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Diana Willits, Mayor
City of Windsor Heights
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CC:
Steve Peterson, Council Member
Betty Glover, Council Member
Tony Timm, Council Member
Threase Harms, Council Member
Zachary Bales-Henry, Council Member
Elizabeth Hansen, City Administrator
Sheilah Lizer, Building and Zoning Official
Erin Clanton, City Attorney
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Delivered via email to:
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August 14, 2017

Re: First Amendment Rights of Windsor Heights Citizens

Dear Mayor Willits and City Council Persons:

I am writing to you on behalf our clients, Diane Foss, Mike Miller, Marijetka Orr, and James Orr, regarding the City of Windsor Heights's ("City") decision to censor certain signs present on their properties and the procedures for doing so, in violation of their constitutional rights. Our intention in sending you this notice is to provide you with an opportunity to promptly resolve this matter amicably so as to protect the rights of our clients as well as all other residents of Windsor Heights without having to resort to litigation.

I. Background

A. Marijetka & James Orr

On Friday, July 14, 2017, our clients Marijetka and James Orrs tied a sign to their front porch which prominently protested the City's decision to move forward with the sidewalk project. The sign stated "No Concrete! 96% Said no, save the green space!" The sign was secured to the house on all four corners in an open-air window-box style opening of their front porch. A photo of the sign is attached.

The next morning, the Orrs left for vacation to Canada. Prior to leaving, the Orrs notified the Windsor Heights Police Department that they would be gone on vacation, so that the police could check in on the home and ensure its safety. The following Tuesday, July 18, while the Orrs were still on vacation, the City sent them a "Notice to Abate" letter, claiming that the sign constituted a nuisance because it was an "unsafe sign." The letter stated that the "maximum projection for any banner is three feet with a minimum clearance of 8.5 feet," and that the sign had been determined to be an "unsafe sign" because "the minimum clearance of 8.5' has not been established." Notably, the sign, being attached to the open-air window area of their front porch, laid flush with porch, such that no clearance would have been necessary, as the sign was placed somewhere where people do not and cannot walk under it, making its designation as a banner inappropriate.

The letter stated that they were required to remove the sign "immediately."

Only a few hours later that same day, City officials came to the property and removed the sign. The City did not have the Orr's consent, or a warrant, to enter onto their property and seize the sign. On August 11, the Orrs filed an appeal of the decision and request for hearing with the City.

B. Diane Foss & Mike Miller

Our clients Miller and Foss are neighbors of the Orrs. Upset by what they believe was a gross overstep by the city in removing the Orrs's sign, Miller and Foss erected their own sign to protest the City's actions, which read "City Hall Run Amok." A photo of the sign is attached.

On July 28, 2017, Miller and Foss received a notice and abatement letter from the City of Windsor Heights ordering them to remove their sign as well. The Notice instructed them to remove the sign from their property within twenty-four hours or face fines of up to $1000 per day that the sign remained in place.

In their case, the sole basis stated in the letter was an alleged violation of Windsor Heights City Code section 50.01, which defines nuisances as "[w]hatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property so as essentially to interfere unreasonably with the comfortable enjoyment of life or property."

The letter did not indicate that the sign violated any other zoning or sign ordinance.

Fearing the extensive fines threatened, Miller and Foss removed the "City Hall Run Amok" sign from their front lawn.

We have identified and documented various other signs of similar size, shape, and location scattered throughout the City of Windsor Heights that have been in place much longer than Miller and Foss's sign—in some cases, for years. Indeed, our clients' "City Hall Run Amok" sign was drawn on an old "Butz for City Council" sign that had remained on their lawn, as well as the lawns of many of their neighbors, for an extensive period of time without any notice to abate. In particular, our clients inform us that signs of a similar size and shape are currently located on the lawns of the Mayor and a City Councilperson.

On August 3, 2017, Miller and Foss appealed the nuisance determination. A hearing is currently scheduled before the Windsor Heights City Council on August 21, 2017 at 6:00 PM. Should you fail to address this matter adequately before that time, attorney Joseph Fraioli will appear on their behalf at that hearing.

II. Law

A. Diane Foss & Mike Miller

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment prohibits the government from censoring speech with which it simply disagrees. Speech on one's own property is held especially sacred under the First Amendment:

> 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. . . . . Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable . . . its need to regulate temperate speech from the home is surely much less pressing.

City of Ladue v. Gilleo, 512 U.S. 46, 58 (1994) (internal citations omitted). Further, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 135 S.Ct. 2218, 2226 (2015).

The City's application of Windsor Heights City Code section 50.01 against Foss and Miller based on the content of their yard sign which it has deemed "offensive" violates the First Amendment. It is impermissible under First Amendment jurisprudence for the City to regulate the message as a nuisance because the sign's message is critical of the City Council. It is similarly impermissible under the First Amendment to censor the sign merely in response to a complaint or complaints by others as to content, an example of an impermissible "heckler's veto."

The abatement letter sent to Foss and Miller did not indicate that the sign violated any sign or zoning ordinances in Windsor Heights, and many other residents of the City have similar types of signs on their front lawns which the City has not acted upon. Signs permitted to stand

include signs on the property of the sitting Mayor and a current sitting council member. The only basis the City could have for distinguishing between Foss and Miller's sign and these other signs is the content of the sign.

An otherwise permissible sign on private property simply cannot become a "nuisance" merely because the government—or a neighbor—does not like or agree with the message it sends. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive of disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). "[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978).

Particularly precious in a democracy is political speech. "Political speech, of course, is at the core of what the First Amendment is designed to protect." Morse v. Frederick, 551 U.S. 393, 403 (2007) (internal quotation marks omitted). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966).

Importantly, in a television interview, Building and Zoning Official Sheilah Lizer noted that the City is "complaint-based only," and therefore only investigates and acts upon alleged nuisances or ordinance violations when it receives complaints. Lauren Donovan, KCCI Des Moines, Windsor Heights Sidewalk Debacle Escalates After Complaint (updated 9:39 PM, July 20, 2017), available at http://www.kcci.com/article/windsor-heights-sidewalk-debacle-escalates-after-complaint/10338414.

Removing, or threatening to remove, the signs based on viewer complaints constitutes a city-enforced heckler's veto—where, rather than protecting the speech of its citizens over objections from passersby, the City is endorsing the views of those who disagree with the speakers' messages in the guise of a "nuisance" problem. See Bachellar v. Maryland, 397 U.S. 564, 567 (1970) ("[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.") (quotation marks and citations omitted). As the Eighth Circuit has affirmed in no uncertain terms, "[t]he first amendment knows no heckler's veto." Lewis v. Wilson, 253 F.3d 1077, 1082 (8th Cir. 2001).

"The government confuses the role of (and violates) the First Amendment when it allows citizens to trigger speech suppression because the speech offends them (i.e., when it allows hecklers to veto)." Frye v. Kansas City Missouri Police Dep't, 375 F.3d 785, 793 (8th Cir. 2004) Beam, J., dissenting. "The First Amendment guards jealously a citizen's right to express even controversial and shocking messages because speech 'may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" Id. at 792–93 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

Nothing about the words "City Hall Run Amok" is unsafe or hazardous to Windsor Heights citizens. As such, any proffered interest the City may assert for censoring Foss and Miller's speech cannot withstand strict scrutiny review. Consequently, the City's classification of Foss and Miller's sign as a nuisance and accompanying abatement letter violate the First Amendment.

B. Marijetka and James Orr

First Amendment

While a municipality may pass zoning requirements that regulate the size of signs on residential property, it may not treat certain signs differently than others based on their content. Under no circumstances may the City ban signs because they are political in nature, or because they criticize the City Council. The Orr's sign was eighteen square feet. Windsor Heights City Code section 175.03(4) discusses signs that are exempt from the sign ordinance requirements. Subsection 175.03(4)(A) exempts, in any zoning district, "[b]ulletin boards for religious assembly or school uses" that are under 20 square feet, but subsection 175.03(4)(H) mandates that residential signs must be under 2 square feet.

Under Reed v. Town of Gilbert, Arizona, regulations of certain types of signs based on the message of those signs constitutes a content-based distinction. 135 S. Ct. 2218 (2015). If political signs, directional signs, and ideological signs are subjected to different requirements under an ordinance, the ordinance will be reviewed under strict scrutiny. Id. at 2227. The City cannot justify permitting certain signs, such as religious signs, to exceed 18 square feet in any zoning district, while restricting residential signs to 2 square feet. Further, a city must still provide adequate justification for any restrictions on the size of signs. See Verilli v. City of Concord, 548 F.2d 262, 265 (9th Cir. 1977) (finding that, absent adequate justification, a four-square foot sign restriction violated the First Amendment).

Finally, in the case of the Orrs, the City apparently regulated their sign as if it were a banner, requiring minimum clearance for persons to pass below, despite the fact that it was not hung in a suspended manner where such clearance would be contemplated by anyone. Rather, the sign was hung flush with the open-air window opening of their front porch, where no clearance would be necessary. It is impermissible for the City to seek to classify signs in search of accomplishing a purpose to censor it. In this case, the application of the banner classification was inherently arbitrary and reeks of a purpose to engage in both content and viewpoint discrimination.

Unreasonable Seizure and Due Process

The City further violated the Orrs' Fourth and Fourteenth Amendment rights, because it deprived the Orrs of due process prior to enforcement of the nuisance determination, and because it executed an unreasonable seizure of the sign.

Administrative enforcement of city ordinances must conform to the reasonableness requirements of the Fourth Amendment. See Michigan v. Tyler, 436 U.S. 499, 504–05 (1978).

Further, before the government may deprive a citizen of their liberty rights to abate a nuisance, the citizen must be provided an adequate opportunity to respond to the allegations and be heard. See Samuels v. Meriwether, 94 F.3d 1163, 1166–67 (8th Cir. 1996); see also Hagen v. Traill Cnty., 708 F.2d 347, 348 (8th Cir.1983).

The City was on notice that the Orrs had left for vacation on July 18, and thus could not immediately comply with the notice to abate. However, the sign was removed by the City mere hours later, on that same day. A similar case from the Second Circuit is instructive here. In Livant v. Clifton, the property owner was out of town when the city sent a notice to abate a nuisance on the property in question. 272 Fed.Appx. 113, 115–16, 2008 WL 925378 (2d Cir. April 7, 2008).

> Livant argues that he was deprived of procedural due process because the Town Officials Defendants failed to provide him with notice and an opportunity to be heard before abating the alleged nuisance on his property. Due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." "Reasonably calculated notice is notice by means 'such as one desirous of actually informing the [property owner] might reasonably adopt to accomplish it.'" Supreme Court decisions have indicated that "where a State or municipality knows that the person's condition or location is such that he will not be adequately apprised of the proceeding in question through the statutory method of notice used, the due process clause will not have been complied with."

Id. (internal citations omitted). The Court determined that where the city was on notice that the property owner would not have received the notice because he was out of town, due process was not met. Id. at 116.

Even if this was not the case, however, a period of less than twenty-four-hours notice is not sufficient to comply with the "reasonable notice" due process requirement. See id. Nor would the City's taking action the same day they sent the letter be objectively reasonable, because here, as a factual matter the sign was not unsafe. It posed no actual danger or harm. See id.; see also Hagen, 708 F.2d at 348 (finding due process was met when city gave landowner over a year's notice to remedy dangerous and hazardous property before taking action); Nikolas v. City of Omaha, 605 F.3d 539, 546–47 (8th Cir. 2010) (finding that the plaintiff was provided several years notice prior to the city acting upon the nuisance property).

The City further conducted an unreasonable seizure under the Fourth Amendment by entering the Orr's property and removing the sign without a warrant. "Although . . . a warrant is not required to abate a public nuisance, the seizure of property considered to be a public nuisance, as well as the entry onto private property to accomplish that seizure, must still be reasonable to comply with the Fourth Amendment." Id. While the Eighth Circuit had found that "an abatement carried out in accordance with procedural due process is reasonable in the absence of any factors that outweigh governmental interests," it has agreed that the seizure must still be reasonable. Samuels v. Meriwether, 94 F.3d 1163, 1168 (8th Cir. 1996) ("When a Fourth

Amendment claim is brought, we need to conduct an independent review of the seizure for reasonableness in addition to any analysis regarding procedural due process.").

There was absolutely no hazard or danger posed by the Orrs' sign that would have required immediate, emergency removal—a truly exceptional course of action given the total lack of danger or hazard caused by the sign. As such, the City's decision to immediately confiscate the sign without providing the Orrs sufficient time to assess the situation and respond to the notice, and subsequently be heard before the City Council, violated their due process rights under the Fourteenth Amendment. And, consequently, given the objective unreasonableness of the City's hasty decision under these circumstances, the seizure of the Orrs' sign was unreasonable and in violation of the Orrs' Fourth Amendment rights.

III. Required Remedy

The First Amendment, Fourth Amendment, and Fourteenth Amendment rights of all Iowans must be protected. In order to avoid litigation, we request the City of Windsor Heights inform us by noon on August 21, 2017 that it will meet the following demands:

1. Agree to cease enforcement of any citation, nuisance action, or ordinance infraction pursuant to Windsor Heights City Code section 50.01 against Diane Foss and Mike Miller relating to their yard sign reading "City Hall Run Amok," issued on July 28, 2017, formally rescind the notice and abatement letter it issued to Diane Foss and Mile Miller on July 28, 2017, and provide assurance that signs which comply with the City's content-neutral size and shape ordinances will not be targeted based on their content in the future.

2. Agree to cease enforcement of any citation, nuisance action, or ordinance infraction pursuant to Windsor Heights City Code sections 50.01, 50.02, 175.08, 175.03, and 175.05 against Marijetka and James Orr relating to their sign reading "No Concrete! 96% Said no, save the green space!," issued July 18, 2017, and formally rescind the notice and abatement letter issued to Marijetka and James Orr on July 18, 2017.

3. Agree to review the Windsor Heights City Code to amend those provisions which may predate, and now conflict with, the holding of Reed v. Town of Gilbert, Arizona, 135 S.Ct. 2218 (2015), which specifically must include section 175.03 which favors religious over other messages in regulating the size of signs in all zones.

4. Agree to adopt procedures governing the City's nuisance abatement enforcement ordinances which comport with minimal due process and the reasonableness requirement of the Fourth Amendment. Specifically, we request that the city's legal counsel review these procedures with the City, and that relevant city staff responsible for enforcement be provided with instruction from the city's legal counsel on these constitutional rights of residents in the nuisance abatement process. Residents must

have a reasonable opportunity to respond to such actions and be heard before their property is seized in accordance with the Fourth and Fourteenth Amendments.

We have copied the attorneys who were cc'ed by city staff in their communication to the Orrs. If they are not representing the city in this matter, please direct this letter to the attorneys who will represent you in this matter immediately.

Please respond in writing by August 21 at noon whether you will comply with these requests. We are optimistic that this matter may yet promptly be resolved without the need for litigation.

If you have any questions, please have your attorneys contact me directly at (515) 207-0567 and rita.bettis@aclu-ia.org.

Very truly yours,

Rita Bettis
Legal Director