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MEMO

TO: **Ryan Schroeder, City Manager**
FROM: **Kori Land, City Attorney**
DATE: **October 9, 2020**
RE: **Legal Analysis of City's Ability to Regulate Noncommercial Signs Posted at 1472 Oakdale Avenue**

Background

Concerns have been raised to the City regarding signs located on private property within the City of West St. Paul. One of the signs, which is one of at least six located on the property, bears a graphic image of an African American male with extensive scars on his back.[1]. Additional concerns have been raised regarding another sign that includes a butterfly as part of the sign's message.[2] Other signs include photos that appear to be of a fetus and exhortations to repent and end abortion. (See photos, attached as Exhibit A). Several questions have arisen regarding whether the number and size of the signs is allowed per the City's sign ordinance regulations, whether the content (message) of the sign is permitted, and the City's legal options to respond to calls for removal of the signs.

1. Number and size of signs and other City Code regulations.

City Code Sections 153.430-153.438 regulate the size, location, and number of signs permitted in the City's various zoning districts, including residential districts. However, these regulations are currently preempted by the provisions of Minn. Stat. Sec. 211B.045 which provides as follows:

> **§211B.045 NONCOMMERCIAL SIGNS EXEMPTION.**
>
> All noncommercial signs of any size may be posted in any number beginning 46 days before the state primary in a state general election year until ten days following the state general election. Municipal ordinances may regulate the size and number of noncommercial signs at other times. (Emphasis added).

The definition in City Code Section 153.431 of Noncommercial Speech is as follows:

> ***NONCOMMERCIAL SPEECH.*** Dissemination of messages not classified as commercial speech which include, but are not limited to, messages concerning political, religious, social, ideological, public service and informational topics.

The West St. Paul City Code repeats the statutory Noncommercial Speech Exemption and clarifies that *regardless of any other provision of the sign section*, this statutory exemption for Noncommercial Speech is enforced through the election season:

> **§ 153.438 NONCOMMERCIAL SPEECH.**
> *Notwithstanding* any other provisions of this chapter, all signs of any size containing noncommercial speech may be posted from 46 days before the state primary in any general election year until ten days following the general election and 13 weeks prior to any special election until ten days following the special election. (emphasis added)

This means that Noncommercial Speech signs are allowed in any size, in any number, in any location, except the right of way, from now until November 13, 2020 and the City is **legally prohibited** from enforcing its regulations related to the size or number of signs if the signs contain noncommercial speech.

Once the election season is over and the City's Sign Ordinance is no longer preempted, the City can review the matter to see if the property owner is in violation of the City's various sign ordinance provisions, such as those that require a permit for a sign that is more than 6 square feet, not allowing signs more than 2 feet from the right of way and not closer than 10 feet from a lot line, not allowing signs painted on or affixed to fences, and not allowing more than one sign on a residential lot in a residential zoning district. Until 10 days after the November election, these regulations are not applicable to the Noncommercial Speech signs posted on the subject property.

2. Nuisance Ordinance

Some citizens have asked if the sign is a public nuisance under the City's nuisance section of the City Code:

> City Code Section 94.15
> (B) *Public nuisance.* Public nuisance includes, but not limited to, the following:
> (14) Constructing, maintaining, permitting or suffering upon one's property any billboard, sign, poster or advertisement, or to post, publish, promulgate, broadcast, display, issue or circulate any insulting, profane or abusive emblem, sign or device, or blasphemous written or printed statement, calculated or such as is likely to cause a breach of the peace;

The enforceability of this ordinance under the First Amendment depends upon applying the operative phrase "breach of the peace" consistently with the First Amendment concept of "fighting words." For the reasons explained in Section 3 below, the ordinance may not be used to prohibit expressions (words, images) that are insulting, profane or abusive that are not "fighting words." Because the offending signs are clearly protected speech on one of the most enduring and divisive

issues in our society, they cannot be prohibited. They are not "fighting words."

3. <u>Content of Signs.</u>

The City may not regulate content of the signs. Noncommercial Speech is protected by the First Amendment, and unless such signs would fall into a category of "unprotected" speech, the City cannot regulate the same based on their content.

The United States Supreme Court has held that:

> "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" U.S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." <u>Reed v. Town of Gilbert, Ariz.</u>, 576 U.S. 155, 163, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015). The United States Supreme Court has further held that "[w]ith rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one." <u>City of Ladue v. Gilleo</u>, 512 U.S. 43, 59, 114 S. Ct. 2038, 2047, 129 L. Ed. 2d 36 (1994); Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." <u>Reed v. Town of Gilbert, Ariz.</u>, 576 U.S. 155, 155, 135 S. Ct. 2218, 2222, 192 L. Ed. 2d 236 (2015).

Further:

> "The First Amendment generally prevents government from proscribing speech … or even expressive conduct … because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. *(Citations omitted).* From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky, supra,* 315 U.S., at 572, 62 S.Ct. at 762. We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, *e.g., Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (obscenity); *Beauharnais v. Illinois,* 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952) (defamation); *Chaplinsky v. New Hampshire, supra* (" 'fighting' words");

> see generally *Simon & Schuster, supra,* 502 U.S., at 124, 112 S.Ct., at 513–514 (KENNEDY, J., concurring in judgment). R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382–83, 112 S. Ct. 2538, 2542–43, 120 L. Ed. 2d 305 (1992).

In other words, content-based regulations of signs on private property is generally impermissible. Additionally, the U.S. Supreme Court has held that:

> "[a] special respect for individual liberty in the home has long been part of our culture and our law(*internal citations omitted*); that principle has special resonance when the government seeks to constrain a person's ability to *speak* there. See *Spence v. Washington,* 418 U.S. 405, 406, 409, 411, 94 S.Ct. 2727, 2728, 2729–2730, 41 L.Ed.2d 842 (1974) (*per curiam*)." Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8– by 11–inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, see *Cox v. New Hampshire,* 312 U.S. 569, 574, 576, 61 S.Ct. 762, 765, 765, 85 L.Ed. 1049 (1941); see also *Widmar v. Vincent,* 454 U.S. 263, 278, 102 S.Ct. 269, 278–279, 70 L.Ed.2d 440 (1981) (STEVENS, J., concurring in judgment), its need to regulate temperate speech from the home is surely much less pressing, see *Spence,* 418 U.S., at 409, 94 S.Ct., at 2729–2730. City of Ladue v. Gilleo, 512 U.S. 43, 57–58, 114 S. Ct. 2038, 2047, 129 L. Ed. 2d 36 (1994). Id.

The City may prohibit "fighting words" and threats. But fighting words are just that: an express invitation to violence. They are "personally abusive epithets," directed to a specific individual, and inherently likely to provoke a violent reaction. The United States Supreme Court has held that "[t]he protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution." Virginia v. Black, 538 U.S. 343, 358, 123 S. Ct. 1536, 1547, 155 L. Ed. 2d 535 (2003). "[A] State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *(Internal citations omitted.)* We have consequently held that fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"—are generally proscribable under the First Amendment. *Cohen v. California,* 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); see also *Chaplinsky v. New Hampshire, supra,* at 572, 62 S.Ct. 766." Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 1547, 155 L. Ed. 2d 535 (2003). "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States, supra,* at 708, 89 S.Ct. 1399 ("political hyberbole" is not a true threat); *R.A.V. v. City of St. Paul,* 505 U.S., at 388, 112 S.Ct. 2538. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Virginia v. Black, 538 U.S. 343, 359–60, 123 S. Ct. 1536, 1548, 155 L. Ed. 2d 535 (2003)

The content of the signs posted on the property at 1472 Oakdale Avenue does not appear to fall

into the narrow category of "unprotected" speech and therefore *is* constitutionally protected. And the City must be exceedingly wary of the temptation to use the power of government to police speech in order to "do good." The First Amendment protects us when we *and* our opponents are in power. The rule of law must be the one we would accept when our social/political adversaries are in control of the government.

Offensive speech is at the heart of protected First Amendment speech. The government does not get to take sides and establish an orthodoxy of acceptable views or polite manners. Speech that is deliberately provocative *is* protected speech unless it falls into one of a few narrow exceptions to First Amendment protection. By prohibiting the government from deciding what expressions are allowed, the First Amendment safeguards our most fundamental freedom.

CONCLUSION

The signs located on the residential property at 1472 Oakdale Avenue contain Noncommercial Speech that is protected by the First Amendment. The City's existing content-neutral sign regulations are preempted by state statute until after November 13, 2020, and absent the signs containing unprotected speech, namely fighting words or obscenity[3], the City has no legal authority to regulate the same under either its sign ordinance or based on the content of the signs themselves.

The Mayor and City Council members, individually, can take a position on the social issues or whether they find the message offensive, but the City may not regulate this private, noncommercial speech.

[1] While not relevant to the legal analysis herein, by way of reference the photo's apparent history is detailed here: https://www.history.com/news/whipped-peter-slavery-photo-scourged-back-real-story-civil-war.

[2] The sign appears to be a "stock" sign that can be purchased on-line at the link below, and which incorporates the AHA (Abolish Human Abortion) "logo" within the butterfly wings themselves: https://www.ahagear.com/products/there-is-forgiveness-purple-sign.

[3] Obscenity or obscene material is determined by applying the three-part *Miller* test as follows "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, quoting Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419 (1973)