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February 26, 2024

Via Email

Lexington Planning Board
1625 Massachusetts Avenue
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Re: Proposed Amendments to Zoning Bylaws Regulating Signage

Dear Members of the Lexington Planning Board:

We write on behalf of the American Civil Liberties Union of Massachusetts (ACLUM) to bring to your attention concerns about the constitutionality—and wisdom—of one portion of the proposed amendment to Lexington's zoning bylaws governing signs (Article 47). Specifically, our concerns relate to the proposed imposition of time limits on temporary signs displayed on private property.

We applaud the Planning Board's work to remove content-based restrictions from its current sign bylaws, as well as for including in the Purposes section of the proposed revisions that a goal is to protect free expression. We urge you, however, not to recommend to Town Meeting the temporal limitations on temporary signs that are currently proposed in subparagraph 5 of Section 5.2.4 of the most recent draft we have seen and was discussed at your meeting on February 7, 2024. We further encourage you to omit any time limits on such signs from the recommendation made to Town Meeting because they curtail too much protected speech, including political speech, without sufficient justification.

We urge you instead to rely on requirements for keeping temporary signs within a reasonable number per property at any one time, of reasonable size, in safe locations and in good condition. This will both avoid serious legal issues and fulfill legitimate Town goals.

Factual Background

The proposed amendment in Section 5.2.4, subparagraph 5 states: "Temporary signs. Shall be limited to display such signs for a period not exceeding 30 consecutive days with no more than 90 days per calendar year."[1] As discussed more below, this language—and how it would be enforced—is unclear in fundamental respects, but it is obviously intended to restrict the amount of time temporary signs, including yard signs, can be displayed.[2]

Yard signs are a cost-effective and long-standing way for residents to express their political and social views both on electoral matters and on other social or political issues of the day. They allow residents to readily communicate with neighbors and those walking or driving by their homes. Common temporary signs include those that urge adoption or rejection of a ballot question or support or rejection of a particular political candidate, as well as those that make commentary on broader societal issues, such as "All Are Welcome Here," "Hate Has No Home Here," "Black Lives Matter," "All Lives Matter," "Support Our Schools," "Support the Police," "Peace on Earth" and similar, including signs such as this that we understand many residents of Lexington display in their yards.

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[1] The proposed amendment would replace a provision currently in Section 5.2.4, which mandates that temporary signs "that advertise or otherwise relate to a particular business or commercial event" be taken down no later than seven days after the conclusion of the event. This existing provision has no applicability to signs like "All Are Welcome Here" or election related signs that are not related to any particular "business or commercial event." We support its repeal, including to remove content-based distinctions, but for the reasons discussed, we believe it should not be replaced with the current proposal or any other time limit. We note that those with event-related signs in their yards will likely take them down in a reasonable time without the need for any mandate, based on their own aesthetic interests, in order to comply with the requirements that any signs be in good condition, and to make room for other more relevant signs.

[2] The proposal would exempt signs that are displayed from the inside of residents' windows or doors, as well as "flags" (including those containing some words) that are affixed to a rope, building or flagpole. Section 5.2.3.

Time-limiting such signs implicates core free speech principles, which provide robust protection for political speech *and* residents' rights to express their views on their own property.

Expressions of non-election related political or social sentiments—such as "Stand up to Antisemitism" or "Stand up to Islamophobia" and others discussed above—are evergreen, in that the interest in expressing such viewpoints is not time limited. Similarly, certain residents will have a strong interest in displaying election-related temporary signs for longer than 30 consecutive days and for more than 90 days total per year. In an exercise of core democratic participation, residents may wish to support specific candidates during both primary and general elections and to express their support or opposition to candidates or ballot questions *early on*. They may also wish to leave election-related signs up after a particular election is over to express their sentiments, for instance, that the correct person or side of an issue won, to protest the results of the election and lay groundwork for a different result in the future, or to convey that their preferred candidate or position should be supported in the next election—no matter when that may be.

Because of the importance of this basic form of expression in our democracy, and for the reasons discussed below, we urge the Planning Board to remove any durational limit on temporary signs from the proposal and instead rely on a provision requiring that temporary signs of the allowed number and size be firmly affixed in the ground so as not to blow away in the wind and cause litter or other harm.

Such a requirement—in conjunction with a requirement that the sign be intact and in good condition, consistent with 5.2.4 subparagraph 4, and not placed in a location that obstructs traffic or causes other safety hazard, consistent with 5.2.4 subparagraph 2—is a narrowly tailored way to honor both free expression and the interest in maintaining reasonable aesthetic standards that has been stated as the justification for the current proposal.

Legal Background and Analysis

As the draft of the proposed bylaw apparently recognizes—by highlighting that a purpose of the revised bylaw is to protect freedom of speech—protection of political speech is at the heart of both the First Amendment and Article 16. *Citizens United v. FEC,* 558 U.S. 310, 329 (2010); *Barron v. Kolenda,* 491 Mass. 408, 420-22 (2023). Indeed, Article 16 has been interpreted by the state's highest court to provide as much, and often greater, protection for expression than does the First Amendment, including for political speech. *Barron,* 491

Mass. at 420 & n.12; *Mass. Coal. for the Homeless v. City of Fall River*, 486 Mass. 437, 440 (2020); *Cabaret Enterprises, Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 16-17 (1984).[3]

The First Amendment and Article 16 of the Massachusetts Declaration of Rights particularly prohibit the government from encroaching on the right to free speech, including the right to speak on political and electoral issues, at one's own residence. "A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (cleaned up).

Further, when government regulation impacts free expression, it is subject to a particularly rigorous form of review for undue vagueness, because vague laws can improperly chill constitutionally protected speech and leave government officials with undue enforcement discretion. Specifically, a regulation must make clear to an ordinary person what behavior is allowed and what is prohibited, and it must contain standards to prevent discriminatory enforcement. *United States v. Williams*, 553 U.S. 285, 304 (2008). The prohibition on vagueness applies with particular force where speech rights are implicated. *Id.*[4]

Here, the proposed durational limitation raises serious issues under each of these lines of reinforcing case law.[5]

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[3] This is not to say that the bylaw should expressly provide for greater protection for political speech, as that would be content-based distinction. But in fashioning an appropriately tailored policy, the Planning Board should take into account the impact of any proposal on the exercise of political speech—and avoid unnecessarily treading on its exercise.

[4] *See also Vill. Of Hoffman Ests. V. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply"); *Commonwealth v. Abramms*, 66 Mass. App. Ct. 576, 581 (2006) ("An additional principle to be noted is that '[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts'").

[5] We are aware that the Planning Board has been advised that the Attorney General's Municipal Law Unit has approved sign bylaws adopted by other Towns that bear some resemblance to some aspects of this proposed bylaw. We urge you not to rely upon such approvals in assessing the constitutionality of this proposed bylaw. The relevant decision letters we have seen suggest that the Municipal Law Unit did not consider free expression concerns such as those raised in this letter, and several of the provisions in the examples cited during the February 7 meeting seemingly contain language substantially different than this proposal—although they are still legally problematic as a matter of free expression.

Vagueness and lack of objective standards to guide enforcement

We admit to sincere and substantial confusion about what exactly the proposed time limits in subparagraph 5 of 5.2.4 are intended to require or prohibit. And if we are confused, it seems clear that enforcement officials and residents of Lexington—including but not limited to those who are not attorneys who read sign bylaws on a regular basis—will not have clear notice of what is being required or forbidden. This creates an untenable and unconstitutional vagueness situation, particularly when free expression is at issue.

We assume that the proposed amendment would apply on a sign-by-sign basis, such that, once a particular sign has been up for 90 days in a calendar year, it could be replaced by another sign, with or without the same message, which will then be subject to a new 90 day limit.[6] We also read the provision to allow someone to take down a sign on the 29th day and put it up again on day 31 or thereafter and thereby not run afoul of the 30-day consecutive limit. That seems to be the fairest reading of the language, including because the number of days seemingly would have to be measured from when a particular sign is put up and taken down.

But because of how the draft is worded, it is conceivable that the bylaw is intended to provide that, once any sign has been up for a total of 90 days in the calendar year, no other signs can be posted on the same property for the remainder of the year. The difference is of course material because, under the first and more likely interpretation, residents would be free to have some yard signs up all year, so long as no specific signs at any one time have been in place for more than 30 consecutive days or a total of 90 days in the calendar year. But under the second possible interpretation, if any one sign has been up for 90 days during the first few months of the year, no further signs could be posted for many months thereafter.

For the reasons discussed below, either option presents other serious constitutional questions; but the lack of clarity means the proposal is in any event inconsistent with anti-vagueness requirements.[7]

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[6] Any ban on putting up a new sign with the same message as a sign that was previously displayed would be content-based, subject to strict scrutiny and, as the Planning Board has recognized, unconstitutional. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

[7] The proposal also raises concerns about equality, effectiveness and cost of enforcement. Is the Town really going to invest in sufficient resources to enable enforcement officers to keep track of what day each sign was posted and each day it remains on each property throughout the Town? If not, how can the limitations be equitably enforced? If so, is the expenditure of so many resources for government agents to monitor residents' exercise of speech rights wise or consistent with basic democratic and constitutional values?

Failure of constitutional scrutiny

Under intermediate scrutiny, even content-neutral restrictions must be narrowly tailored to serve a substantial government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 796, 799 (1989). *See also City of Boston v. Back Bay Cultural Association, Inc.*, 418 Mass. 175, 183 (1994) (ruling a noise ordinance failed to satisfy intermediate scrutiny due to lack of sufficient tailoring). There are serious questions whether the durational limits could meet that test. After all, what substantial and legitimate interest does the Town have in forbidding signs that are in good condition, create no safety hazard and do not exceed reasonable size and number limits? To the extent the asserted interest is in aesthetics, any impact would be marginal at best, given that many others throughout the neighborhood may well have signs in their yards that are still within their time limits *and* any signs would have to be in good condition, not obstructive and limited in number and size. And certainly, if residents can still have the maximum number of signs up all year by replacing each sign with another when any applicable 30-day or 90-day limitation period has run, as would be the case under what we believe is the intended construction, the proposal would not serve the asserted aesthetic purpose.[8]

In sum, the proposal would, at a minimum, subject residents to the costs and hassle of repeatedly switching out signs or, at worst, bar them from having any signs for many months of the year, all without serving any substantial government interest.

We do not doubt that members of the Planning Board sincerely intend and hope for the durational limit on temporary signs to serve a governmental interest in maintaining the aesthetic appearance of the Town. But it is hard to see how it would actually serve that interest in any meaningful way or in fair proportion to the burdens on free expression it would create. We thus have serious doubts that the proposal would be found to be narrowly tailored to serve a significant governmental interest.

Suppression of "too much speech"

Even if the time limit requirement could survive intermediate or rational basis scrutiny, we believe it would be found to suppress "too much speech"—including political speech—from one's own home. *City of Ladue v. Gilleo*, 512

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[8] This reality may mean that the proposal could not even survive rational basis review. *See, e.g., Goodridge v. Dept. of Public Health*, 440 Mass. 309, 329-30, 334, 336, 338 (2003) (all laws, especially those that impinge on constitutional liberties, must not be arbitrary and must bring about a rational result).

U.S. at 51. This is certainly true if the proposal bars any additional signs after any sign or signs have been up on the property for 90 days in the year.[9] But it may well be the case even under the more likely interpretation, given the expense and management required to adhere to the requirements.

We acknowledge that in *City of Ladue v. Gilleo* the Supreme Court was considering a ban on any and all signs at residential properties, while here interior window signs, flags and yard signs for at least part of the year would be allowed.[10] But we think that, faced with the question of whether this proposal suppresses "too much speech" at the home, the Supreme Judicial Court would answer the question in the affirmative, including under Article 16 of the Declaration of Rights. This is particularly true given the Court's recent recognition of robust protection for political speech in *Barron v. Kolenda* and given that Article 16 often provides more protection than the First Amendment.

Because such time limits raise a host of free expression-related issues, we urge you not to include them in the proposal you recommend to Town Meeting.

Conclusion

Perhaps even more importantly than legal arguments, we believe that this proposal would be harmful to operation of our democracy, which is currently at a troubling inflection point. Now in particular, there is a need to provide and encourage outlets for the peaceful expression of the diverse range of views that exist in our pluralistic society.

We therefore urge you to not move forward with any durational limit on temporary signs and, instead, focus on assuring that any temporary signs are subject to reasonable placement, size, number and condition requirements. That is a more narrowly tailored way to protect reasonable public safety and aesthetic interests in a manner that does not unduly restrict residents' expression from their own property on vital issues of their time.

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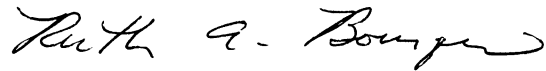
[9] Indeed, in a case in which ACLUM represented the plaintiffs, the U.S. District Court of Massachusetts ruled that a Holyoke ordinance banning temporary signs for three months of the year was unconstitutional. *See Molloy v. Holyoke,* https://www.aclum.org/sites/default/files/2019_04_12_final_judgment_molloy_v._holyoke_3-18-cv-30182.pdf.

[10] While allowing window signs all year round is important and constitutionally required, such signs are no replacement for yard signs, including because some residents do not have windows from which signs can clearly be seen, particularly by those who drive by and who must presumably keep their eyes closer to the road. Neither are flags containing messages a substitute for yard signs given the much greater cost of creating such flags and places from which to fly them in order to comply with the requirements of the proposed bylaw.

Thank you for your important work on these issues and your dedication to the protection of free expression. If you or counsel for the Town have any questions about this letter, we would be happy to discuss. We can be reached at rbourquin@aclum.org and rdavidson@aclum.org or 617-482-3170 exts. 348 and 320.

Sincerely,



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Cc: Abby McCabe, Planning Director