



FLORIDA DEPARTMENT *of* STATE

RON DESANTIS
Governor

LAUREL M. LEE
Secretary of State

November 5, 2021

The Honorable Lori Edwards
Supervisor of Elections, Polk County
P.O. Box 1460
Bartow, Florida 33831

Re: DE 21-04 No-Solicitation Zone – Private
Property within Zone – § 102.031, Florida
Statutes

Dear Supervisor Edwards:

This letter responds to your request for an advisory opinion regarding the authority of a supervisor of elections to control the use of private property falling within the 150-foot no-solicitation zone around a polling place. Because you are a supervisor of elections proposing to take action related to Florida's election laws, the Division of Elections is authorized to issue an opinion to you pursuant to section 106.23(2), Florida Statutes (2019).

FACTS

Your request for an advisory opinion asks if it is a violation of Florida law for private citizens to post campaign yard signs on their private property during voting hours if the private property falls within the 150-foot no-solicitation zone of a polling place as articulated under section 102.031, Florida Statutes. Your request is based on a 2020 candidate's request to place campaign signs and actively campaign on their front lawn, which was located within the 150-foot no-solicitation zone of polling places or early voting locations in Polk County. The Division interprets your request as asking whether you are authorized to remove campaign signs placed on private property that falls within a designated 150-foot no-solicitation zone around a polling place.

ANALYSIS

The Division of Elections issued an advisory opinion on a similar question last year addressing “what authority, if any, a supervisor of elections has to control the use of private property failing within the 150-foot no-solicitation zone around polling places under section 102.031, Florida Statutes.” *Div. of Elections Op. 20-01* (September 21, 2020). The Division relies on its prior opinion and provides additional guidance herein.

Although no court has held Florida’s non-solicitation statute unconstitutional, there is an open question as to the constitutionality of the no-solicitation zone as it applies to private property where the private property has not been offered up to serve as a polling place. The Division of Elections thus declines to advise the Polk County Supervisor of Elections, categorically, to attempt to impose the 150-foot non-solicitation zone against an owner of private property. However, the Division notes that specific facts and circumstances should be analyzed on a case-by-case basis in order to harmonize the rights of voters and private property owners.

Florida Law restricts solicitation as follows:

No person, political committee, or other group or organization may solicit voters inside the polling place or within 150 feet of a drop box or the entrance to any polling place, a polling room where the polling place is also a polling room, an early voting site, or an office of the supervisor where vote-by-mail ballots are requested and printed on demand for the convenience of electors who appear in person to request them. Before the opening of a drop box location, a polling place, or an early voting site, the clerk or supervisor shall designate the no-solicitation zone and mark the boundaries.

§ 102.031(4)(a), Fla. Stat. (2021). “Solicit” or “solicitation” is defined broadly to include, but is not limited to:

seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; selling or attempting to sell any item; and engaging in any activity with the intent to influence or effect of influencing a voter.

§102.031(4)(b), Fla. Stat. (2021).

In 2009, the 11th Circuit Court of Appeals, relying on United States Supreme Court precedent, upheld the constitutionality of the statute, which has remained essentially unchanged until 2019 when the zone was enlarged from 100 feet to 150 feet¹, and 2021 when drop boxes were

¹ (ch. 2019-162, Laws of Florida)

included.² *Citizens for Police Accountability Committee v. Browning*, 572 F.3d 1213, 1221-22 (11th Cir. 2009) (“We stress the short time (a few days a year) and small areas (less than a football field) in which the Florida statute suppresses some political speech around the polls....”). However, the *Citizens* court only addressed the constitutionality of the statute as it applied to the solicitation of voters exiting polling places concerning matters unrelated to any issue then on the ballot; it did not address the constitutionality of the no-solicitation zone statute as applied to private property. *Id.* at 1215.

Almost forty years ago, Florida had a similar statutory provision that prohibited any person from soliciting votes or signatures on petitions within 100 yards of a polling place on election day. § 104.36, Fla. Stat. (struck down in *Clean Up ‘84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985)). The 11th Circuit declared the statute unconstitutional as overbroad because the statute did not distinguish between public and private property and “third parties, not before the court, may feel inhibited in utilizing their protected first amendment communications because of the existence of the overly broad statute.” *Clean Up ‘84*, 759 F.2d at 1514.

The Court in *Citizens for Police Accountability Committee* did not address its decision in *Clean Up ‘84*. Thus, it appears an open question whether the provisions of section 102.031 can be applied to private property owners within the 150-foot no-solicitation zone where the private property itself has not been offered up to serve as a polling place. For this reason, the Division of Elections declines to render categorical advice as to the applicability of section 102.031 to private property. The Division notes, however, that this inquiry was posed in the context of a broad question of authority, absent a specific factual basis that may be necessary to accurately and legally harmonize the rights of voters and private property owners.

The Division of Elections finds that reading the provisions of section 102.031 as a whole, including section 102.031(4)(e) added in 2019, and previously existing section 102.031(4)(d), the statute can be interpreted in a manner that neither impinges upon the important rights and interests of voters to access polling locations in an unobstructed and unimpeded manner, nor upon owners of private residential and business properties who maintain property rights in such locations and who did not offer up such property for polling locations.

First, the statute recognizes that polling places are not structurally identical and have unique physical characteristics that come into play when delineating a no-solicitation zone. Section 102.031(4)(c) provides in pertinent part that: “Each supervisor of elections shall inform the clerk of the area within which soliciting is unlawful, based on the *particular characteristics* of *that* polling place.” “Polling place” is defined in section 97.021(29) as “the building which contains the polling room where ballots are cast.” This italicized language, which has resided in the statute for a number of years, recognizes that every polling place will be structurally distinct and have different substantive components. A downtown polling place, for example, may abut or even house (in the case of a large county building) a preexisting privately owned café physically removed from the supervisor of elections office both by walls and floors, but technically falling within the

² (ch. 2021-11, Laws of Florida)

150-foot no-solicitation zone. It would be unreasonable and likely unconstitutional to attempt to shut down an existing private café's business operations during the timeframes implicated by section 102.031(4).

If not for interpreting the subsection (4) no-solicitation zone language within the larger context and purposes of the overarching section 102.031 under which it falls, the language of subsection (4) on its face could be taken to unintended extremes. This is apparent not only as in the above example of attempting to shutter an abutting private café or coffee shop, but as another example, to also potentially include the prohibition of the "sale" of items in a vending machine in the hallway of a county building housing the supervisor of elections office based on the broad statutory definition of "solicitation" in section 102.031(4)(b), Florida Statutes, to include selling or attempting to sell any item to voters.

Second, new language added to section 102.031 in 2019, as well as previously existing language, leads to an interpretation that the intent of the overall subsection is to primarily govern the property on which a polling place or early voting site is located and the owners, operators, or lessees of such property, as opposed to abutting (or even encased, as noted above) private property and its owners. More specifically, section 102.031(4)(d) applies to "any public or private *property used as a polling place or early voting site*" and provides that:

Except as otherwise provided in paragraph (a), the supervisor may not designate a no-solicitation zone or otherwise restrict access to any person, political committee, candidate, or other group or organization for the purpose of soliciting voters.

§ 102.031(4)(d), Fla. Stat. (2019) (emphasis added). Additionally, new paragraph (4)(e) was added in 2019, and provides:

The owner, operator, or lessee of the *property on which a polling place or an early voting site is located*, or an agent or employee thereof, may not prohibit the solicitation of voters outside of the no-solicitation zone during polling hours.

§ 102.031(4)(d), Fla. Stat. (2019) (emphasis added). Paragraph (e) reiterates the same prohibition as paragraph (d) – disallowing the prohibition of solicitation on the property of a polling place beyond the 150-foot no-solicitation zone provided for under paragraph (a). The difference is that paragraph (e) enjoins the owner, operator, or lessee of the polling place property from prohibiting solicitation beyond the zone, while paragraph (d) enjoins the supervisor of elections from extending the zone. These proscriptions specifically apply to bar extension of the no-solicitation zone *on polling place property*, as opposed to the instant inquiry of whether the original zone applies to private property. Nonetheless, the statute's exclusion of the rights and duties of owners, operators, or lessees of adjacent private property implies that the no-solicitation zone should not encroach upon private property not offered as a polling place. Thus, while a narrow reading of 102.031(4)(a) appears to require the supervisor of elections to apply the no-solicitation zone blindly and upon all adjacent parcels, a more integrated and reasonable reading of the entirety of

section 102.031, and especially subsections (4)(c) through (4)(e), requires attention be directed to the “*particular characteristics*” of each polling place or early voting location.

Although the concerns that the Eleventh Circuit espoused almost forty years ago in *Clean Up '84* are still relevant when evaluating Florida’s current no-solicitation zone statute, section 102.031(4) does not operate in a vacuum and a comprehensive reading may alleviate potential First Amendment issues. *See Clean Up '84*, 759 F.2d at 1514. The Division thus finds that the rights of voters and private property owners under section 102.031 can be harmonized in a reasonable manner where neither suffers injury and elections proceed in an orderly fashion.

Moreover, a supervisor of elections has additional statutory authority to limit activity on private property that interferes with a voter’s right to access the polls in a peaceful and unencumbered manner or otherwise threaten the maintenance of order at the polls:

Each election board shall possess full authority to maintain order at the polls and enforce obedience to its lawful commands during an election and the canvass of the votes.

§ 102.031(1), Fla. Stat. (2021). The supervisor of elections thus has the statutory authority to craft individualized responses to specific factual scenarios depending on the “*particular characteristics*” of the situation.

Finally, the Division of Elections would encourage the supervisor of elections to select, where possible, polling locations and drop box locations that do not contain unrelated private property within the bounds of the 150-foot no-solicitation zone. The Division is cognizant that in some locations that may not be possible. When faced with such a situation, the supervisor of elections should assess the particular characteristics of the polling place, take into account any structural separation of private property interests, and determine the proper course for harmonizing the interests of voters and private property owners. For example, a temporary barrier may properly be utilized to create such a separation at times.

The Division is confident that a supervisor of elections, in exercising his or her duty under section 102.031(4)(c) to “inform the clerk of the area within which soliciting is unlawful based on the particular characteristics of that polling place,” will be able to achieve the compelling interests of allowing voters to access the polling place without confusion and undue influence and with the integrity of the election process intact. *See Burson v. Freeman*, 504 U.S. 191, 198-99 (1992) (recognizing and affirming those compelling interests supporting the application of a no-solicitation zone); *Browning*, 572 F.3d at 1219 (accord).

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SUMMARY

The Division of Elections declines to advise, without more facts and circumstances specifically at issue, the supervisor of elections to impose the 150-foot non-solicitation zone against an owner of private property, where the private property itself has not been offered up to serve as a polling place, unless activity on the private property begins to interfere with maintenance of order at the polls, in which case the supervisor of elections' enforcement authority under section 102.031(1), Florida Statutes may be implicated.

Respectfully,

A handwritten signature in blue ink, appearing to read "M. Matthews".

Maria I. Matthews, Esq.
Director, Division of Elections