



City of Peoria

OFFICE OF THE CITY ATTORNEY
8401 W. Monroe Street, Room 280
Post Office Box 4038
Peoria, AZ 85380-4043
T 623.773.7330
F 623.773.7043

OPINION NO. 2015 - 01

TO: Chris Jacques, Planning and Community Development Director
FROM: Stephen M. Kemp, City Attorney
DATE: December 24, 2015
SUBJECT: Application of First Amendment to the United States Constitution and the Arizona Constitution to Donation Bins

QUESTION:

This is to request a formal legal opinion of the impact on the current Donation Bin Ordinance adopted by the Peoria City Council as Ordinance No. 2015-08 stemming from the Court decisions in *Reed v. Town of Gilbert and Planet Aid v. St. Johns, Michigan*, 782 F3d. 318 (6th Circuit 2015). More specifically, as you know, the Ordinance currently requires Temporary Use Permits for donation bins to have notarized owner authorization. Do you recommend that this practice continue short of a formal Zoning Text Amendment and in light of the above referenced decisions?

OPINION:

On April 7, 2015, the Peoria City Council adopted Ordinance No. 2015-08. The Ordinance provided a specific definition for Donation/Recycling Drop-off Boxes. The Ordinance also contained a number of regulatory requirements on the issuance of Temporary Use Permits for the boxes and regulatory requirements regarding their placement. One of the regulatory requirements is set forth in subsection 1 which is the subject of your opinion request that pertains to a notarized written authorization by the owner. The owner authorization requirement provides as follows:

14-3-14. DONATION/RECYCLING DROP-OFF BOXES

Donation/Recycling Drop-Off Boxes are subject to the issuance of a Business License and approval of a Temporary Use Permit (TUP) pursuant to Article 14-39 and upon receipt of notarized written authorization by the property owner or authorized agent. An authorized agent must provide written evidence he/she has the authority to approve and locate a drop-off box on the parcel.

This requirement of a notarized signature is unique to Donation/Recycling Drop-Off Boxes. All other Temporary Use Permits are governed pursuant Section 14-39-13.D of the Peoria Zoning Ordinance which provides:

D. *Application.* A property owner or duly authorized agent may submit an application for a Temporary Use Permit. The applicant shall obtain the official application materials from the Department. Submittal requirements shall be as outlined on the official form and any other requirements that the Department deems necessary to understand the proposal, including Site Plans prepared in accordance with Section 14-39-11, "Site Plan Review," of this Article. The applicant shall submit the official application and associated materials, together with the applicable fee, to the Department.

Following enactment of Ordinance No. 2015-08, the Sixth Circuit United States Court of Appeals rendered a decision in *Planet Aid v. City of St. Johns, Michigan*, 782 F.3d 318 (6th Circuit 2015) on April 6, 2015 and available on April 8, 2015. In *Planet Aid*, the City of St. Johns, Michigan ("St. Johns") appealed a decision by the United States District Court the Western District of Michigan issuing an injunction against the enforcement of the City's donation bin ordinance.

The St. Johns' ordinance banned donation boxes from locating in the City, while grandfathering in existing boxes. Subsequently, Planet Aid filed a complaint seeking injunctive relief on the grounds that charitable solicitation is protected by the First Amendment to the United States Constitution and that the ordinance must be evaluated under a strict scrutiny analysis. The Court agreed with Planet Aid and granted its request for an injunction.

The United States Supreme Court held that charitable solicitation is speech that is protected by the First Amendment to the United States Constitution.¹ In evaluating ordinances restricting charitable solicitation, the Supreme Court has applied a strict scrutiny analysis, holding that an ordinance cannot be sustained unless it serves a sufficiently strong, subordinating governmental interest.²

Subsequently, the Fifth Circuit United States Court of Appeals invalidated a Texas law requiring that donation bin applicants indicate if the donations received would be sold for profit. The Court held that donation bins are not mere collection points for unwanted items, but silent solicitors and advocates for

¹ *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826 (1980); *Secretary of State v. Munson*, 467 U.S. 947, 104 S.Ct. 2839 (1984); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667 (1988)

² This is frequently referred to as a compelling governmental interest. Generally this is an interest so compelling that regulation is required and the means selected are the least restrictive.

particular charitable causes and as such are protected by the First Amendment to the United States Constitution.³

Moreover, the Arizona Constitution independently recognizes the right to freedom of speech. Ariz. Const. Art. 2 §6. In fact, the Arizona Supreme Court held the Arizona Constitution is, in some respects more protective of free speech than the First Amendment.⁴ Therefore a similar analysis would apply in evaluating Peoria's Ordinance under the Arizona Constitution. If, Peoria's Ordinance fails to meet federal constitutional standards it would fail to meet Arizona constitutional standards. Even if, the Ordinance met federal constitutional standards it may violate the Arizona Constitution.

Under this analysis if an ordinance is content based, strict scrutiny applies, if however, if an ordinance is content neutral, then a constitutional analysis would apply an intermediate level of scrutiny. Under intermediate scrutiny we look to see if the ordinance imposes a reasonable time, place and manner restriction. The United States Supreme Court adopted four principles of analyses which are used to ascertain whether a regulation is content based or content neutral.

First, the Court focuses on whether the government has adopted a regulation of speech, because of disagreement with the message it contains.⁵ That is, if the regulation engages in viewpoint discrimination, it is content-based.⁶ The general rule is that laws which by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based and therefore unconstitutional.

Second, the Court held that the content-neutral/content-based distinction may turn on whether the regulation hampers the communicative impact of the speaker's expressive conduct.⁷ That is, if a regulation is content-neutral only if it is unrelated to expression.⁸ For example, a regulation prohibiting tobacco advertising within 1000 feet of a school could prohibit a grocery store from having a tobacco display behind a counter. The broad regulation prohibits legal expressive conduct with the result being that the communicative impact of the conduct is interfered with in violation of the First Amendment.

³ *National Federation of the Blind of Texas, Inc. v. Abbot*, 647 F.3d 202 (5th Cir. 2011)

⁴ *Coleman v. City of Mesa*, 230 Ariz. 352, 284, P.3d 863 (2012), *citing*, *State v. Stummer*, 219 Ariz. 137, 194 P.3d 1043 (2008)

⁵ *Hill v. Colorado*, 530 U.S. 703, 719, 120 S.Ct. 2480, (2000); *quoting Ward v. Rock against Racism*, 491 U.S. at 791, 109 S.Ct. 2746 (1989)

⁶ *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. at 643, 114 S.Ct. 2445 (1994)

⁷ *Texas v. Johnson*, 491 U.S. 397, 411, 109 S.Ct. 2533 (1989).

⁸ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567, 121 S.Ct. 2404 (2001).

Third, the Court should examine whether the legislature's predominant intent regarded the content of the speech, rather than its secondary effects.⁹ An adult use ordinance aimed at combating secondary effects from adult uses would be upheld, however a similar ordinance aimed at preventing adults from viewing videos of specified sexual activities in the privacy of their home would be struck down.

Fourth, and most obviously, the United States Supreme Court finds that when a regulation is based on the content of speech and not applicable to all speech irrespective of content, the regulation is content-based. That is, when a regulation regulates speech on the basis of its subject matter, it is by its very nature not content-neutral.¹⁰

Under these principles of analyses adopted by the Court, Ordinance No, 2015-08 clearly regulates protected speech on the basis of its content and therefore those provisions that regulate content are unconstitutional in violation of the First Amendment to the United States Constitution and the Arizona Constitution. The Ordinance singles out Donation/Recycling Boxes for special application requirements applied to no other Temporary Use Permit. Other temporary uses such as Christmas Tree lots, Valentine's Day lots and Fireworks lots invoke similar owner/lessee authorization, traffic, debris and compatibility issues, yet are not subject to the stringent application standards contained in subsection 1 of 14-3-14, only Donation/Recycling Boxes are subject to such requirements.

It can be argued that Donation Bins may end up on vacant property or large parking lots without the consent of the owner and the notarization requirement is designed to prevent this. However, a Pumpkin sales lot can end up in a neighborhood shopping center with the permission of the grocery store and no notice to an owner of the shopping center or a Valentine's Day sales lot may end up on a corner lot, authorized by a real estate broker and with no permission of the lot owner. Uses such as Christmas Tree lots, Valentine's Day lots or Pumpkin lots can result in negative impacts on the owner such left over merchandise, trash and debris, yet none of the concern to the property owner's consent is provided in the City's process for application and issuance of Temporary Use Permits in these cases. The City does not require such notarization and written authorization for Pumpkin sales lots and Valentine's Day sales lots. Only the donation/recycling bin use is singled out for this higher standard.

Subsection 1 can only meet constitutional requirements if it's narrowly tailored to promote a compelling governmental interest. The requirement that only the applications for Temporary Use Permits for Donation/Recycling Boxes have

⁹ *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925 (1986).

¹⁰ *Consol. Edison Co.*, 447 U.S. at 530, 100 S.Ct. 2326 (1980).

notarized written authorization by the property owner and written evidence that the property owner representative have authority to locate the box provide strong indicia that the requirements are content based and fail to survive strict scrutiny.

The remaining provisions of Ordinance No. 2015-08 survive constitutional scrutiny. As the Sixth Circuit held in *Planet Aid v. City of St. Johns*, a City may regulate the physical characteristics of outdoor structures, provided they are content neutral. The remaining regulations contained in Section 14-3-14 of the Peoria Zoning Ordinance seek to do exactly that.¹¹

In summary, the negative effects that this Ordinance proposes to address occur with other Temporary Use Permits and yet no such authorization requirements are imposed. For these reasons, this office concludes that the provisions of Subsection 1 are not narrowly tailored to meet a compelling governmental interest. Because they fail to meet a compelling governmental interest, the provisions of Subsection 1 violate both the First Amendment to the United States Constitution and the Arizona Constitution and are invalid. In analyzing the remainder of the Ordinance following removal of the offending provision, the following is relevant.

In construing a statute, we are guided by the principle that it is presumed a statute is constitutional and it should be interpreted in such a manner as to uphold the statute. If, however, a statute burdens free speech, any presumption in favor of its validity is removed.¹²

A second principle in construing a statute is to give effect to the entire statute. Provisions of a statute are only ruled upon if necessary.¹³ These principles are followed in order to avoid interference with the legislative prerogative of enacting laws. Only if a statute is unconstitutional in its entirety, is the statute struck down in its entirety.

In this case, subsection 1 clearly burdens free speech and is not entitled to validity, however the remainder of the statute is not content based, but reasonable time, place and manner restrictions pertaining to land use. These provisions are entitled to a presumption of validity. Invalidating subsection 1 does not raise issues of judicially rewriting a statute, as the remainder of Ordinance No. 2015-08 can be applied without this provision.

¹¹ Subsection 3 requires placement on a paved service
Subsection 4 regulates placement on setbacks; landscaped areas and parking spaces
Subsection 5 regulates interference with vehicular circulation
Subsections 6 – 16 regulate donation box maintenance, cleanup and enforcement

¹² *Gallardo v. State*, 236 Ariz. 84, 336 P.3d 717(2014)

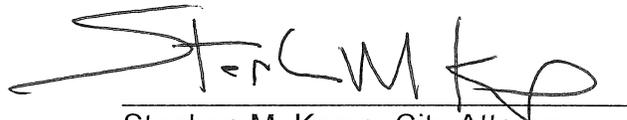
¹³ *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014)

In conclusion, it is our opinion that subsection 1 of Ordinance No. 2015-08 violates the First Amendment of the United States Constitution and Article 2, Section 6 of the Arizona Constitution. Enforcement of the current provision places the City at the risk of depriving a person of their constitutional rights in violation of 42 U.S.C. §1983, et al. It is our recommendation that the provision used for property owner/representative authorization for all other Temporary Use Permit applications be applied to Donation/Recycling Boxes.

If you should have any further questions, please do not hesitate to contact this office.

Sincerely yours,

OFFICE OF THE CITY ATTORNEY
CITY OF PEORIA, ARIZONA



Stephen M. Kemp, City Attorney

cc: Honorable Mayor and Council
Carl Swenson, City Manager
Susan Daluddung, Deputy City Manager
Rhonda Geriminsky, City Clerk
Jay Davies, Neighborhood Services Manager

413115.docx
SK:sk