

# THE RUTHERFORD INSTITUTE

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INTERNATIONAL OFFICE  
CENTRAL AND EASTERN EUROPE  
Budapest, Hungary

December 15, 2011

Darren K. Coffey, Interim County Administrator  
County of Fluvanna  
P.O. Box 540  
Palmyra, Virginia 22963

**Re: County Sign Ordinance / Restrictions on Flags**

Dear Mr. Coffey:

The Rutherford Institute has been contacted by Debra Kurre and David Merriman about restrictions imposed by the County of Fluvanna on flags that they desire to place in front of commercial property in order to advertise their businesses. Our review of the restrictions indicates that the prohibition on commercial flags is discriminatory and violates the First Amendment rights of Ms. Kurre, Mr. Merriman and other business owners who wish to use flags to draw attention to their businesses. So long as this present restriction on flags is enforced, the County violates the fundamental rights of its citizens to speak freely.

Ms. Kurre and Mr. Merriman each operate businesses from a location along State Route 53 (Thomas Jefferson Parkway) in Fluvanna County. In April of this year, Ms. Kurre, who owns the premises, received a notice that the property was in violation of the County's Zoning Ordinance § 22-15-2.(1)c, relating to "moving signs" based upon the presence of two multicolored flags on the property. In response to this notice of violation, Ms. Kurre had the flags removed. Mr. Merriman also had a "Farmers Insurance" flag at his place of business to notify the public of the insurance services he provides. However, because of the notice sent to Ms. Kurre and the order of removal contained therein, he also removed the flag.

Ms. Kurre has made available to us e-mail correspondence between you, in your capacity as County Planning Director, and her in late March of this year regarding the legality of flags under Fluvanna County sign regulations. In this correspondence, you wrote that "flags" are considered "signs" under the broad definition set forth in County Zoning Ordinance § 22-22-1. Moreover, you took the position that "traditional flags—the official banner of a state or nation, often decorated with emblems or images that symbolize that state or nation" would be considered Public Signs and exempt from the

restrictions contained in the County's regulation of signs. The gist of your position is that a flag, despite being a sign, is exempt and allowable under the Zoning Ordinance so long as it is a "traditional" flag bearing the symbol of a state or nation, while other flags bearing other images or messages are forbidden "moving signs" under the ordinance.

The kind of distinction you have drawn between exempt and prohibited flags is impermissible under the guarantee to freedom of speech contained in the First Amendment to the U.S. Constitution because the distinction is based upon the content of the message on the flag. Although court decisions recognize the power of localities to regulate signs, signs are protected by the First Amendment because they are a form of expression. *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). An initial step in determining whether provisions of an ordinance regulating signs are valid is to determine whether the restrictions imposed are content-based. *Bowden v. Town of Cary*, 754 F. Supp. 2d 794, 801 (E.D.N.C. 2010). As a general matter, laws that distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. *Id.* at 802. If parts of a sign ordinance are content-based, they are subject to "strict scrutiny," meaning they must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. *Id.* at 804.

Fluvanna County's regulation of flags is clearly content-based because whether a flag is exempt from restrictions depends upon the image or message conveyed by the flag. As discussed above, the County will allow "traditional" flags which bear the symbol of a nation or state but forbids other flags, including those which bear the symbol of a business or communicate that the business is "open," such as the flags displayed by Ms. Kurre and Mr. Merriman. As a content-based restriction on expression, the sign ordinance is presumptively unconstitutional. See *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569-70 (11<sup>th</sup> Cir. 1993) (sign regulation that provided an exemption only applicable to governmental flags was an unconstitutional content-based restriction on expression).

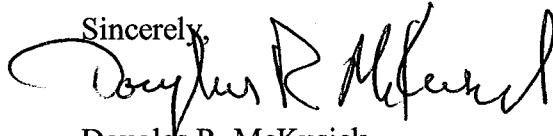
The fact that the messages conveyed by the flags displayed by Ms. Kurre and Mr. Merriman are commercial in nature does not change the conclusion that the restriction at issue here is impermissibly content-based. In an analogous case, the U.S. Supreme Court held that a city's regulation of newsracks in the interest of aesthetics and public safety was unconstitutional because the regulation selectively banned only newsracks distributing commercial publications. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The Court pointed out that the distinction between commercial and noncommercial publications bore no relationship whatsoever to the aesthetic and safety interests the city used to justify the restrictions. *Id.* at 424. It ruled that because the restriction was content-based, it was unconstitutional even though the discrimination was directed at commercial speech. *Id.* at 430. Relying on this decision, another federal district court has found unconstitutional a city ordinance that placed greater restrictions

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on banners and flags expressing commercial messages than flags containing non-commercial messages. *Young v. City of Roseville*, 78 F. Supp. 2d 970 (D. Minn. 1999).

Therefore, Fluvanna's regulation of flags, which prefers "traditional" flags but forbids non-traditional flags of the kind displayed by Ms. Kurre and Mr. Merriman, is content-based and must serve a compelling interest in order to be valid under the First Amendment. Even assuming the restriction on flags is intended to further local interests in traffic safety and aesthetics, *see* Fluvanna Zoning Ordinance § 22-15-1, these are not compelling governmental interests which allow a content-based regulation of expression to survive strict scrutiny. *See Bowden*, 754 F. Supp. 2d at 808. Moreover, the restriction is not "narrowly tailored" to achieve those interests because commercial flags cause no greater distraction or aesthetic problems than "traditional" flags. *Discovery Network*, 507 U.S. at 430.

Because the selective prohibition on non-traditional, commercial flags such as those displayed by Ms. Kurre and Mr. Merriman is unconstitutional and infringes on their First Amendment rights, they should be allowed to display those flags free from the threat that they will be cited for violating the County Zoning Ordinance. On their behalf, we ask for assurances that they will be allowed to display their flags. We request a response to this letter by January 3, 2012 so that we can advise Ms. Kurre and Mr. Merriman accordingly.

Sincerely,  
  
Douglas R. McKusick  
Staff Attorney

Cc: Deborah Kurre  
David Merriman