, it is argued that denying a permit or prohibiting certain messages altogether constitutes unconstitutional government censorship. In this case, there is no dispute that Mr. Verduin's message is allowed in the Township. The only disagreement—and thus, the only issue before the Court—is whether Mr. Verduin's sign is subject to the 20-square-foot limitation in Section 17.4(J) of the Zoning Ordinance.

A. Contrary to Mr. Verduin's Argument, the Sign at Issue is a Political Sign

Section 17.4(J) of the Zoning Ordinance permits political signs in all zoning districts in the Township, without a permit, but states in relevant part that political signs "shall not be larger than 20 square feet...." At the hearing in this matter, Defendant argued that the sign at issue is not a political sign and, therefore, is not subject to the 20-square-foot limitation. For the reasons discussed at the hearing and in this post-hearing brief, the Township disagrees with Mr. Verduin's position.

1. Construction of Municipal Zoning Ordinances

In order to determine whether Mr. Verduin's sign is a political sign, the Court must construe the Zoning Ordinance. As the Township noted at the hearing in this case, Michigan courts are required to construe municipal ordinances in the same manner as statutes. "The goal of statutory construction, and thus of construction and interpretation of an ordinance, is to discern and give effect to the intent of the legislative body." *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407-408; 761 NW2d 371 (2008). In determining the meaning of an ordinance, "[t]erms used in an ordinance must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions." *Id.* See also *Kenefick v City of Battle Creek*, 284 Mich App 653, 656; 774 NW2d 925 (2009) (reviewing "common dictionary definitions" to ascertain the meaning of words used in the city's ordinance). In determining the meaning of a municipal zoning ordinance, Michigan courts also accord "great weight" to the construction of the ordinance by the officer or agency charged with its administration. *Macenas v Village of Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989).

Further, it is well established that "all statutes and ordinances are presumed to be constitutional and are construed so unless their unconstitutionality is clearly apparent." *Houdek v Centerville Twp*, 276 Mich App 568, 573; 741 NW2d 587 (2007). The party challenging the ordinance—here, Mr. Verduin—has the burden of rebutting this presumption of constitutionality. *Id.* "Only if there is no possible reasonable construction that would render an ordinance constitutional must a court strike it down." *Id.*

2. Political Signs

As the Court is aware, the Zoning Ordinance does not define "political sign." Therefore, in order to determine whether Mr. Verduin's sign is a political sign for purposes of the Zoning Ordinance, the Court must resort to the dictionary definition of "political."

At the hearing, this Court recited the definition of "political" found in *Black's Law Dictionary,* which reads:

> **Political.** Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to excise of rights and privileges of the influence by which individuals of a state seek to determine or control its public policy; having to do with organization or action of individuals, parties, or interests that seek to control appointment or action of those who manage affairs of a state. [*Black's Law Dictionary* (5th ed).]

See also *Black's Law Dictionary* (9th ed), which defines "political" as "[p]ertaining to politics; of or relating to the conduct of government." "Politics" is defined as "[t]he science of the organization and administration of the state" or "[t]he activity or profession of engaging in political affairs." Further, the Michigan Supreme Court has recognized that the term "political" means "pertaining to policy or the administration of government." *People v Gansley,* 191 Mich 357, 366; 158 NW 195 (1916).

Under any of these definitions, both "Marxism" and "socialism" can be reasonably characterized as political doctrines or political philosophies and, thus, the sign can be characterized as a political sign (i.e., evoking a political message). Further, the Township Planner determined that the sign was "political" and this Court is required to give "great weight" to his interpretation of the Zoning Ordinance. *Macenas, supra,* 433 Mich at 398.

At the March 22, 2013 hearing, this Court asked counsel for Mr. Verduin whether he had any cases to support the position that the sign at issue is not a political sign. In response, defense counsel presented this Court with three cases he claimed supported that position. The Township fails to see how any of these three cases support Mr. Verduin's argument.

In the first case, *Café Erotica of Florida, Inc v St John's Co,* 360 F3d 1274 (11th Cir, 2004), the sign ordinance at issue defined a political sign as "[a]ny sign containing a non-commercial opinion or endorsement message and not containing a commercial message."[3] It should go without saying that the Township is not bound by a definition in a zoning ordinance adopted by the legislative body in a Florida county (or anywhere else), nor should this Court rely to any extent on that county's definition of political sign in construing the Township's Zoning Ordinance. Common sense dictates that there is not a universal definition of "political sign" and that definitions of political signs and other types of signs vary among jurisdictions. See e.g., *Gannett Outdoor Co v City of Troy,* 156 Mich App 126, 129-130; 409 NW2d 719 (1986), in which the city defined a political sign as a sign providing "information relating to the election of a person to public office, or relating to a political party, or relating to a matter to be voted upon at an election called by a public body, or any other public issue or expression of opinion."

Nevertheless, even if the Florida county's definition was somehow relevant to this case, Mr. Verduin's sign would clearly be considered a political sign under that definition, as the Court can take judicial notice that his sign contains a non-commercial opinion and does not contain a commercial message. Thus, contrary to Mr. Verduin's argument, the case does not support his position that his sign is not a political sign—it supports the Township's position.[4]

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[3] Obviously this Court is not bound in any way by this federal court decision, or the other two federal court decisions presented by Mr. Verduin. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). See also *Camreta v Greene*, 131 S Ct 2020, 2033 n 7 (2011) (a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case").

[4] Ultimately, the central issue in the *Café Erotica* case was whether political billboards could be prohibited *in areas where commercial billboards were permitted.* Thus, that case is not on point. Billboards are only permitted in the industrial zoning districts in the Township (which does not include Mr. Verduin's property) and, thus, the billboard provisions of the Zoning Ordinance (Section 17.12) are simply not at issue. Further, even if Mr. Verduin were to assert that his First Amendment rights are being violated because he cannot erect a billboard in a residential zoning district, Michigan courts have made

Similarly, the second case that Mr. Verduin relies on, *Whitton v City of Gladstone,* 54 F3d 1400 (8th Cir, 1995), is not binding on this Court, and is not on point. The challenge in *Whitton* centered around durational (time) limitations on signs—which this Court expressly recognized is not at issue in this case—as well as lighting and vicarious liability provisions, which also are not at issue in this case. The *Whitton* case does not shed any light on the meaning of a political sign and, therefore, does not in any way support Mr. Verduin's argument that the sign at issue is not a political sign.

Finally, Mr. Verduin relies on *King Enterprises, Inc v Thomas Twp,* 215 F Supp 2d 891 (ED Mich, 2002), which, again, is not binding on this Court and does not support Mr. Verduin's argument. The township zoning ordinance at issue in that case defined a "political campaign" sign as a sign "announc[ing] referendum issues or candidates seeking public political office and other data pertinent thereto." *Id.* at 900. As stated above, it is irrelevant how other townships or municipalities define political signs, or whether other zoning ordinances carve out definitions for "political campaign" signs. It should be self-evident that this case must be decided based on the language in Gaines Charter Township's Zoning Ordinance, and the rules of construction do not permit the Court to read a restriction into the Zoning Ordinance based upon the legislative act or discretion of another municipality. Courts "cannot read restrictions or limitations into a statute [or ordinance] that plainly contains none." *Lafarge Midwest, Inc v Detroit,* 290 Mich App 240, 257; 801 NW2d 629 (2010).

In fact, the *King Enterprises* court noted that under the zoning ordinance in that case, only certain political signs were even allowed. For example, the court noted that a political

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clear that "[t]he First Amendment is not violated when the government allows the protected speech to occur, even if not in the desired locale." *Truckor v Erie Twp*, 283 Mich App 154, 166; 771 NW2d 1 (2009). Thus, this Court should not even entertain such an argument from Mr. Verduin, because it is not only well beyond the scope of this case, but also because such an argument is clearly without merit.

message exhorting citizens to contact their representative concerning pending legislation would not be allowed, but a sign advocating the election of a candidate displayed with thirty days of an election is permitted. Thus, the restrictions in that case were more restrictive than the Township's Zoning Ordinance. In fact, in *King Enterprises,* the township limited each premises to a total of 32 square feet of political campaign signs. As the Township noted at the hearing in this matter, there is no restriction on the number of political signs, nor is there a limit on the aggregate political signage. Thus, the Township's 20-square-foot restriction is in fact considerably more liberal than the ordinance in *King Enterprises.*

Thus, despite the representations at the hearing in this matter, Mr. Verduin did not present any cases to support his argument that the sign at issue is not a political sign. Moreover, it is undisputed that the sign is larger than 20 square feet. Thus, the only remaining issue before the Court is whether the Township may enforce its 20-square-foot restriction on political signs. And, for the reasons discussed below, this Court should answer "yes."

B. Mr. Verduin did not overcome the presumption that the Township's 20-square-foot-restriction on political signs is constitutional; therefore, this Court should find that Mr. Verduin's sign violates Section 17.4(J) as alleged.

The Township maintains that the challenged provision is a constitutionally permissible content-neutral time, place, manner restriction. It is well settled that "content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Truckor v Erie Twp*, 283 Mich App 154, 163; 771 NW2d 1 (2009) (citations omitted).

In *Outdoor Sys, Inc v City of Clawson,* 262 Mich App 716, 723; 686 NW2d 815 (2004), the Court of Appeals set forth "the proper analysis for determining content neutrality":

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

In the *City of Clawson* case, the Court explained that an ordinance distinguishing between accessory (or on-site) and non-accessory (or off-site) signs and placing different restrictions on the two types of signs is content neutral because such an ordinance "reflects no bias, censorship or preference for a particular viewpoint over another." *Id.*

Similarly, in this case, the Township's size regulation—which applies to all political signs in all zoning districts—reflects no bias, censorship or preference for a particular viewpoint over another. It is not based on the Township's assessment of the desirability of the ideas expressed on the signs. It does not show a preference for any particular message, and was not adopted because of disagreement with any particular message. Simply stated, it does not evince any intent on the part of the Township to regulate or censor content whatsoever. Thus, the size restriction is a content-neutral time, place, and manner restriction.

The fact that the Township's 20-square-foot restriction applies to all signs in the category of "political signs" does not render the restriction content based. The Sixth Circuit Court of Appeals has specifically held that a zoning ordinance can be content-neutral even if it *categorizes* signs according to content. In *HDV—Greektown, LLC v Detroit,* 568 F3d 609 (6th Cir, 2009), **Exhibit 5,** the plaintiff challenged a city ordinance that separately defined advertising, business and political signs and imposed different size and design standards on each. The court rejected the "overly narrow" argument that the distinction between the types of speech amounted to a content-based regulation. The court explained that:

> An ordinance is not a content-based regulation of speech if (1) the regulation controls only the places where the speech may occur, (2) the regulation was not adopted because of disagreement with the message that the speech conveys, or (3) the government's interests in the regulation are unrelated to the content of the affected speech. [*Id.* at 621.]

The court then found that "[t]here is simply nothing in the record to indicate that the distinctions between the various types of signs reflect a meaningful preference for one type of speech over another." *Id.* at 622. Importantly, the Sixth Circuit Court doubted that any municipal sign ordinance could be deemed content-neutral under the plaintiff's argument. *Id.* at 623.

The *HDV-Greektown* case is on point because it involved different height requirements for different categories of signs. And, while the case is not binding on this Court, it is important to note that it was recently cited with approval by the Michigan Court of Appeals in *Sackllah Investments, LLC v Northville Charter Twp,* unpublished opinion per curiam of the Court of Appeals, issued August 9, 2011 (COA Docket No. 293709), 2011 WL 3476808, **Exhibit 6**. Under both cases, the Township's 20-square-foot restriction is constitutional.

To highlight the distinction between a constitutional content-neutral restriction (such as the size restriction at issue in this case), and an unconstitutional content-based restriction, the Township points to this Court's question regarding whether the 20-square-foot limitation would apply to a sign that reads "I Love America." The Township maintains that it would apply to such a sign, as the sign contains noncommercial speech that, under the broad definition of "political", can be considered a political sign. In fact, the limitation applies with equal force to a political sign that some would consider patriotic, such as the Court's example of an "I Love America" sign, as it would to one that some would consider unpatriotic, anti-government, or even offensive. The Township's size limitation does not discriminate based on the content or viewpoint of the message. To suggest that the Township must or should allow property owners unfettered discretion to display large billboard-sized "patriotic" political signs

on residential property (or other noncommercial signs displaying messages that the Court suggested should generally not be offensive to passers-by) clearly runs afoul of the First Amendment because–contrary to the Township's actual zoning regulations—*that* would constitute an impermissible content-based restriction.

It is not the Township's responsibility or desire to police the content of signs in the Township or to approve or disapprove messages. Nor does the Township's political sign regulation do that. The Township's interest is not in regulating content or the types of messages that can be displayed, or in deciding which signs are patriotic, distasteful or offensive to others—the Township's interest is solely in regulating all signs through permissible, content-neutral time, place and manner restrictions.

To that end, the Township recognizes that even a content neutral restriction on speech must be narrowly tailored to achieve a significant governmental interest. The Township's purpose in regulating signs in the Township, as set forth in Section 17.1 of the Zoning Ordinance, is to:

A. Promote the public peace, health, and safety of residents and visitors;

B. Eliminate distractions that are hazardous to motorists and pedestrians;

C. Protect the public's ability to identify establishments and premises;

D. Protect the natural beauty and distinctive character of Gaines Charter Township;

E. Protect commercial, business, office and industrial districts and areas from visual chaos and clutter;

F. Provide an environment that fosters the reasonable growth and development of business and commerce;

G. Protect and enhance property values; and,

H. Balance the individual rights of property owners to communicate their message with the public's right to be free of unreasonable distractions and aesthetic intrusions. [**Exhibit 1.**]

Mr. Verduin did not allege that the size restriction does not directly advance significant governmental interests. Presumably, this is because Michigan courts have recognized that traffic safety and aesthetics are sufficient to justify size and height limitations on signs. *Outdoor Sys, Inc v City of Clawson,* 262 Mich App 716, 723-724; 686 NW2d 815 (2004). "Protecting and promoting public health, safety, and general welfare are legitimate governmental interests and protecting aesthetic value is included in the concept of the general welfare." *Norman Corp v City of East Tawas*, 263 Mich App 194, 200-201; 687 NW2d 861 (2004) (recognizing that sign limitations designed to dissipate visual clutter are reasonably related to protecting the general welfare because visual clutter detracts from the community's aesthetic value and may create dangerous distractions to passers-by"). See also *Metromedia, Inc v City of San Diego*, 453 US 490, 501, 507; 101 S Ct 2882 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals"); *Truckor, supra,* 283 Mich App at 163 ("plaintiffs do not contest that the ordinance serves a substantial governmental interest and for good reason"). Thus, this Court should find that the Township's interests in Section 17.1 are the types of significant governmental interests that justify restrictions such as size limitations on signs.

Further, Mr. Verduin has never articulated any argument that the 20-square-foot limitation is more restrictive than necessary to accomplish the Township's objectives. At most, Mr. Verduin hinted at the hearing to the fact that while the Township restricts political signs to 20 square feet, the Township allows 32-square-foot commercial banners. However, as indicated above, the fact that the Township applies different size restrictions to different categories of signs does not render the restriction unconstitutional. The Zoning Ordinance does not as a matter of law discriminate against political speech in favor of commercial speech. Nor can the Court

conclude as a matter of law that the Zoning Ordinance allows commercial messages to be displayed more prominently than political signs.

As a practical matter, as the Township emphasized at the hearing in this matter, the Township does not currently limit the number of political signs and, therefore, an individual is allowed to convey as many political messages, or support as many political candidates, as desired. That can hardly amount to suppression of speech. Compare *Dimas v City of Warren*, 939 F Supp 554, 557 (ED Mich, 1996) (finding that the city's one election sign per candidate, per issue, and per opinion restriction was an impermissible infringement on speech).[5]

Moreover, the Michigan Attorney General has twice concluded that municipalities may limit the size of political signs. In OAG No. 6258 (November 26, 1984), **Exhibit 7,** the Michigan Attorney General concluded that a municipality may reasonably regulate the size of political signs on private property, provided that it does so in a manner that preserves the efficacy of the medium, and also provided that the sign is of sufficient dimension to enable a person traveling by vehicle or on foot to readily perceive the message. As shown in the Attorney General's opinion, courts have upheld more restrictive size limitations on political signs than the one at issue in this case. See e.g., *Baldwin v Redwood,* 540 F2d 1360 (9th Cir, 1976) (upholding a 16-square-foot restriction on political signs, with an 80-square-foot aggregate size limit); *Ross v Goshi,* 351 F Supp 949 (D Hi, 1972) (upholding an 18-square-foot limitation on signs). The size restrictions that have been stricken down as unconstitutional were significantly more

[5] Some municipalities have much smaller size limits on political signs. In addition, some municipalities have established a limit on the number of yard signs per residence because, at some point, the sheer number of signs realistically impairs the aesthetics of a neighborhood. The Township does not have such restrictions, nor has the Township adopted different size restrictions for the various zoning districts, which Michigan courts have upheld (for example allowing larger signs in commercial districts, while placing greater restrictions on residential signs). The Township also has not placed different limitations on different types of political signs. Instead, the Township thus far has taken a more temperate approach, because it recognizes—as has the Supreme Court—that "residents themselves have strong incentives to keep their own property values up and prevent 'visual clutter' in their own yards and neighborhoods." *City of Ladue v Gilleo,* 512 US 43, 58; 114 S Ct 2038 (2004).

restrictive than the Township's. See e.g., *Verrilli v City of Concord,* 548 F2d 262 (9th Cir, 1977) (concluding that a 4-square-foot limitation per sign was unconstitutional); *State v Miller*, 416 A2d 821 (NJ, 1980) (concluding that a 6-square-foot limitation would probably be unreasonable).

Over twenty years later, the Michigan Attorney General issued OAG No. 7185 (January 13, 2006), **Exhibit 8,** in which it reaffirmed its statement that a municipality may reasonably regulate the size of political signs on private property, provided that it does so in a manner that preserves the efficacy of the medium, and also provided that the sign is of sufficient dimension to enable a person traveling by vehicle or on foot to readily perceive the message. The Attorney General noted that courts have upheld size restrictions where they apply "to all signs of the same category or class," and that there is no bright-line test for determining whether a size restriction is reasonable. This is consistent with the case law discussed above.

There is no doubt that the 20-square-foot restriction leaves open ample opportunity for speech—and Mr. Verduin has never alleged otherwise. The speaker can convey his or her message by telephone, speeches, advertisements on radio, television or in print, on bumper stickers, through email or the Internet, or by displaying signs within the allowable size limits. Further, Mr. Verduin has never alleged that a 20-square-foot sign is not of sufficient dimension to enable a person traveling by vehicle or on foot to readily perceive the message. Such an argument would be specious, as this Court can take judicial notice that political signs (including campaign signs and other political signs) that are much smaller than 20-square-feet are frequently and regularly displayed on private property.

Finally, Mr. Verduin has not shown this Court that the sign at issue (or any other noncommercial sign of that scale or magnitude) would be allowed in a residential zoning district *under any provision* of the Zoning Ordinance. So, to the extent Mr. Verduin argues that his sign

is receiving differential treatment, or that he is being discriminated against based on the message on his sign, his argument is wholly without merit.

III. CONCLUSION AND RELIEF REQUESTED

For all of the reasons discussed above and at the hearing in this matter, Plaintiff Gaines Charter Township respectfully requests that this Honorable Court find Defendant responsible for violating Section 17.4(J) of the Gaines Township Zoning Ordinance, a municipal civil infraction, and that the Court order the appropriate relief, including but not limited to removal of the sign under MCL 600.8727 and MCL 600.8302.

Respectfully submitted,

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Dated: March 29, 2013

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