

January 22, 2010

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Town of Cary, North Carolina  
Attn: Mr. Jeffery G. Ulma, Director of Planning  
P.O. Box 8005  
Cary, North Carolina 27512-8005

**Re: Amendments to Land Development Ordinance**

Dear Mr. Ulma:

The Town of Cary has requested my input regarding a review of its current Land Development Ordinance (LDO) involving signage insofar as the LDO provisions are impacted by the First Amendment of the United States Constitution. I have had the opportunity to review the current LDO as well as review proposed modifications to the LDO. I have also had the opportunity to discuss proposed modifications with you and members of the staff, including the Associate Director of Planning Ricky Barker and the Senior Planner Mary Beerman.

As a legal professional specializing in drafting and reviewing land development regulations for signage, it is my recommendation that the same be reviewed on a periodic basis to ensure that the regulations continue to satisfy any and all constitutional requirements, to remove superfluous and/or obsolete provisions, to codify actual practice, and to provide additional clarity in purpose, scope and intent in conjunction with aesthetic concerns, or pedestrian/vehicular safety, or both.

By and large, the regulation of signage under a land development code is principally concerned with community aesthetics. Given the fact that such a code is focused with land development under a municipality's zoning and police powers, the land development code provisions as to signs do not normally extend to objects such as cemetery markers, temporary holiday/seasonal decorations, public art, equipment or machinery signs, and the like. It has been my practice over recent years to carefully define the term "sign" in a manner that does not reach beyond the traditional scope of a land development regulation. It has also been my practice to carefully prune language that may be superfluous or obsolete and to keep provisions direct and simple on the one hand, but with enough specificity on the other hand to ensure that the law is clear. The Town of Cary has developed a very sophisticated land development code that needs very little, if any, modification.

The Town of Cary's current LDO satisfies the three issues that most commonly arise in connection with sign codes: (1) the presence of what is commonly referred to as a "substitution clause," (2) a provision that makes adequate allowance for "election signs," sometimes referred to as "political signs," and (3) a provision that makes sufficient allowance for signage sometimes referred to as "free expression" or "free speech" signs to ensure that a local government does not

run afoul of restricting too much speech and to satisfy the U.S. Supreme Court's decision in *Ladue v. Gilleo*, 512 U.S. 43 (1994).

To the extent that any of the foregoing issues pose First Amendment concerns, the following explanations should assist the Town Planning and Zoning Board and/or the Town Council.

A. **Substitution clause.** Following the decision in *Metromedia v. City of San Diego*, 453 U.S. 490 (1981), many local governments have adopted a "substitution clause" to specifically provide that commercial speech is not preferred over noncommercial speech. This usually codifies actual practice. Local governments were urged to adopt substitution clauses by the Southern Environmental Law Center (Charlottesville, Virginia) in the late 1980s, and many published decisions have referred to the presence or absence of a "substitution clause" in analyzing the constitutionality of sign regulations. See *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987); *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43 (4th Cir. 1987); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988). See also *Get Outdoors II, L.L.C. v. San Diego, Calif.*, 381 F.Supp.2d 1250 (S.D.Calif. 2005), aff'd, 506 F.3d 886 (9th Cir. 2007); and *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993). The Town of Cary has a substitution clause contained within the LDO, at Section 9.17 (Substitution of Messages), which provides:

Any sign allowed under this Chapter or a predecessor ordinance, without a permit, by sign permit, by conditional use permit, or by variance, may contain, in lieu of any other message or copy, any lawful noncommercial message that does not direct attention to a business operated for profit, or to a product, commodity or service for sale or lease, or to any other commercial interest or activity, so long as said sign complies with the size, height, area and other requirements of this Chapter.

B. **Election signs.** Temporary election signs frequently become an issue when an ordinance sets a short time limit for the display of election signs prior to an election, and typically courts have viewed such pre-election durational limits as unconstitutional restraints on free speech. Election signs are often referred to as, and are always included within the definition of, "political signs." The context often makes it clear that the term "political signs" refers to what serve as election signs. The Town of Cary's LDO, at Section 9.2.O, essentially describes what one would consider to be traditional election signs within its framework for regulating "political signs." The Town of Cary's LDO also provides durational limits setting a time frame for election signs to be removed following an election. As opposed to pre-election durational limits, these post-election durational limits are typically upheld. See *Election Signs and Time Limits, Evolving Voices in Land Use Law*, 3 Wash. U.J.L. & Pol'y 379 (2000). Another issue involving temporary election signs involves limits on the number of election signs that may be displayed on a parcel or lot. See *Arlington County Republic Party v. Arlington County*, 983 F.2d 587 (4th Cir. 1993). Some legal experts suggest that there be an aggregate square footage allowed for temporary election signs prior to an election, or that the allowable number of

temporary signs be increased during election season. A cautious approach to temporary election signs-and my recommended practice-is to allow for a temporary election sign for each candidate and each issue during an election season and to establish no durational limit other than one for the removal of temporary election signs following the conclusion of the election. The Town of Cary has already established precisely the type of regulation that I recommend to local governments. The LDO, at Section 9.2.O, allows for a temporary election sign for each candidate and each issue, and establishes no durational limit prior to an election, but only a durational limit of ten days after an election for the temporary signs to be removed. This manner of regulation is tied to the function served by such signs and I would not recommend any change from the current provisions in that regard.

**C. Free expression signs.** The phrase “political signs” is sometimes used to describe not only temporary election signs but also signs that are sometimes referred to as free expression/free speech signs that allow for an individual or entity to express a noncommercial message or a viewpoint on any topic (whether or not political in nature). Regardless of their designation, such free expression signs may be specifically allowed through other contexts within a sign code, including but not limited to the use of a substitution clause that allows a noncommercial message to be substituted in place of a commercial message (discussed above), or as residential signs subject to size, height, and number limitations, or as a form of political sign but without the durational limit applicable to an election sign or a political sign that functions as an election sign. Some jurisdictions allow free expression signs in practice but have not yet codified that practice. Typically, the only constraint upon the content of these signs would be any state law provision that prohibits obscene speech. I always recommend that local governments leave it to state law to describe the contour of obscene speech. The Supreme Court determined in *Ladue* that it is a necessity for a local government to provide for the allowance of what is sometimes referred to as free expression or similar such expression in the context of signage.

In the *Ladue* case, City of Ladue resident Margaret P. Gilleo placed a six square foot sign on her front lawn with the message “Say No to the War in the Persian Gulf, Call Congress Now.” The signs were vandalized, which she reported to the police, and they advised her that such signs were prohibited in Ladue. *See* 512 U.S at 45. Ms. Gilleo then applied for a use variance and the variance was denied. Ms. Gilleo subsequently placed an 8.5” x 11” sign in her second story window which stated, “For Peace in the Gulf,” and the City of Ladue enacted a new sign ordinance which continued to restrict personal message signs, even including the 8.5” x 11” sign displayed by Ms. Gilleo in her second story window. *See* 512 U.S. at 45-6.

For those interested in learning more about the *Ladue* case beyond the opinion itself, I recommend reading the briefs filed by the parties and the amici and the transcript of the oral arguments. I will provide the same to the Town of Cary should any citizen be interested in reviewing that record. The City of Ladue was enforcing an ordinance that did not allow for any display of a temporary sign on a residential lot such as would allow a homeowner to display a particular viewpoint or opinion. By not allowing Ms. Gilleo, as a homeowner, to display a sign that was even less than one square foot anywhere on her property, the City of Ladue had restricted too much speech. The Supreme Court’s decision stated:

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

. . . Gilleo and other residents of Ladue are forbidden to display virtually any “sign” on their property. The ordinance defines that term sweepingly. . . .

Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes.<sup>FN12</sup> They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

FN12. “[S]mall [political campaign] posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate—an impact that money can't buy.” D. Simpson, *Winning Elections: A Handbook in Participatory Politics* 87 (rev. ed. 1981).

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. [Citation omitted.] Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate. [Footnote omitted.] Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means. [Footnote omitted.]

A special respect for individual liberty in the home has long been part of our culture and our law, [citations omitted] that principle has special resonance when the government seeks to constrain a person's ability to *speak* there. [Citation omitted.] 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, [citations omitted], its need to regulate temperate speech from the home is surely much less pressing [citation omitted].

Our decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs.<sup>FN17</sup> It bears mentioning that individual residents themselves have strong incentives to keep their own property values up and to prevent "visual clutter" in their own yards and neighborhoods-incentives markedly different from those of persons who erect signs on others' land, in others' neighborhoods, or on public property. Residents' self-interest diminishes the danger of the "unlimited" proliferation of residential signs that concerns the City of Ladue. We are confident that more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens. As currently framed, however, the ordinance abridges those rights.

FN17. Nor do we hold that every kind of sign must be permitted in residential areas. Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We also are not confronted here with mere regulations short of a ban.

512 U.S. at 48, 54-55, 57-59.

Following the decision, the City of Ladue amended its sign regulations to allow for the display of a temporary sign that would accord Ms. Gilleo and any other homeowner the opportunity to communicate their opinion through a small sign. Today, the City of Ladue's modified sign ordinance allows the display of one such sign (double-sided) with a maximum size limitation of four square feet per sign face. City of Ladue Sign Ordinance, § 130-5(a)(5) (one sign with a political, religious or other similar noncommercial message per lot).

While there may be alternative modes of communication, the U.S. Supreme Court would not countenance a *complete* or *total* prohibition of any sign on residential property. As a practical matter, many communities do not prohibit the display of a free expression sign on residential property but do not actually provide for that type of signage in their sign codes. This often necessitates the codification of actual practice, and many communities have codified that practice when reviewing their sign codes and actual practices. I typically recommend that a local government provide for the display of one free expression sign at any time, with a size limitation ranging from three square feet to four square feet per sign face. Examples from other jurisdictions include the Township of East Hanover, N.J. (3 square feet); Township Union (Hunterdon County), N.J. (3 square feet); Clay County, Fla. (3 square feet); City of Monroe, N.C. (3 square feet); Town of Orchard Park, N.Y. (4 square feet); City of Oldsmar, Fla. (3 square

feet); City of St. Pete Beach, Fla. (3 square feet); Town of Orange Park, Fla. (3 square feet); Lebanon Borough, N.J. (4 square feet); Clinton Township, N.J. (4 square feet); Town of Clinton, N.J. (3 square feet); Greenwich Township, N.J. (3 square feet); City of Winter Park, Fla. (3 square feet).

A range of three to six square feet appears to be common among North Carolina municipalities that have specifically provided for such signage. *See* City of Monroe, N.C. (3 square feet); the City of High Point, N.C. (6 square feet); and City of Greensboro, N.C. (6 square feet). Many municipalities have not made provision for free expression signs in their codes, but nevertheless follow the teachings of Ladue and do not prohibit a small free expression sign such as the one displayed by Ms. Gilleo. If the question comes up, it is prudent to codify actual practice.

The Town of Cary's ordinance allows the display of two such residential signs<sup>1</sup> (each double-sided) with a maximum size limitation of 5 square feet per sign face (*see* Section 9.3.2(S)(1), Residential Sign), in addition to a wall sign on a building in residential use up to two square feet in size that may be increased in size through a variance (*see* Section 9.3.2(X)(2)(a)1, Wall Sign-Residential/Institutional). This is more liberal as to the number of free expression signs than any local government that I have worked with over the past decade. I would not recommend any change to the current provision. I would note that the current provision does not limit free expression signs to wall signs or require that freestanding signs be within a few feet of a building or structure, but allows the signs to be displayed as freestanding signs along the lot line or anywhere else on the property. Again, the Town of Cary's approach is more liberal than other provisions that I have reviewed that limit such signs to being within a specific distance from a building or structure which may be some distance away from the street or lot line.

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In connection with the specific provisions as proposed by the Town of Cary Planning Department, I offer the following:

**1. Section 9.3.2.R.** I have reviewed the proposed amendment to certain provisions allowing for off-premise "open house" residential real estate signs, contained within the LDO at Section 9.3.2.R. Due to the adverse conditions in the residential real estate markets across the country, it is not unusual for a local jurisdiction to ease provisions as to the time, place and/or manner involved in the display of temporary "open house" and/or directional real estate signs. Last year, a local jurisdiction in Florida determined that an amendment was necessary and appropriate based upon consideration of the unique function served by such temporary signage in view of the nationwide housing crisis and the increase in the number of distressed real estate parcels offered or that may be offered for sale. This is precisely the type of careful balance that courts will uphold as being uniquely within the scope of a legislative function, not to be second guessed by the judiciary. Under current jurisprudence [*see Linmark Associates v. Town of Willingboro*, 431 U.S. 85 (1977)], temporary on-site real estate signs, such as "for sale" signs,

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<sup>1</sup> The Town of Cary defines the term "Sign, Residential" as "Any sign located in a district zoned for residential uses that contains no commercial message." Town of Cary LDO, at Section 12.2.

must be allowed given their important role and unique function. In invalidating an ordinance that prohibited “for sale” on all but model homes, the Supreme Court stated, “That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families.” *Id.* at 86. Temporary residential real estate signs identifying an “open house” and/or providing directions to the “open house” serve an important function by assisting the motoring public in locating an open house and improving traffic safety by providing information during peak periods when the real estate community is active in providing opportunities for potential buyers and renters to visit residential parcels. The modification to the time period, the number of qualifying open house events, and the allowable color scheme, when combined with the Town’s past history of limiting the time, place, and manner for such temporary signs, confirm that the Town of Cary has struck a balance in the community’s continuing interests in aesthetics and traffic safety with the function served by the display of temporary “open house” signs during the weekend.

Given the expectation that the distressed residential real estate market will continue for approximately three years, the Florida jurisdiction set a three year sunset on its modification by providing in the adopting ordinance that the amendment to that particular section shall stand repealed at 12:01 a.m. on the date that is three years following the date of the adoption of the ordinance, whereupon the provisions of said section shall revert to the provision that was in effect immediately prior to such amendment unless subsequently amended. This would appear to be a prudent choice and I would recommend the same for your consideration. Of course, further amendments could be adopted as the circumstances change.

**2. Section 9.1.2.B(4) and Section 9.4.** I have reviewed the proposed deletion of superfluous provisions contained within Section 9.1.2.B(4), *i.e.*, “the reference to the prohibition of all signs not expressly permitted by this chapter.” I have also reviewed the proposed deletion of the introductory sentences to Section 9.4, *i.e.*, “All signs not expressly permitted under this chapter or exempt from regulation hereunder in accordance with the previous section are prohibited. Such signs include, but are not limited to” to be replaced with the following provision: “The following signs and devices are specifically prohibited.” As I mentioned previously, land development regulations for signage should be periodically reviewed, *inter alia*, to remove superfluous provisions. The proposed deletions within Section 9.1.2.B(4) and Section 9.4 are examples of the types of superfluous provisions that I recommend for deletion from a land development code. I have discussed these provisions with you and your staff and confirmed that these provisions are indeed unnecessary and serve no real purpose. While these provisions are not unusual, the better practice is to simply delete them. The presence of superfluous provisions may sometimes engender speculation or nonsensical hypotheses if someone tries to attribute a nefarious purpose to their inclusion in a code, as opposed to the simple fact that the language in question is simply superfluous-nothing more, nothing less.

**3. Section 9.2.E and Section 9.2.F, along with Principles of Interpretation.** I have reviewed the proposed deletion of “works of art with no commercial message . . .” (§ 9.2.E) and “holiday decorations with no commercial message . . .” (§ 9.2.F) from the list of signs exempt from regulation in Section 9.2 of the LDO, along with the box entitled “Principles of

Interpretation.” In view of the proposed amendment of the definition of “sign” for purposes of the Town’s LDO at Section 12.4, these provisions and the related language of the principles of interpretation are superfluous. Consistent with my earlier observations, a land development code does not ordinarily concern itself with objects such as cemetery markers, temporary holiday/seasonal decorations, equipment or machinery signs, noncommercial artwork (public art), and the like. For purposes of defining the term “sign,” it is not unusual to exclude from the definition those objects that are outside the traditional scope of a land development regulation. I am not aware of any logical reason to extend a “land development” regulation to reach an object such as a temporary holiday or seasonal decoration, a cemetery marker, public art, a machinery or equipment device, etc. As a land development code, the words and phrases therein should be defined with a recognition of the purpose of the regulation, and the Town of Cary’s LDO accomplishes this. See the discussion below as to Section 12.4 of the LDO.

**5. Section 7.9.3(J), Section 9.4.B, and Section 9.6.1(E)(5).** I have reviewed the proposed addition of Section 7.9.3(J) Exterior Lighting – Lights in Landscaping and Illuminated Tubing to Section 7 of the LDO. This seems to be an appropriate location for this provision, as opposed to Section 9.4.B. Accordingly, I concur that the reference to “illuminated tubing or strings of light . . .” within Section 9.4.B of the LDO should be deleted as an obsolete provision, and that the provisions of Section 9.6.1(E)(5) should likewise be deleted as an obsolete provision.

**6. Renumbering of Sections 9.4.C through 9.4.M to Sections 9.4.B through 9.4.L.** The renumbering of these provisions is necessitated by the deletion of the current Section 9.4.B.

**7. Section 9.4.M.** I have also reviewed the proposed renumbering of Section 9.4.N to Section 9.4.M, coupled with the inclusion of the terms “billboards, and pole signs” which have been moved from Section 9.6.1.E.9 of the LDO. The retention of the phrase, “except as otherwise permitted in this ordinance” is appropriate for purposes of clarity given the exception for temporary off-site “open house” residential real estate signs. The terms “off-site signs,” “billboards” and “pole signs” have their own specific meanings as set forth in Section 12.4 of the LDO. The law is quite clear that new “off-site signs” or new “billboards,” when defined or construed to mean offsite commercial signs or billboards, can be completely prohibited. *See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-807 (1984) (summarizing *Metromedia*: “[t]here the Court considered the city’s interest in avoiding visual clutter, and seven Justices explicitly concluded that this interest was sufficient to justify a prohibition on billboards”); *Ladue*, 512 U.S. at 49 (summarizing *Metromedia*: “The Court concluded that the city’s interest in traffic safety and its esthetic interest in preventing “visual clutter” could justify a prohibition of off-site commercial billboards even though similar on-site signs were allowed”). *See also Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 814 (9th Cir. 2003).

The terms “billboard” and “off-site sign” are often synonymous and used to describe the same sign type. For example, the Town of Cary defines the term “Billboard” as “Any outdoor advertising sign erected and maintained by an advertising business or service, upon which advertising matter may be displayed and that generally advertises firms and organizations that,

along with their goods and services, are not located on the same premises as the sign; and whose surface is sold, rented or leased for display of advertising material” (see LDO Section 12.4) and defines the term “Sign, off-site” as “Any sign that is used to attract attention to an object, person, product, institution, organization, business, service, event, or location that is not located on the premises upon which the sign is located. This shall not include traffic, directional, or regulatory signs or notices erected by a federal, state, county, or municipal government agency.” *Id.* Here, the commercial connotation of these two definitions should be readily apparent. See, e.g., *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798, 801-802 (9th Cir. 2007); *Maverick Media Group, Inc. v. Hillsborough County, Fla.*, 508 F.Supp.2d 1126, 1154-1155 (M.D.Fla. 2007), *vacated on other grounds*, 528 F.3d 817 (11th Cir. 2008); *Infinity Outdoor, Inc. v. City of New York*, 165 F.Supp.2d 402, 406 (E.D.N.Y. 2001). See also *Office of Senator Mark Drayton v. Hanson*, 550 U.S. 511, 514 (2007).

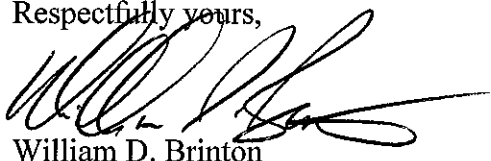
Also, it is not unusual to prohibit “pole signs” in favor of signs commonly known as ground signs or monument signs. Depending upon the context, a proposed sign may be prohibited as an off-site sign, and/or a billboard and/or a pole sign, and the terms are not mutually exclusive.

**8. 9.6.1(E)(9) - Prohibited Signs and Devices.** The amendments to Section 9.4, resulting in the addition of a new Sections 9.4.M through 9.4.P, make the provisions of 9.6.1(E)(9)(a) through (d) superfluous.

**9. Section 12.4.** I have reviewed the proposed modification of the term “Sign” in Section 12.4. As I mentioned at the outset of this letter, it has been my practice over recent years to define the term “sign” in a manner that does not reach beyond the traditional or intended scope of a land development regulation. The proposed modification of the term “Sign” in Section 12.4 is appropriate here to make clear the scope of that term in the context of a land development code. The same would not be intended to reach within its scope holiday decorations, public art, cemetery markers, lighting accentuating architectural or landscape features, or machinery or equipment signs incorporated into the machine or equipment itself that functions to identify a product or service dispensed or offered by the device, such as a soft drink or other vending machine, a gas pump machine, an express mail drop-off like a UPS or Federal Express device, a phone booth, a newspaper dispenser or coin operated device, and such other similar machines or equipment that are visible from the street but are not intended to be regulated as signs within the scope of a land development code.

I hope this review will be helpful.

Respectfully yours,



William D. Brinton

Town of Cary, North Carolina

January 22, 2010

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c: Mr. Ricky Barker, Associate Director of Planning, Town of Cary  
Ms. Mary W. Beerman, Senior Planner, Town of Cary  
Ms. Rachel Cociolo, Paralegal, Rogers Towers, P.A.