



COMMONWEALTH of VIRGINIA

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David P. Bobzien, Esq.
Fairfax County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064

Dear Mr. Bobzien:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether § 33.1-373 prohibits the posting of political campaign signs within state rights-of-way.

Response

It is my opinion that § 33.1-373 does not prohibit the posting of political campaign signs within state rights-of-way. Fairfax County may enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373. It also is my opinion that signs and advertising supporting an individual's candidacy for elected public office or other ballot issues are not subject to such an agreement, unless such signs and advertising remain in place more than three days after the election to which they apply.¹

Background

You advise that Fairfax County is considering entering into an agreement with the Commonwealth Transportation Commissioner under § 33.1-375.1(A) that would allow the County to enforce the provisions of § 33.1-373. You advise further that in 1993 § 33.1-351 was amended by the General Assembly to delete from the definition of "advertisement" signs "for any political party or for the candidacy of any individual for any nomination or office." You conclude that by amending § 33.1-351 in this manner, the General Assembly did not intend political signs to be prohibited in the state's rights-of-

¹ A prior opinion of the Attorney General (the "2000 Opinion") concludes that placing of political signs within the public highway rights-of-way violates §§ 33.1-19 and 33.1-375 and the Commonwealth Transportation Board rule governing the use of rights-of-way within the system of state highways. *See* 2000 Op. Va. Att'y Gen. 136. Further, the 2000 Opinion concludes that a Commonwealth's attorney may prosecute candidates for local office who post campaign materials on state highway-owned rights-of-way. *Id.* at 138. To the extent that the 2000 Opinion concludes that the term "advertisement" includes political signs, it is expressly overruled.

way because it explicitly deleted such signs from the definition of “advertisements” which are prohibited in state rights-of-way and subject to prosecution under § 33.1-373.²

Applicable Law and Discussion

The General Assembly has enacted Article 1, Chapter 7 of Title 33.1, §§ 33.1-351 through 33.1-378, a part of the Outdoor Advertising in Sight of Public Highways Act (“Act”), to govern outdoor advertising in and adjacent to the highway right-of-way. Section 33.1-351 defines the following terms used in Chapter 7:

“*Advertisement*” means *any* writing, printing, picture, painting, display, emblem, drawing, *sign*, or similar device which is posted or displayed outdoors on real property and *is intended to* invite or to draw the attention or to *solicit the patronage or support of the public to any* goods, merchandise, real or personal property, business, *services*, entertainment, or amusement manufactured, produced, bought, sold, conducted, furnished, or *dealt in by any person*; the term shall also include any part of an advertisement recognizable as such. [Second through sixth emphasis added].

....

“*Sign*” means *any outdoor sign*, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is *designed, intended, or used to advertise or inform*, any part of the advertising or informative contents of which is visible from any highway. [Second and third emphasis added].

Section 33.1-373 provides that anyone who places any advertisement within the limits of any highway shall be assessed a civil penalty of \$100 for each occurrence. “Advertisements placed within the limits of the highway are ... a public and private nuisance and may be ... removed ... by the Commonwealth Transportation Commissioner or his representatives without notice.”³

Prior to the 1993 Session of the General Assembly, § 33.1-351 defined the term “advertisement” to mean

any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device which is posted or displayed outdoors on real property and is intended to invite or to draw the attention or to solicit the patronage or support of the public to any goods, merchandise, property, real or personal, business, services, entertainment or amusement manufactured, produced, bought, sold, conducted, furnished or dealt in by any person or for any political party or for the candidacy of any individual for any nomination or office; the term shall also include any part of an advertisement recognizable as such[.]

²Section 2.2-505(B) requires that an opinion request from a county attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

³VA. CODE ANN. § 33.1-373 (2005).

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However, the 1993 Session of the General Assembly struck the phrase “or for any political party or for the candidacy of any individual for any nomination or office” from the definition of advertisement.⁴ The 1993 amendment clearly changed the applicable definition of an advertisement in the context of outdoor advertising in and adjacent to a highway right-of-way such that political party or candidacy posters or signs no longer are “advertisements” as defined in the Act. Therefore, following the 1993 amendment to § 33.1-351, signs, posters, and similar media of political parties or candidates for nomination or office no longer constitute “advertisements” within the meaning of the Act.

You note that Fairfax County is contemplating an agreement, pursuant to § 33.1-375.1(A), to act as an agent of the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373 and to collect the penalties and costs provided therein. Section 33.1-375.1(C) provides that political campaign signs, among others, are not subject to any agreement pursuant to § 33.1-375.1(A) for the enforcement of § 33.1-373. Section 33.1-375.1(C) further provides that this “exception shall not include [such] signs and advertising in place more than three days after the election to which they apply.” Therefore, while signs and advertising supporting an individual’s candidacy for elected public office may be placed in state rights-of-way pursuant to § 33.1-373, such placement is not subject to enforcement pursuant to agreements entered into under § 33.1-375.1(A) unless such signs have been in place for more than three days after the applicable election.

Conclusion

Accordingly, it is my opinion that § 33.1-373 does not prohibit the posting of political campaign signs within state rights-of-way. Fairfax County may enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373. It also is my opinion that signs and advertising supporting an individual’s candidacy for elected public office or other ballot issues are not subject to such an agreement, unless such signs and advertising remain in place more than three days after the election to which they apply.⁵

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:1303; 1:941/08-013

⁴1993 Va. Acts ch. 538, at 668, 668; *see also* 1983-1984 Op. Va. Att’y Gen. 190, 191 (concluding that “[b]ecause political speech is afforded the highest form of protection under the First Amendment,” political campaign poster posted in highway right-of-way could be found to be protected under First Amendment).

⁵*See supra* note 1.