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October 20, 2016

Naida Parker, Town Clerk  
Town of Rochester  
One Constitution Way  
Rochester, MA 02770

Re: **Rochester Annual Town Meeting of June 13, 2016 – Case # 8105**  
**Warrant Articles # 16, 17, 18, 19, 20, 21, 22, and 23 (Zoning)**  
**Warrant Articles # 11 and 15 (General)**

Dear Ms. Parker:

**Articles 11, 15 16, 17, 18, 19, 20, 21, 22, and 23** – Except as provided below in Articles 15 and 22 [see p. 1 for **Disapproval # 1 of 2** and p. 4 for **Disapproval # 2 of 2**], we approve these Articles and the maps pertaining to Articles 19 and 20, from the Rochester June 13, 2016, Annual Town Meeting.

**Article 15** - Article 15 adds a new Surface Water Protection by-law to the Town's general bylaws. The by-law prohibits the withdrawal of water from surface water, including wetlands, streams, lakes, and ponds, within the Town into tanks or tank vehicles. See Section B of the by-law. Section D of the by-law imposes a \$100 fine for the first by-law violation and "\$500 for each subsequent violation." We disapprove and delete the text "and \$500 for each subsequent violation" from Section D because it is inconsistent with G.L. c. 40, § 21. [**Disapproval # 1 of 2**]

General Laws Chapter 40, Section 21, authorizes towns to impose penalties "not exceeding three hundred dollars for each offense." Thus, \$500 for subsequent violations of the new Surface Water Protection by-law is inconsistent with G.L. c. 40, § 21. For this reason, we disapprove and delete "and \$500 for each subsequent violation" from Section D of the by-law.

**Article 22** - Article 22 adds a new Section XXIV, "Signs" to the Town's zoning by-laws. The new Section XXIV imposes general regulations applicable to all signs and imposes specific regulations based on the type of sign and location of the sign. Our comments on the new Section XXIV are provided below.

## I. Sign By-laws in General - The Reed Test.

In Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015), the United State Supreme Court held that the Town's content-based sign regulation was unconstitutional because it was not narrowly tailored to serve a compelling state interest.

The Town of Gilbert, Arizona adopted a comprehensive sign ordinance that required a sign permit for outdoor signs. The sign ordinance exempted 23 types of signs from the permit requirement, including three types of signs that were the focus of the Court's decision: (1) ideological signs; (2) political signs; and (3) temporary directional signs relating to a qualifying event.<sup>1</sup> However, such signs were subject to specific restrictions, including durational and size limitations.

The Petitioners in Reed were the Good News Community Church and its pastor, who placed 15 to 20 signs around the Town informing the public of its worship services. The Petitioners were cited twice for violating the Town's temporary directional sign restrictions. Specifically, the Petitioners were cited for (1) displaying the signs past the time limit required under the ordinance and (2) for omitting the date of the event on the signs. After failing to resolve the matter with the Town, the Petitioners filed a complaint alleging that the sign ordinance violated their free speech rights guaranteed under the First and Fourteenth Amendments to the U.S. Constitution. The Ninth Circuit Court of Appeals held that the sign ordinance's provisions were content-neutral and did not violate the First Amendment. The United State Supreme Court granted certiorari and reversed the Ninth Circuit's decision.

The Supreme Court focused on three categories of signs that, in the Town's ordinance, were exempt from the sign permit requirement but subject to specific durational and size limitations: (1) ideological signs; (2) political signs; and (3) temporary directional signs relating to a qualifying event. First, the Court reiterated that the First Amendment prohibits local governments from restricting expression because of the message, idea, subject matter, or content. Id. at 2226. A regulation is content-based if it applies to a particular speech because of the topic discussed or the idea or message expressed. "This commonsense meaning of the phrase 'content-based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Id. at 2227. Content-based laws are subject to strict scrutiny and are presumptively unconstitutional. Strict scrutiny requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. Id. at 2227.

The Supreme Court held that Gilbert's sign ordinance was content-based on its face because the restrictions placed on signs were based entirely on the communicative content of the sign. For example, the sign ordinance defined an ideological sign as a sign that communicates a message or idea that does not fit within another category in the sign ordinance. The ordinance defined a political sign as a sign that is designed to influence the outcome of an election. Finally,

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<sup>1</sup> "Qualifying event" was defined in the ordinance as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Id. at 2225.

a temporary directional sign was defined as a sign that directs the public to church or some other qualifying event. Each of these signs was then subject to different size and durational limitations. Because the sign ordinance was content-based, the Court analyzed it using strict scrutiny.

Strict scrutiny requires the Court to determine whether: (1) the municipality demonstrated a compelling governmental interest and (2) whether the restriction is narrowly tailored to achieve that governmental interest. The Town of Gilbert offered two governmental interests for adopting its sign ordinance: (1) preserving the Town's aesthetic appeal; and (2) traffic safety. Reed, 135 S.Ct. at 2231. The Court assumed for the sake of argument that those were compelling governmental interests, but found that the sign ordinance's distinctions were under-inclusive. The sign ordinance was under-inclusive because temporary directional signs are "no greater [an] eyesore" than ideological or political signs, yet, the ordinance allowed unlimited ideological signs while imposing greater restrictions on temporary directional signs. As to traffic safety, the Court found that temporary directional signs did not pose a greater threat to traffic safety than ideological or political signs.<sup>2</sup> Id. at 2231-32. Because of this under-inclusiveness, the ordinance was not narrowly tailored to further a compelling governmental interest and therefore failed strict scrutiny review. Id. at 2232.

In holding that the Town's sign ordinance was unconstitutional, the Court offered guidance on the types of sign regulations that may be adopted consistent with the First Amendment. The Court noted that the Town had ample content-neutral options to regulate signs. In a concurring opinion, Justice Alito offered specific examples of sign regulations that could be imposed so long as they are not content-based:

- Rules regulating size;
- Rules regulating location;
- Rules distinguishing between lighted and unlighted signs;
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change;
- Rules that distinguish between the placement of signs on commercial and residential property;
- Rules distinguishing between on premises and off-premises signs;
- Rules restricting the total number of signs allowed per mile of roadway; and
- Rules imposing time restrictions on signs advertising a time event.

Reed, 135 S.Ct. at 2233.

If a sign by-law is challenged in court, it is the municipality's burden to demonstrate that the sign by-law is narrowly tailored to achieve a compelling government interest. Reed, 135 S.Ct. at 2231. A municipality usually attempts to meet that burden by citing to a statement of purpose or findings in the by-law itself. *See, e.g., Commonwealth v. Weston W.*, 455 Mass. 24, 27-28, 36 (2009) (ordinance included a series of findings made by the council followed by a

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<sup>2</sup> In fact, the Court observed that a "sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting." Id. at 2232.

statement of purpose, supporting the trial court judge's finding that the council adopted the ordinance only 'after months of planning, debating, and researching models from other cities'). Only after the community demonstrates the legitimate goals of the by-law can the court determine whether the by-law is narrowly tailored to achieve those goals.

## II. Specific Comments on the new Section XXIV "Signs".

### A. Political Signs.

Section E (2) of the by-law regulates political signs and provides as follows (with emphasis added):

Signs must be placed on private property only with the permission of the property owner. **Political signs may be no larger than five (5) square feet. All signs must be removed within forty-eight (48) hours following the vote on the related subject. An exception is allowed for political signs that are fixed to registered motor vehicles and/or registered trailers. All regulations for registered motor vehicles and registered trailers apply. A size exception is also allowed for political signs that are carried or held by individuals or groups of individuals.**

We disapprove and delete the text above in bold and underline from Section E (2) because it is inconsistent with the First Amendment to the United States Constitution as applied to the states via the Fourteenth Amendment, and with Article 16 of the Massachusetts Declaration of Rights. [Disapproval # 2 of 2]

The above bold and underlined text in Section E (2) regulates political signs by placing size and durational limitations that are not imposed upon other types of signs. Such different treatment of political signs is inconsistent with the Court's decision in Reed, Reed, 135 S. Ct at 2224; *see also* Tauber v. Town of Longmeadow, 695 F. Supp 1358, 1361 (D. Mass. 1988) ("By favoring commercial speech over noncommercial speech the Longmeadow bylaws clearly violate the First Amendment of the Constitution."); Matthews v. Needham, 764 F. 2d 58 (1st Cir. 1985) (invalidating a bylaw that prohibited posting of most outdoor signs, including political signs, but included exceptions for certain types of commercial signs and signs related to charitable and religious institutions); and Tierney v. Methuen, 12 Mass.L.Rptr. 340 (Mass. Super. 2000) (invalidating a sign ordinance to the extent that it imposed size limits on political signs that were not also imposed on other types of signs.). The text above in bold and underlined singles out one type of speech (political) for restrictions not imposed on other types of speech. For example, the Town requires that yard sale signs shall not exceed six square feet and contractor signs shall be removed within seven days after completion of the work. It is well settled that protected speech may be subject to reasonable time, place, and manner restraints as long as legitimate governmental interests exist and are cited as the basis of restraint. Such restraints are allowable only if they are content neutral. The restrictions imposed above in Section E (2) are based on the content of the signs and are similar to the restrictions struck down by the Court in Reed. For these reasons, we disapprove and delete the above bold and underlined text from Section E (2).

B. Remaining Provisions of the new Section XXIV.

Certain other remaining provisions in the new Section XXIV could be considered to be content-based regulations and subject to strict scrutiny under Reed. See Section E (3) 6.8.13 pertaining to “for sale rent, or lease” signs. The Town may wish to discuss the application of the Reed decision to the remaining provisions in the new Section XXIV with Town Counsel.

**Note:** Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,  
MAURA HEALEY  
ATTORNEY GENERAL

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cc: Town Counsel Blair Bailey

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Attest

  
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Constable

Oct 31, 2016