

## MEMORANDUM

DATE: DECEMBER 7, 2021

TO: SWEET HOME ADMINISTRATION, FINANCE AND PROPERTY COMMITTEE

FROM: ROBERT SNYDER, CITY ATTORNEY

TOPIC: SWEET HOME COUNCIL RULES ON COUNCIL DRESS CODE AND IN PERSON ATTENDANCE AT MEETINGS

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SUBJECT:

The committee has recently proposed the following change to the Council Rules:

23)When in meetings of public events, Councilors will present themselves as professionals in manner and dress. As nonpartisan positions, Councilors will refrain from clothing or paraphernalia which depicts a political party or position when representing the city and/or the Council.

OREGON STATE LAW:

Article I section 8 of the Oregon Constitution states: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

In general Oregon's free-speech jurisprudence is uniquely protective of expression of all kinds. Indeed, it is no exaggeration to state that- with very few and limited exceptions, all speech and expressive conduct are constitutionally protected in Oregon.

One of the exceptions is Incompatibility. The "incompatibility exception" to protected expression has been applied in only two cases. The Court concluded that a district attorney's statement to the press about a pending criminal prosecution was incompatible with his duty to ensure a fair trial for the defendant and the Court concluded that a judicial candidate's personal solicitation of campaign funds was incompatible with the appearance of judicial impartiality. Comment: In each case, the Court concluded that the challenged statements were incompatible with a specific public value-fair trial or appearance of judicial impartially-and that the speaker, by virtue of the speaker's office or candidacy, owed a duty to that value. Although the Court has not explicitly stated so, this exception would appear to be limited to persons holding positions

of public trust and those seeking those positions. (Taken from text of OSB CLE Book)

#### IN CONCLUSION ON THE STATE LAW:

I think that an argument can be made that to promote a City Council value of impartiality that the above exception would allow a speech restriction that would be justified and comply with the above Oregon constitutional section on free speech.

#### FEDERAL LAW:

The United States Supreme Court in a 2018 case dealt with the issue of a law prohibiting voters from wearing a political badge, political button, or other political insignia inside a polling place on Election Day. This "political apparel ban" covers articles of clothing and accessories with political insignia upon them.

The Federal Case Law is as follows:

The First Amendment prohibits laws "abridging the freedom of speech." The Court uses a "forum based" approach for assessing restrictions that the government seeks to place on the use of its property. Generally speaking our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums and nonpublic forums. In a traditional public forum-parks, streets, sidewalks, and the like-the government may impose reasonable time, place and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny and those based on viewpoint are prohibited. The same standards apply in designated public forums-spaces that have "not traditionally been regarded as a public forum" but which the government has "intentionally opened up for that purpose." In a nonpublic forum on the other hand-a space that "is not by tradition or designation a forum for public communication"- the government has much more flexibility to craft rules limiting speech.

In the 2018 case the Court concluded that the polling booth was a nonpublic forum-the forum with the most flexibility to form rules but even in this forum the Court required the government to not use the word "political" because of vagueness/overbreadth but the Court did approve of part of the government Policy and stated:

The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate and items demonstrating support of or opposition to a ballot question but did not approve of "issue oriented material designed to influence or impact voting"-to vague. The Court in another section of the 2018 case sets forth examples of other state laws that are allowable:

Other States have laws proscribing displays prohibiting the visible display of information that advocates for or against any candidate or measure including the display of a candidate's name, likeness or logo, the display of a ballot measure's number, title, subject, or logo and buttons, hats or shirts containing such information----prohibiting the wearing of a badge, insignia, emblem or other similar communicative device relating to a candidate, measure or political party appearing on the ballot.

In the 2018 case in referring to voting polls or voting booths the Court made the following statements:

"common sense" that a campaign-free zone outside the polls was "necessary" to secure the advantages of the secret ballot and protect the right to vote.

It is a time for choosing, not campaigning.

Members of the public are brought together at that place at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most.

Thus in light of the special purpose of the polling place itself the state may choose to prohibit certain apparel there because of the message it conveys so that voters may focus on the important decisions immediately at hand.

Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.

(As a side note in 1996 the Oregon court in its own polling place case said that the state could not restrict political badges etc but could only restrict disruptive behavior.)

#### IN CONCLUSION ON THE FEDERAL LAW:

Applying the principles from the above 2018 case, the City Council in governing itself by the use of internal rules can assert that it is a nonpublic forum and be under the "flexible" test as described above. In following what the Court suggested was allowable the verbiage for the City Council rules could read as follows:

23)When in meetings of public events, Councilors will present themselves as professionals in manner and dress. As nonpartisan positions, Councilors will refrain from clothing or paraphernalia which displays the name, likeness or logo of a political party; displays the name, likeness or logo of a candidate; or demonstrates support of or opposition to a ballot measure or ballot question when representing the city and/or the Council.

#### CITY COUNCIL ATTENDANCE:

In regard to the proposed amendment to video conferencing you may want to consider the following:

If a councilor has participated via video conferencing two times in a row and requests a third time, the request will be denied except in case of an emergency, for health reasons or for an ADA accommodation.

RECOMMENDATION:

The committee may want to have one more meeting before presenting their recommendations to the City Council to discuss the above drafts or other versions that the committee wants to consider. There are no guarantees that a judge will agree with the use of the above exceptions but I think that the arguments can be made and may prevail.