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**Via Email**

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BJ Church  
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32 Main Street  
Lee, MA 01238

Re: Lee Sign Ordinances, Enforcement Actions and Free Speech

Dear Town of Lee officials Ketchen, Brittain, Church and Dowd:

We write to you, in your capacities as representatives of the Town of Lee,<sup>1</sup> about recent, apparently widespread infringements of the fundamental right of free speech and to urge the Town to take immediate action to address the situation.

The American Civil Liberties Union of Massachusetts, Inc. (“ACLUM”) has become aware that, in the past several days, Building Commissioner Church and Building Inspector Dowd confiscated numerous signs from residents’ private property, including but not limited to signs expressing their views on the highly controversial issue of creating a dump for PCB-laden materials in

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<sup>1</sup> We ask that you also share a copy of this letter with members of the Selectboard, the Planning Board, and Town Counsel.

or near the Town.<sup>2</sup>

This action was apparently taken with no prior written notice to individual property owners, in violation of Section 199-7.6F of the Zoning Code and basic principles of due process. It was also taken in spite of the residents' constitutionally-protected rights to express their views on matters of public importance on their private property without any need for prior authorization of the Town, subject only to reasonable regulations as to size and location and to the extent such regulations are relevant to public safety. Moreover, it apparently involves the Town's taking and misappropriation of personal property, without due process, and trespasses on private property.<sup>3</sup>

We therefore urge you in the strongest terms to take immediate action to return all signs confiscated from private property and issue a public apology for this seemingly gross violation of residents' rights.

### **Legal Background**

An overview of the free expression principles implicated by the Town's conduct is contained in a prior open letter to Cities and Towns.<sup>4</sup>

Under constitutional law, government regulations that forbid signs or require residents to obtain prior government permission, e.g. a permit, to express their views on matters of public import on their own private property are unlawful.

The Lee Zoning Code implicitly recognizes this principle through its exemption to permitting requirements for "political" signs, but does so in a manner that is too narrow to satisfy constitutional muster. For instance, it is too narrow because 199-7.3 defines a political sign to include only "A sign designed to influence the action of voters for the passage or defeat of a measure or the election of a candidate to a public office at a national, state or local election." Indeed, the sign at issue in the leading case of *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), which is emphasized in our open letter, was a sign

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<sup>2</sup> Eyewitness reports – corroborated by a response to a public records request – confirm the named individuals confiscated the signs.

<sup>3</sup> We understand from reviewing video of the May 24, 2021 Planning Board meeting (beginning around minute 18) that this situation may have begun with an expression of concern about signs opposing the dump being nailed on telephone poles, which may be located on public property. Regardless of the Town's authority to enforce in a viewpoint and content-neutral way rules governing signs on public property (which on a quick review of the Zoning Code do not seem all that clear), the Town's authority with regard to signs on private property is more restricted as a constitutional matter. Indeed, the Planning Board members specifically referenced this important distinction in the May 24 meeting, while some of them were apparently of the incorrect view that political signs on private property legally can be time-limited.

<sup>4</sup> The letter is available here:

[https://www.aclum.org/sites/default/files/20190423\\_open\\_letter\\_to\\_towns.pdf](https://www.aclum.org/sites/default/files/20190423_open_letter_to_towns.pdf).

expressing a non-electoral political view, “For Peace in the Gulf.” It is also too narrow to provide sufficient constitutional protection because 199-7.7 states that political signs (as narrowly defined) can only be posted for 20 days prior to and 5 days after voting day. As explained in our open letter and as was at issue in a 2019 case against the City of Holyoke,<sup>5</sup> such limits on electoral signs prohibit too much speech at the home and are also a content-based restriction in violation of *Reed v. Gilbert*, 576 U.S. 155 (2015). The Zoning Code is also too narrow, and discriminatory on the basis of the content of the regulated speech, because political signs can only be 4 square feet – which we note the signs at issue here apparently did *not* exceed – while other types of signs, including various commercial signs, can be larger. *See, e.g.*, 199-7.7E and G and 199-7.8.

We have also seen communications from the Building Commissioner purporting to justify the removal of these political signs from private property based on varying assertions that they were too close to public property and/or did not have the homeowners’ names on them. As to setbacks, we see no general rule that signs on private property have to be some particular distance from public property, as opposed to specific requirements applicable, for instance, to construction signs and for rent or for sale signs. 199-7.7E and G. In any event, it is highly doubtful that any rule prohibiting homeowners from using the full extent of their property to express their views would be constitutional, absent a determination that a particular placement caused a real public safety issue, e.g. with regard to traffic safety.<sup>6</sup> Similarly, we see no Town of Lee rule requiring that each homeowner put their name on any sign expressing their political views and, indeed, such a rule would likely be unconstitutional, because the Town does not have a legitimate interest in knowing who has posted signs on private property and residents have a right to engage in anonymous speech.<sup>7</sup>

Compounding these clear free speech violations is the utter lack of due process in this recent confiscation of signs. Recognizing basic due process

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<sup>5</sup> *Molloy v. City of Holyoke*, No. 3:18-cv-30182 at 2 (D. Mass. 2019), <https://www.aclum.org/en/cases/molloy-et-al-v-city-holyoke> (city ordinance limiting the times during the year when residents can display political signs at their own residences declared unconstitutional).

<sup>6</sup> Indeed, sign restrictions on land close to public ways are constitutionally suspect. *Flaherty v. Knapik*, 999 F. Supp. 2d 323 (2014). We further note that the Town’s code provisions are fraught with content-based distinctions that make them problematic under *Reed*, discussed above, as applied to both public and private property.

<sup>7</sup> *See, e.g., Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382–83, 2385 (2021) (the constitution “requires that there be a substantial relation between [any] disclosure requirement and a sufficiently important governmental interest, and that the disclosure requirement be narrowly tailored to the interest it promotes”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (state law prohibiting distribution of anonymous political literature violated the First Amendment).

principles, 199-7.6 E expressly requires a written notice about any allegedly unlawful sign and provides 20 days for the resident at issue to correct the situation or appeal. Multiple people have reported to us that no such notice was provided before their signs were confiscated by Town employees. As some residents have noted, if proper notice had been given, they could have pointed out the lack of bases for the confiscation and/or adjusted the signs to come into conformity with any duly promulgated and constitutional limitations.

### **Conclusion**

For the reasons stated above and more, we urge you to, within 48 hours or less, return all signs confiscated from private property, issue individual and public apologies for this abuse of power, suspend further unconstitutional applications of the Zoning Code, and revise the Code to come into constitutional compliance. Failure to do so could expose the Town and individual Town employees to liability under state and federal civil rights laws, particularly given that “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 374 (1976).

Sincerely,

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