ALAN WILSON
ATTORNEY GENERAL

May 19, 2015

Ms. Allison C. Coppage, Esquire
Assistant Beaufort County Attorney
Office of the County Administrator
Post Office Drawer 1228
Beaufort, South Carolina 29901-1228

Dear Ms. Coppage:

You have requested the opinion of this Office regarding what appears to be a conflict between the ability to campaign within the vicinity of a polling place on an election day and the authority of a homeowners' association to regulate political campaign signage and solicitation within the given community. Due to this apparent conflict, you ask "whether when a private gated community opens facilities within it for a public purpose, namely providing a polling location for the Beaufort County Board of Elections, does the homeowners' association retain the ability to regulate solicitation and political signage while the property is being used for public purposes?"

Law / Analysis

I. First Amendment Rights Within a Common-Interest Community Generally

As you note in your correspondence, privately owned, gated communities and other types of "common-interest communities" often impose covenants and restrictions prohibiting solicitation and signage. See generally Adrienne Iwamoto Suarez, Covenants, Conditions, Restrictions … on Free Speech? First Amendment Rights in Common-Interest Communities, 40 Real Prop. Prob. & Tr. J. 739, 740 (2006). While the constitutionality of these restrictions have been questioned, courts have been reluctant to hold common-interest communities responsible for protecting First Amendment rights of its residents and non-residents, as applicable to the states through the Fourteenth Amendment, on the basis that the common-interest community is a private, rather than state actor. Id. at 744. As the United States Supreme Court has explained,

> [b]efore an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on *state action*, not on action by the owner of private property used only for private purposes.

Central Hardware Co. v. Nat'l Labor Relations Bd., 407 U.S. 539, 547, 92 S.Ct. 2238, 2243 (1972) (emphasis added).

In a prior opinion of this Office we concluded that a privately owned, gated community could prohibit door to door campaigning by political candidates without violation of the First Amendment as no state action was present. See Op. S.C. Att'y Gen., 2011 WL 2214076 (May 25, 2011). In support, we acknowledged that numerous courts have determined that gated communities or condominium associations are not state actors. Id. at *1 (citing Kalian at Poconos, LLC v. Saw Creek Estates Cmty. Ass'n, 275 F. Supp. 2d 578 (M.D. Pa. 2003); Goldberg v. 400 E. Ohio Condo. Ass'n, 12 F. Supp. 2d 820 (N.D. Ill. 1998)); see also Laguna Royale Owners Ass'n v. Darger, 174 Cal. Rep. 136, 144 (Cal. Ct. App. 1981) (stating that there is "considerable doubt" as to whether the actions of a condominium association constitute state action); Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 673 A.2d 340, 449 Pa. Super. 124 (Pa. Super. Ct. 1996) (upholding restriction against placement of signs visible from the outdoors without board's prior approval for lack of state action). Despite the general assessment from courts that common-interest communities are not considered state actors to bring into play the rights given by the First Amendment, several theories for establishing that they are have been raised. In addition, arguments have been presented under state constitution provisions. We will discuss these theories briefly.

One theory rests in the assertion that the common-interest community possesses all of the attributes of an operating municipality, often referenced as the "functional equivalent test." See Adrienne Iwamoto Suarez, Covenants, Conditions, Restrictions ... on Free Speech? First Amendment Rights in Common-Interest Communities, 40 Real Prop. Prob. & Tr. J. 739, 744 (2006). In Marsh v. Alabama, the United States Supreme Court held a First Amendment claim could be asserted against a company-owned town being that it "has all the characteristics of any other American town," including homes; streets; a sewer system; a post office; police; a business block consisting of merchants and service establishments; and free and open access to the public. Marsh v. Alabama, 326 U.S. 501, 502, 66 S.Ct. 276, 277 (1946). Extending Marsh, the Court thereafter held that shopping mall owners were state actors in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325, 88 S.Ct. 1601, 1612 (1968). However, it later retracted from its expansive holding in Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219 (1972), and even more so in Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 96 S.Ct. 1029 (1976).

Lloyd emphasized that for a private entity to be considered a state actor under Marsh it must assume *all* of the functions of a municipality, but it did preserve the right to engage in expressive activity in shopping centers if related directly to the shopping center's operations. Lloyd, 407 U.S. at 562-64, 92 S.Ct. at 2226-27 (1972). Hudgens entirely overruled Logan Valley, and held that to be considered a state actor under Marsh, the area must include the full spectrum of municipal powers and the private entity must stand in the shoes of the State. Hudgens, 424 U.S. at 518-19, 96 S.Ct. at 1036 (1976). Accordingly, it appears First Amendment claims against a common-interest community under the functional equivalent doctrine fail without the community having all the necessary requirements established in Marsh. While

common-interest communities do have many attributes similar to a municipality, they likely lack *all* of those characteristics, such as a business block and open and free access to the public.

Also worthy of mention is Shelley v. Kraemer, 334 U.S. 1, 20-21, 68 S.Ct. 836, 845-46 (1948), where the Supreme Court held that judicial enforcement of a housing covenant prohibiting the sale of homes to African Americans constituted a state action for purposes of equal protection analysis under the Fourteenth Amendment. While judicial enforcement of the covenant led the Court to conclude a state action was present in Shelley, courts have since been hesitant to extend Shelley beyond its facts. See, e.g., Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) (holding that Shelley "has not been extended beyond the context of race discrimination"); Wilco Elec. Sys., Inc. v. Davis, 375 Pa.Super. 109, 114, 543 A.2d 1202, 1205 (1988) ("[W]here a state court enforces the right of private persons to take actions which are permitted but not compelled by law, there is no state action for constitutional purposes in the absence of a finding that racial discrimination is involved as existed in the *Shelley* case. . . .") (citing Parks v. Mr. Ford, 556 F.2d 132, 136 n.6a (3rd Cir. 1977)). One case has gone as far as suggesting Shelley has been overruled sub silentio. See King v. King, 162 Wash.2d 378, 401, 174 P.3d 659, 671 (Wash. 2007) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 n. 21, 102 S.Ct. 2744 (1982)). Therefore, the argument that a state action exists upon judicial enforcement of a restrictive covenant of a common-interest community prohibiting solicitation and signage would also likely prove unsuccessful. This argument also poses difficulty because the homeowners' association would have to initiate the action for judicial enforcement of the covenant.

The third argument does not rely on establishing the common-interest community as a state actor for purposes of First and Fourteenth Amendment claims, but rather lies in state constitution provisions, should they provide more expansive individual liberties than the United States Constitution. In PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980), the Court emphasized the ability of states to "adopt in its own constitution individual liberties more expansive than those conferred by the federal constitution." Id. at 81, 100 S.Ct. 2040 (citing Cooper v. California, 386 U.S. 58, 62, 87 S.Ct. 788, 791 (1967)). New Jersey is an example of a state that has done so, as its Constitution's provision of a broad affirmative right to free speech has been described as "broader than practically all others in the nation." Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492, 46 A.3d 507, 513 (N.J. 2012) (quoting Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145, 752 A.2d 315, 325 (N.J. 2000) (internal citations omitted)).

As New Jersey has a series of cases balancing property rights and speech rights under its state's constitution, these cases serve as a good example of this theory. Two decisions by the New Jersey Supreme Court addressed restrictions on free speech that owners of private properties imposed on non-resident visitors. See State v. Schmid, 84 N.J. 535, 423 A.2D 615 (N.J. 1980) (concluding Princeton University violated the constitutional rights of speech and assembly of a person trying to distribute political materials because the University's restriction in place at the time lacked a reasonable regulatory scheme); New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 650 A.2d 757 (N.J. 1994) (finding that

expressional rights of individuals trying to distribute leaflets in opposition to military intervention in the Persian Gulf in a shopping center outweighed the private property interests).

Three other New Jersey Supreme Court opinions involved private communities' restrictions on the free speech rights of its own residents, examining whether limits on an individual's right of expression on private property violated the New Jersey Constitution's guarantee of free speech. See Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344, 929 A.2d 1060 (N.J. 2007) (holding restrictions of a common interest community allowing only one sign per lawn and one sign per window, but also allowing residents to walk through the neighborhood, ring doorbells, and advance their views did not violate the New Jersey Constitution); Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 46 A.3d 507 (N.J. 2012) (finding planned townhouse community that barred virtually all expressional activity, including the posting of political signs on a homeowner's own property in support of his own campaign, was unreasonable and in violation of the New Jersey Constitution); Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 103 A.3d 249 (N.J. 2014) (finding restriction on residents' distribution of all written materials, including resident's campaign materials for a board of director's seat in common-interest community, was unreasonable and resident's right to free speech outweighed the board's justification for the restriction).

Being that New Jersey's constitution provides perhaps the broadest affirmative right to free speech in the nation, it is unlikely a South Carolina court would reach similar conclusions to the cases decided by the New Jersey Supreme Court discussed above should it be faced with comparable arguments. Compare N.J. Const. art. I, § 6 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. ...") with S.C. Const. art. I, § 2 ("The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances"). In fact, S.C. Const. art. I, § 2 is nearly identical to the First Amendment of the United States Constitution, indicating the rights to free speech and assembly afforded under it are no broader than those of the First Amendment. See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peacefully to assemble, and to petition the Government for redress of grievances").

In light of the unlikely success of arguments addressed above, it remains our opinion that a court would characterize a common-interest community being used for private purposes as a private actor, opposed to a state actor, for purposes of analysis under the First and Fourteenth Amendments. Furthermore, because our State Constitution's right to free speech is not more expansive than the First Amendment, any related argument, in our opinion, would also fail. As such, we believe a court would find a common-interest community can restrict political solicitation and signage when the property is being used for private purposes.

II. First Amendment Rights: When Common-Interest Community is Used as a Polling Place

Although it is our belief regulations preventing signage and solicitation within a common-interest community would likely be enforceable against the arguments set forth above when property is used for private purposes, analysis changes when portions of the property are opened as a polling place on an election day. Cases outside of our jurisdiction reveal that portions of private property used for the purpose of voting in an election have been characterized as public property subject to the requirements of the First Amendment. See, e.g., Liberty Township Tea Party v. Int'l Bhd. of Elec. Workers, No. 1:10cv707, 2010 WL 6539420 (S.D. Ohio 2010); United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004). As the Court in IBEW summarized:

> Although . . . property is private property on almost any other day of the year, it may still be subject to the requirements of the First Amendment when it permits voters to come onto its property on election day for the purpose of voting. *See Cornelius,* 473 U.S. at 801. However, even if a portion of private property becomes public property, the government is not required "to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Rather, the existence of access to government property and the extent to which such access may be limited by the government depends on the character of the property at issue. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

Liberty Township Tea Party v. Int'l Bhd. of Elec. Workers, No. 1:10cv707, 2010 WL 6539420, at *4 (S.D. Ohio 2010). As such, discussion of the types of forums the United States Supreme Court has adopted as a means of determining when the government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes is necessary.

As we have discussed in a prior opinion of this Office, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948 (1983) is the landmark case for First Amendment public forum analysis. See Op. S.C. Att'y Gen., 2008 WL 4870539 (Oct. 13, 2008). As addressed in that opinion, the following discussion in Perry established the types of fora and applicable standards for limitations on expressive activity:

> [i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939). In these quintessential public

forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service v. Council of Greenburgh*, 453 U.S. 114, 132, 101 S.Ct. 2676, 2686, 69 L.Ed.2d 517 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980); *Grayned v. City of Rockford*, supra, 408 U.S., at 115, 92 S.Ct., at 2302; *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Schneider v. State of New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (university meeting facilities); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976) (school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (municipal theater). ... Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Widmar v. Vincent*, supra, 454 U.S., at 269-270, 102 S.Ct., at 279.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Greenburgh Civic Ass'n*, supra, 453 U.S., at 129, 101 S.Ct., at 2684. In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Id.*, 453 U.S., at 131, n. 7, 101 S.Ct., at 2686, n. 7. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*, 453 U.S., at 129, 101 S.Ct., at 2684; *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976); *Adderley v. Florida*, 385 U.S. 39, 48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966).

Perry, 460 U.S. at 45-46, 103 S.Ct. at 954-55.

The Perry Court concluded that the school mail facilities at issue in the case fell into the third category, thus rendering the property a nonpublic forum. Id. at 46, 103 S.Ct. at 955-56. In the Court's view, "[t]he internal mail system, at least by policy, is not held open to the general public." Id. at 47, 103 S.Ct. at 956. The Court also recognized that such system was not a limited public forum, which:

> may be created for a limited purpose such as use by certain groups, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed 440 (1981) (student groups), or for the discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976) (school board businesses).

Id. at 46, n.7, 103 S.Ct. at 955, n.7.

While Perry identified three types of fora under its analysis – the traditional public forum, the designated public forum, and the nonpublic forum – the Court also recognized that a government entity may create a limited public forum. Perry, at 46, n.7, 103 S.Ct at 955, n.7. Whether to classify a limited public forum apart from a designated public forum as its own category has caused great confusion among courts in years past. See, e.g., Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006) ("Substantial confusion exists regarding what distinction, if any, exists between a 'designated public forum' and a 'limited public forum.'"); Christian Legal Soc'y v. Walker, 453 F.3d 853, 865 n.2 (7th Cir. 2006) ("The forum nomenclature is not without confusion. Court decisions also speak of 'limited public' fora; most recently this phrase has been used interchangeably with 'nonpublic' fora, which means both are subject to a lower level of scrutiny .... But 'limited public forum' has also been used to describe a subcategory of 'designated public forum,' meaning that it would be subject to the strict scrutiny test .... That confusion has infected this litigation"); Goulart v. Meadows, 345 F.3d 239, 249 (4th Cir. 2003) ("There is some confusion over the terminology used to describe this third category [designated public forum], as the Supreme Court and lower courts have also used the term 'limited public forum.'").

However, subsequent to the Supreme Court's Decision in Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 470, 129 S.Ct. 1125, 1132 (2009), it has been recognized that the limited public forum is own separate category of forum. Specifically, the Sixth Circuit Court of Appeals stated that "In *Summum*, the Supreme Court clarified that the designated public for[u]m and the limited public forum are distinct forum types and that restrictions on speech in a limited public forum receive lesser scrutiny than those in a designated public forum." Miller v. City of Cincinnati, 622 F. 3d 524, 535 n.1 (6th Cir. 2010). The Tenth Circuit noted that "[b]oth the Supreme Court and Tenth Circuit have made clear, however, that a 'designated public forum' and a 'limited public forum' are distinct categories and subject to different standards in evaluating governmental restrictions on speech in these fora." Doe v. City of Albuquerque, 667 F.3d 1111, 1128 (2012). Likewise, the Fourth Circuit has identified the limited public forum as a distinct type of forum. See Child Evangelism Fellowship of MD, Inc. v. Montgomery County

Pub. Sch., 457 F.3d 376 (4th Cir. 2006) ("[W]hile the Constitution imposes more severe restrictions on government regulation of private speech in a traditional public forum or a designated public forum than in a limited public forum or a non-public forum, even in the last two categories, government restrictions on private speech must be both reasonable and viewpoint neutral.").

With the types of fora in mind, we turn to two cases addressing similar situations to the one in your letter that we find particularly helpful. In United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738, 741 (6th Cir. 2004), at issue were the rights of individuals wishing to solicit signatures for a petition on an election day at various areas around six polling places. Two of the six polling places were located on privately owned property, specifically at a Y.M.C.A. and a church. Id. In its forum analysis, the court determined it was first necessary to identify the relevant forum to which the individuals sought access, and then to determine whether such forum was public or nonpublic. Id. at 746. In identifying the forum, the court distinguished that:

> in defining the relevant forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. When speakers seek more limited access, however, we must take "a more tailored approach to ascertaining the perimeters of [the relevant] forum within the confines" of the government property at issue.

Id. at 747 (citing Cornelius, 473 U.S. at 797, 105 S.Ct. 3439) (internal citations omitted).

The court referenced three zones in the vicinity of a polling location, pursuant to Ohio law, including: (1) the campaign-free zone, inside the polling location and the 100-foot perimeter; (2) the area outside of the campaign-free zone; and (3) the public right-of-way, such as public sidewalks and public roads. Id. Because it was clear campaigning and electioneering was not permitted in the campaign-free zone and was permitted in the public right-of-ways, the area at issue was the area outside of the campaign-free zone encompassing the parking lots and walkways leading to the polling place. Id.

The court pointed out the lower court's conclusion that the parking lot, walkways and hallways leading to the polls, and the area containing the voting booths themselves should be classified as "limited designated public forums," relying heavily on Embry v. Lewis, 215 F.3d 884 (8th Cir. 2000). Id. at 748. In disagreement, the court provided that "[t]here is no evidence in the record in this case that indicates that Ohio intended to open up nontraditional forums such as schools and privately-owned buildings for public discourse merely by utilizing portions of them as polling places on election day." Id. at 749. It noted the confusion among courts "surrounding the use of the terms 'designated public forum' and 'limited public forum' " and suggested that "[w]hen the district court, following the decision in *Embry*, described the parking lots and walkways leaving to the polling places as 'limited designated public forums,' it may have had in mind the 'limited public forum' described in *Good News Club v. Milford, 533 U.S. 98, 106, 121 S.Ct. 209.*" Id. at 750. However, the Court declined to address the distinction, noting that:

> [w]e do not need to delve deeply into the nuances of designated versus limited public forums in this case, however, because these types of forums are characterized by discourse, and *discourse is what is absent here.* That some expressive activity occurred within the context of the forum created "does not imply that the forum thereby [became] a public forum for First Amendment purposes." . . . . In the absence of evidence of an intent on the part of the government to open these nontraditional forums for public discourse, limited or otherwise, we conclude that the parking lots and walkways leading to the polling places are nonpublic forums, with no different status than the remaining areas on school and private property.

Id. (citations omitted) (emphasis added). Thus, the Court concluded the parking lots and walkways leading to the polling places at issue in the case were nonpublic forums. Id. at 751.

Next considering the applicable standard – whether the exclusions were reasonable and viewpoint neutral – it noted that exclusions from the Y.M.C.A. and the church areas were in response to "requests from the owners of those properties. . . ." Id. at 750-51. In justifying the exclusion, the court explained that

> appellees could prohibit appellants from soliciting signatures if they thought that their activities would disrupt the polling place or . . . [the] private property surrounding it. "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a view-point neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."

Id. at 751. Accordingly, because the parking lot and walkways leading to the polling place were classified as nonpublic fora, the court found that the appellants' First Amendment rights were not violated as the justification for exclusion was found to be reasonable and viewpoint neutral. Id.

Several years later in Liberty Township Tea Party v. Int'l Bhd. of Elec. Workers, No. 1:10cv707, 2010 WL 6539420 (S.D. Ohio 2010), a District Court of Ohio addressed issues similar to those faced in Sidney. The case involved a twenty-two acre piece of privately owned property, a portion of which was dedicated and used for the government function of conducting an election on an election day. Id. at *1, 4. Specifically at issue were the First Amendment rights of a woman asked to leave the property after setting up a table outside of a 100-foot campaign free zone to solicit petition signatures; the table also displayed political signage. Id. at *2. The private property outside the campaign-free zone, including "access to areas reasonably appurtenant to the driveways, parking lots and sidewalks leading to and from IBEW's polling place" was the area at issue. Id. at *4.

In determining whether the Plaintiff's speech could be afforded protection under the First Amendment, the Court examined three factors: (1) whether the challenged speech was protected speech; (2) the nature of the forum in which the speech would be presented; and (3) whether the

justification presented by Defendants for their conduct satisfied the relevant standard for the forum. Id. at *3 (citing Cornelius v. NAACP Legal Defense & Educ. Fund. Inc., 473 U.S. 788, 797, 105 S.Ct. 3439 (1985)). As there was no dispute that the speech in question was protected, the court's focus was on factors (2) and (3).

In its forum analysis, the court rejected that the property at issue was a traditional public forum: "despite serving as polling place, IBEW has a history of private ownership and is not akin to a public sidewalk, park or street." Id. at *5. The court also rejected the argument that the government had demonstrated a policy or practice of allowing electioneering activities outside the campaign-free zone thereby designating those areas as a designated public forum. Id. at *6. Specifically argued was the fact that political discourse at polling locations had always been permitted throughout the county and a memorandum from the Ohio Secretary of State characterizing the areas outside the campaign-free zone as a neutral zone where free speech protections guaranteed by the First Amendment remain intact. Id. (citations omitted). The Court distinguished that the memorandum did not address the situation at hand, being that "it does not address how free speech protections are to be applied when the polling area is located on historically private property and a person other than the owner of the private property wished to engage in political discourse on that property." Id (citations omitted). Accordingly, it reasoned that the designated public forum classification was not applicable, stating that "[w]hile . . . political discourse outside the campaign-free zone is generally associated with elections and, if present, is subject to the protections of the First Amendment, it cannot find that this evidence shows an intent of the government to open up the private property of IBEW to the *public at large* for expressive activity." Id. (emphasis added).

The court did however find the forum in question was a limited public forum, being that "the evidence shows that the access to IBEW's polling location for expressive activity on election day is limited to those individuals seeking to engage in political discourse or electioneering activity." Id. at *7. It is important to note that the Court distinguished that "IBEW has permitted signs from multiple political affiliations to be placed on the grass immediately to the left and right of the driveways" and also "permitted approximately four to eight individuals to engage in political discourse near the walkways or front parking lot leading to the polling location." Id. It therefore clarified that "*to the extent that IBEW allows political discourse to occur on its property while it is being utilized as a polling place*, the portion of the property that has been opened up to political discourse (but not the whole 22 acres of IBEW's private property) is a public forum." Id. (emphasis added). As a result of this permission, the court reasoned that "IBEW has opened up these portions of its property to expressive activity and has intertwined itself with a function exclusively reserved to the State, that is, the administration of elections." Id (citations omitted). Thus, it found the area in question was best characterized as a limited public forum, and in doing so explained that subsequent to Sidney, the limited public forum standard had been clarified by the United States Supreme Court as a separate forum type. Id. (citing Miller v. City of Cincinnati, 622 F. 3d 524, 535 n.1 (6th Cir. 2010)).

After concluding the polling place was a limited public forum, the court next applied the relevant standard, stating:

> [a]s a limited public forum, the First Amendment guarantees of freedom of speech and association are available to those who desire to engage in political discourse on election day. IBEW may not discriminate against that speech on the basis of viewpoint and any restrictions on speech must be reasonable in light of the purpose served by the forum.

Id. at *8 (citations omitted). The Court further distinguished that the other areas on the property not opened up to political discourse and electioneering activity, that were used non-discriminatorily and for private purposes only, retained their private property status, instead of being classified as a non-public forum. Id. Therefore, those areas were not subject to constitutional analysis. Id. Because the evidence conflicted as to why the plaintiff was excluded, therefore requiring finders of fact, the court did not reach a conclusion as to whether the Plaintiff's First Amendment rights had been violated being that the matter before it was a motion for injunctive relief. Id. at *10.

To summarize, both Sidney and IBEW found a lack of evidence that indicated the government intended to open up the privately-owned property at issue to the public at large for expressive activity by utilizing portions of the property as polling places on an election day. However, analysis altered slightly between the two cases as a result of whether permission was granted by the owners of the property for electioneering. The Court in Sidney found that discourse was absent, despite some expressive activity occurring. Therefore, in Sidney, the forum discussed in this opinion was classified as a nonpublic forum. In IBEW, the owners of the property permitted signs from multiple political affiliations to be placed in certain areas and also permitted individuals to engage in political discourse near the walkways or front parking lot leading to the polling location. Therefore, by intertwining itself with the government function of administering elections that was exclusively reserved to the State, the Court held the forum in question was a public forum, but was limited to those individuals seeking to engage in political discourse or electioneering activity, not the public at large. As Sidney and IBEW found the forums addressed above were a nonpublic and a limited public forum, respectively, the less stringent standard for regulation was applied in both cases. Also significant, the court in IBEW found that the property not opened for use for the purpose of the election retained its private property status and was therefore not subject to First Amendment analysis.

Conclusion

Restrictions against political signage and solicitation within a common-interest community used for private purposes generally withstand constitutional scrutiny as such communities are not considered state actors for purposes of First Amendment analysis, as applied to the states through the Fourteenth Amendment. However, arguments have been raised to challenge bans on solicitation and signage in common-interest communities, the most successful being rights afforded under one's state constitution, should it provide more expansive rights than the First Amendment; South Carolina's Constitution does not.

In contrast, when portions of private property are used as a polling location for an election, the particular portions of the property used for such public purpose have been subject to

the requirements of the First Amendment. Therefore, to determine whether certain speech is protected under the First Amendment, a court would be required to determine whether the challenged speech is protected, the forum classification where the speech would be presented, and whether the justification for the restriction withstands the applicable standard for the forum.

Because political solicitation and signage is protected speech[1], a court's analysis would likely be focused on the forum where the speech would be presented and whether the justification for the exclusion complies the standard applicable with the forum. Both courts in Sidney and IBEW found a lack of evidence that indicated the government intended to open the private property at issue to the public at large for expressive activity by opening certain portions of the property as a polling location. Consistent with the reasoning of those courts, we believe that if areas outside the campaign-free zone[2] used for purposes of the election similar to those discussed above are at issue (i.e., parking lots and walkways leading to the polls), they would likely be considered nonpublic fora or limited public fora, dependent upon the degree of electioneering permitted and the extent the owner of the property intertwines itself with the government function of administering elections.

In addition to time, place, and manner regulations, restrictions on speech in both a nonpublic forum and a limited public forum are permissible so long as they are viewpoint neutral and reasonable in light of the purpose which the forum at issue serves. Whether a particular gated community's justification of its restriction on speech would be considered reasonable and viewpoint neutral would of course have to be determined by the facts at hand and therefore is beyond an opinion of this Office. See Op. S.C. Att'y Gen., 2010 WL 928445 (Feb. 18, 2010) ("This office has repeatedly stated that an opinion of this office cannot determine facts noting that the determination of facts is beyond the scope of an opinion of this office.").

Finally, as to the areas within the gated community not opened or permitted for use during the election, we agree with the reasoning of the IBEW court that those areas would continue to be categorized as private property and would not be subject to First Amendment analysis. Therefore, we believe a court would find the restrictions imposed by the homeowner's association on solicitation and signage could remain in effect and would be enforceable in the areas not permitted for use for purposes of the election.

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[1] See City of Ladue v. Gilleo, 512 U.S. 43, 54-55, 114 S.Ct. 2038, 2045 (1994) ("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. 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."); Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437 (1966) ("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."); Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 216 (1964) ("[T]he first Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.").

[2] See S.C. Code Ann. § 7-25-180 (Supp. 2014) ("It is unlawful on an election day within two hundred feet of any entrance used by the voters to enter the polling place for a person to distribute any type of campaign literature or place any political posters.").

Very truly yours,

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