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MEMORANDUM

DATE: July 13, 2011

TO: All Cities

FROM: Kristin N. Eick, Office of the City Attorney

RE: Public Service Announcements, Political Signs, and Use of Public Facilities for Campaign Purposes

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As the election season is upon us, many elected officials will have questions about public service announcements, political signs, and the use of public facilities for campaign purposes. This memorandum is intended to provide you with a brief overview of the law regarding all three of these topics.

Public Service Announcements

Last year, the legislature enacted RCW 42.17A.575, which provides that "no municipal officer may speak or appear in a public service announcement that is broadcast, shown, or distributed in any form whatsoever during the period beginning January 1st and continuing through the general election if that official or officer is a candidate." A public service announcement means a communication that meets all of the following criteria. The communication is:

(a) Designed to benefit or promote the community's health, safety or welfare, or nonprofit community events;
(b) Not selling a product or service;
(c) Sponsored by an organization with a history of routinely providing the community such outreach public service messages in the service area of the organization;
(d) Of primary interest to the general public and is not targeted to reach only voters or voters in a specific jurisdiction;
(e) Not coordinated with or controlled or paid for by a candidate's authorized committee or political committee;
(f) Subject to the policies for public service announcements of the entity broadcasting, transmitting, mailing, erecting, distributing or otherwise

publishing the communication including policies regarding length, timing, and manner of distribution;[1] and

(g) One for which the arrangements to include a reference or depiction of the candidate or candidates in the communication were made at least six months before the candidate became a candidate.[2]

If the municipal officer does not control the broadcast, showing, or distribution of a public service announcement in which he or she speaks or appears, then the official or officer must contractually limit the use of the public service announcement to be consistent with the time limits set forth in the statute prior to participating in the public service announcement. However, the statute does not apply to public service announcements that are part of the regular duties of the office that only mention or visually display the office or office seal or logo and do not mention or visually display the name of the municipal officer in the announcement. While the municipal officer who is a candidate cannot speak or appear in PSAs beginning January 1 through the general election, their offices can produce or arrange for such messages if it is part of the normal and regular conduct of that office.

Examples of public service announcements include, but are not limited to, communications regarding nonprofit community events, outreach, or awareness activities, such as: breast cancer screening, heart disease, domestic violence, organ donation, emergency, or other disaster relief for organizations such as the Red Cross, programs designed to encourage reading by school children, childhood safety, fund drives for charitable programs such as United Way, and similar matters.

According to the PDC, public service announcements are usually scripted and frequently (1) describe limited facts about an event, community outreach effort service or cause and (2) invite listeners to educate themselves and/or to assist in the activities. Given this approach, the PDC has stated that public service announcements would not include the following:

- news items or editorials that are of primary interest to the general public in a news medium controlled by a person whose business is that news medium and not controlled by the candidate or committee;

[1] According to a Public Disclosure Commission Interpretation, this phrase describes that PSAs are typically scripted and time and/or space-limited ads, the text of which must satisfy the policies of the entity distributing the message before the PSA is transmitted. If the entity producing and/or distributing the message is a public agency, the PSA must be part of the normal and regular activities of the agency, conform to internal policies or rules the agency applies to all communications produced by the agency, and not assist a campaign, pursuant to RCW 42.17.128, RCW 42.17.130, and RCW 42.17.180, discussed below.

[2] The PDC's Interpretation further provides that this phrase regarding the six-month advance time period for arrangements for PSAs applies only to the electioneering communications exemption at RCW 42.17.020(21)(f). This is because the January 1 through general election time period applies specifically to the 2010 PSA Law.

- hosted radio or television talk shows where the participating public official is not paid by the show's sponsor, and which are of primary interest to the general public in a news medium controlled by a person whose business is that news medium and not controlled by the candidate or committee;
- open news or press conferences;
- news releases and newsletters;
- live speeches;
- testimony;
- rallies;
- responses to a specific inquiry;
- communications produced or made as part of litigation, including but not limited to exhibits, oral or written argument, class action notices, news releases or news conferences to announce litigation filings or case outcomes, and the like;
- public agency websites;
- personal communications not using public facilities, including personal social media (such as personal emails or letters, or an individual's Facebook page that is not published or sponsored by a public agency); and
- announcements during councilmember reports about upcoming community events.

Use of Public Facilities for Campaign Purposes and Promoting or Opposing Ballot Propositions

Elected officials are free to vigorously campaign for office as long as their activities do not make use of public facilities, time, or resources and do not pressure or condone City employees' use of public facilities, time, or resources to support candidates. The state Public Disclosure Law governs what elected officials may and may not do during campaigns:

> No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency: PROVIDED, That the foregoing provisions of this section shall not apply to the following activities:
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> (1) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as

> (a) any required notice of the meeting includes the title and number of the ballot proposition, and
> (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;
> (2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;
> (3) Activities which are part of the normal and regular conduct of the office or agency.

RCW 42.17.130. "Public facilities" include publicly-owned or operated land, buildings, equipment, supplies, and communications systems (including telephones, e-mail and voice-mail, internet access, cell phones, and video/audio equipment), and employee work time and agency publications. "Normal and regular conduct" is defined as:

> [C]onduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

WAC 390-05-273.

Being an elected official or public employee does not affect the individual's right to participate freely in the political process. The public disclosure law merely restricts the use of public facilities, equipment, and time in the furtherance of a campaign. PDC regulations provide:

> (1) RCW 42.17.130 does not restrict the right of any individual to express his or her own personal views concerning, supporting, or opposing any candidate or ballot proposition, if such expression does not involve a use of the facilities of a public office or agency.
>
> (2) RCW 42.17.130 does not prevent a public office or agency from (a) making facilities available on a nondiscriminatory, equal access basis for political uses or (b) making an objective and fair presentation of facts relevant to a ballot proposition, if such action is part of the normal and regular conduct of the office or agency.

WAC 390-05-271.

In addition, no candidate or political organization may solicit payments or contributions on City property.

> Solicitation for or payment to any partisan, political organization or for any partisan, political purpose of any compulsory assessment or involuntary contribution is prohibited: PROVIDED, HOWEVER, That officers of employee associations shall not be prohibited from soliciting dues or contributions from members of their associations. No person shall solicit on state property or property of a political subdivision of this state any contribution to be used for partisan, political purposes.

RCW 41.06.250(1).

In sum, the following are permitted campaign-related activities for elected officials and public employees:

- Register citizens to vote
- Spend time on election day poll checking
- Wear campaign buttons
- Display bumper stickers on private vehicles (even if parked in City's parking lot)
- City Managers and City Administrators may inform staff during non-work hours of opportunities to participate in campaign activities
- Make a statement supporting or opposing a ballot measure at an open press conference, or in response to a specific question from the public. (However, the official's staff is not authorized to use public facilities to draft, type or distribute a press release.)
- An elected <u>legislative body</u> may collectively vote to support or oppose a ballot measure so long as proper public notice of the meeting references the ballot issue's title and number, and persons who oppose the measure are given an approximate equal opportunity to express their views.

<u>As long as no public property or facilities are used</u>:

- If not being compensated or using public equipment or vehicles, may attend any function or event at any time during the day and voice his or her opinion about a candidate or ballot measure. May use his or her title when making these appearances, but should clarify that he/she is only speaking on behalf of himself or herself, not the City.
- Campaign for or against any candidate or ballot issue
- Distribute campaign material
- Solicit voluntary campaign contributions
- Make campaign contributions
- Speak before groups in support of personal positions or otherwise undertake advocacy activities.

The following are not permitted campaign activities for elected officials and public employees:

- Campaign or solicit political contributions or endorsements, using public facilities or on government property.
- Carry or display political material in or on publicly-owned vehicles.
- Display or distribute campaign posters, placards, or other promotional material on publicly-owned or operated premises.
- Use government supplies, equipment, or facilities to print, mail, or otherwise produce or distribute campaign materials at any time whether during or after work hours.
- Solicit signatures for any initiative, recall, or referendum campaign on publicly-owned or operated premises.
- Use public meeting facilities for campaign-related activities, except when meeting facilities are customarily made available on an equal access, nondiscriminatory basis for a variety of uses, including political activities (i.e., the facility is merely a "neutral forum" where the activity is taking place, and the public agency in charge of the facility is not actively endorsing or supporting the activity that is occurring).
- Use publicly-owned facilities or resources to instruct or urge public employees to campaign for or against a candidate or ballot proposition on their own time, or to state or imply that their job performance will be judged according to their willingness to use their own time on a campaign.

Political Signs

In general, a city cannot regulate the content of political signs but can regulate the noncommunicative aspects of political signs for aesthetic and traffic-safety reasons. These aspects include such things as spacing, size and removal requirements. Collier v. Tacoma, 121 Wn.2d 737 (1993). Any regulation of such noncommunicative aspects (*i.e.*, removal requirements) must apply equally to commercial signs allowed in the City. For example, if the city allows a certain amount of time to remove real estate signs, it cannot apply a shorter time period for removing political signs. This is due to the fact that commercial signs cannot be treated more favorably than political signs. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981); Ladue v. Gilleo, 512 U.S. 43 (1994). Thus, if the city regulates the noncommunicative aspects of political signs, such regulations should apply equally to similar temporary commercial signs.

However, a city's ability to prohibit political signs altogether depends upon the forum analysis a court applies. In "traditional public forums," for example, parks, streets (including the planter strip between the curb and the sidewalk), and sidewalks, a city may not entirely prohibit political signs throughout the city. In Collier v. City of Tacoma, the Court also held that cities may not impose pre-election time limitations upon posting political signs, such as prohibiting political signs from being displayed more than 60 days prior to an election.

Cities can prohibit political signs on utility poles and in other nonpublic forums, if the prohibition equally applies to similar temporary commercial signs. The United States Supreme Court upheld such a regulation in City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), and the Washington Supreme Court upheld a nearly identical regulation in City of Seattle v. Mighty Movers, Inc., 152 Wn.2d 343 (2004).

Finally, the U.S. Supreme Court has recognized the "fundamental" free-speech right of every property owner to display political (including campaign) signs, subject only to reasonable size and number restrictions, upon their own private property in Ladue v. Gilleo, 512 U.S. 43 (1994). Any of these regulations of political signs on private property should be viewpoint neutral and cannot favor commercial speech over political speech.

As a reminder, RCW 29A.84.040 provides that it is a misdemeanor to remove or deface lawfully placed political advertising, including yard signs or billboards, without authorization.

If you have any questions on the above matters, please do not hesitate to contact your City Attorney.

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