



You Really "Need to Read" Reed

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Basis of Zoning Power and Limitations

- "Police Power"
Permissible basis for zoning: i.e. traffic, congestion, property values, nuisance
- The Fifth Amendment of the U.S. Constitution Places Limits
"After all, if a policeman must know the Constitution, then why not a planner?" *Brennan Dissenting, San Diego Gas and Electric Co. v. City of San Diego*, 101 S. Ct. 1287 (1981).



When a regulation involves the First Amendment...

- Enhanced judicial scrutiny.
- Not presumed constitutional.
- Generally, no greater regulation than necessary to advance a substantial governmental interest.
- Need clear, detailed statement of intent (and record) to establish the governmental interest, and that this regulation advances the interest.



First Amendment & Land Use

- Regulation of Signs
- Regulation of Adult/Sexually Oriented Uses
- Regulation of Religious Assemblies & Uses (First Amendment and *RLUIPA*)



First Amendment

Governments "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 for a redress of grievances.**"



Sign Regulations

- Sign regulation is required – included in the statutory definition of "land development regulations"
- Direct, content-based regulation of ideological speech is strictly scrutinized and rarely upheld. Commercial speech is protected by intermediate scrutiny, requiring regulation to balance the speech rights against other substantial public interests. *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557 (1980) (must seek to implement a substantial governmental interest, and directly advance that interest).
- To meet this standard, must have a statement of purpose establishing government's interests that justify the regulation
 - aesthetics
 - traffic safety



Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is accepted that governments may regulate the physical characteristics and locations of signs.

- The main justifications for sign regulation: aesthetics and traffic safety
- Also placemaking, economic development, property values, democracy



Sign Regulations

Regulations of signs are usually acceptable if:

- justified without reference to the content of the signs subject to the law (i.e., content neutral);
- Are narrowly tailored to serve a significant governmental interest; and
- Leave open ample alternative channels for communication of the information.

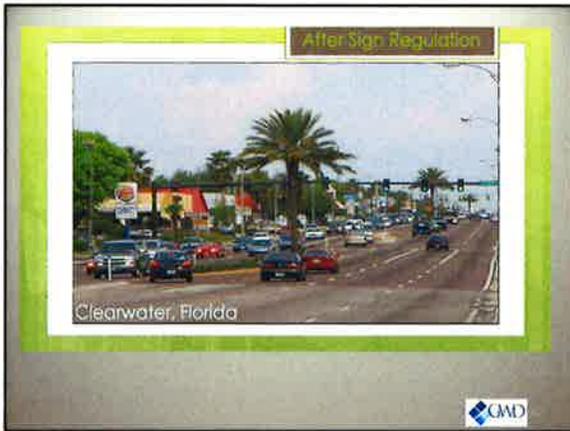


Before Sign Regulation



Clearwater, Florida





Content-Based Regulations

- Normally, any time government makes regulatory distinctions based on the "content" of the regulated speech, courts will apply a very demanding analysis, known as "strict scrutiny."
- **What is content-based regulation of speech?**
Do you have to look at the message to determine whether the rule applies? If so, content-based.
Examples: "for sale," "directional," "identification," "grand opening," or "stop" signs.
 - *is the government trying to regulate or censor content? If so, content-based.*
Example: censorship of movies or newspapers, sign regulations allowing US flags but not other flags, etc.




- If a sign code, on its face, is content-based, its purpose and its justification do not matter. If it's content neutral, then the court can consider the justification. Innocent motives do not eliminate the danger of content based rules being used to censor speech.
- The "need to read" rule adopted by Reed
- Must not single out political or noncommercial speech for less favorable treatment than applicable to commercial speech. Commercial speech does not have the same protection. Political speech is holiest of holies.



- "What's good for the goose" rule applies. If 4' by 4' real estate sign is allowed in residential districts, political signs should not be limited to 2' by 2'. Both are temporary signs with the same impacts. So treating them differently based on their content runs afoul of First Amendment case law.



LESLIE KNOPE CITY COUNCIL

Sign Code Traps

- Favoring Commercial Speech
 - Must not single out political or noncommercial speech for less favorable treatment than applicable to commercial speech. (i.e. problematic to have more restrictive regulations of political campaign signs than of real estate signs)
- Durational limits for political signs should be avoided and, if included, must be at least 90 days and consistent with other durational limits.
- Posting duration based on "usefulness" of the sign is considered valid:



More Issues

- Single Family Neighborhoods
 - Must allow noncommercial speech in single family residential zones. *City of Ladue v. Gilleo*, 512 U.S. 3 (1994), ("Free speech sign")
 - Must allow some kinds of commercial speech in single family residential zones. *Linmark Assocs. v. Willingsboro Township*, 431 U.S. 85 (1977).
- Flags (and other signs)

Must avoid viewpoint discrimination. Example: cannot only allow US flags or governmental flags. *Dimmitt v. Clearwater*, 985 F.2d 1565 (11th Cir, 1993).





More Sign Code Traps

Pay Attention to Procedures, in addition to substance!

- Lack of deadlines for decision
- Unbridled administrative discretion to deny permit

Make sure that review and permitting procedures provide strict deadlines for review and approval or denial of sign permit, and that review criteria are definite and objective. Educate staff.




“Billboard Shakedown Scheme”

- Outdoor advertising companies attack local government sign ordinances on constitutional defects
- Court strikes down ordinance, then company may install billboards
- Modern billboards have a useful life of at least 70 years
- Local governments must proactively focus on their sign regulations to defend against attack



Justice Thomas Justice Alito Justice Roberts Justice Scalia Justice Kennedy

Reed vs. Town of Gilbert - Unanimous

Justice Breyer Justice Kagan Justice Ginsburg Justice Sotomayor

Religious Signs and Free Speech

- The court decided in Reed v. Town of Gilbert, Ariz., that a town ordinance that places different limits on political, ideological and directional signs violates the First Amendment.
- 9-0, Decided June 18
- The justices agreed on the bottom line but not the rationale. Six justices said the ordinance was subject to the most searching form of judicial review, strict scrutiny, and that it could not survive it. Three justices agreed that the ordinance must fall but said the legal principles announced by the majority were too sweeping, endangering many reasonable sign ordinances.



Maximum Sign Sizes

Homeowners Association signs

Ideological signs
These are either a permanent sign type, limited in number and not allowed in ROW

Political signs (nonresidential zones)
These signs are subject to a state pre-emption that allows larger political signs in ROW

Qualifying Event Signs
These signs are subject to a state pre-emption that allows larger political signs in ROW

Per Reed's Course

Temporary Sign Regulations



Event Signs



Election Signs

- Nonpolitical, non-ideological, non-commercial event signs: 6 sq. ft.
- Maximum duration: 12 hours before, until 1 hour after the event
 - In ROW
- Political temporary signs: 32 sq. ft. (in nonresidential zones)
- Maximum duration: 60 days before and 15 days after elections
 - In ROW



Ideological Signs

(for non-commercial expression unrelated to an election)

- Ideological signs could be larger (i.e. 20 sq. ft.) than "qualifying event" signs, but not as big as political signs in a nonresidential zone
- They could be displayed for an unlimited period of time.
- However, they couldn't be displayed in the right-of-way like event signs and election signs

Reed Decision Facts/Holding

- No prior Supreme Court decisions were overruled by Reed v. Gilbert, did not cite main sign cases.
- First Supreme Court decision on sign law for over 20 years.
- Town of Gilbert prohibited outdoor signs without a permit except for 23 categories (bazaar signs, flying banners) and 3 relevant categories: Ideological signs—up to 20 square feet with no time or placement restrictions; political signs—32 square feet and only displayed during election season; and “temporary directional signs”—no more than 4, 6 square feet, 12 hours before and 1 hour after.
- All 9 on Supreme Court: Sign code is illegal, but did not agree on why.
- The Town offered justifications of aesthetics and traffic safety but that means the Code’s distinctions are “highly underinclusive”.
- Thomas: Town can still regulate size, building materials, lighting, moving parts, portability. The Town can forbid postings on public property in an evenhanded manner.



Key Quotes

- Court struck down the “event based” provisions as content based. “A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.”
- “An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers and passengers—e.g., warning signs marking hazards on private property or signs directing traffic—MIGHT also survive strict scrutiny”.



- Importance of Concurring opinion, stating that the following would not be “content based”, distinguishing based on:
 1. Size
 2. Locations, distinguishing between freestanding signs and building signs
 3. Lighted and unlighted
 4. Signs with fixed messages and electronic signs with messages that change
 5. Signs on private vs. public property
 6. On-premises vs. off-premises [???? Requires reading]
 7. Total number per mile of roadway (Note: Must allow each “parcel” to have signs).
 8. Time restrictions advertising a onetime event... These do not discriminate based on topic/subject but are like rules restricting the times within which oral speech or music is allowed. [????? Requires reading]
 9. Government speech: Reed court recognized that the Government must speak and is not regulated the same as private individuals.
- Sent conflicting signals.
- Not listed:
 1. Commercial vs. noncommercial
 2. Temporary vs. Permanent
 3. Private directional signs
- One concurrence: very concerned about most laws with subject matter exemptions will now be struck down. Court would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs (well placed speed bumps? Lower speed limits? Ban on hidden driveways?)



➤ Consequence: "Our communities will find themselves in an unenviable bind: they will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter."



➤ Here Gilbert's distinctions do not pass strict scrutiny, intermediate scrutiny, or the laugh test.

➤ Concurrence: The Town offered no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet.

➤ The city said directional signs "need to be smaller because they need to guide travelers along a route".

➤ "I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us."



➤ Commercial/Non-Commercial. Reed didn't overrule prior cases allowing commercial/non-commercial distinction—Constitution provides less protection to commercial speech.

➤ May be wishful thinking to write off Reed as only addressing non-commercial speech.



Free Expression



Walker

- The Confederate Flag and Free Speech
- The court decided in Walker v. Texas Division, Sons of Confederate Veterans that Texas was free to reject specialty license plates bearing the Confederate battle flag. 5-4 Decided June 18
- Nine states, some under court order, had let drivers choose specialty license plates featuring the Confederate flag and honoring the Sons of Confederate Veterans, which says it seeks to celebrate Southern heritage. But Texas refused to allow the group's plates, saying the flag was offensive.
- In 2011, not long before the motor vehicles department rejected the plates, Gov. Rick Perry indicated he supported such a move. "We don't need to be scraping old wounds," he said. The American Civil Liberties Union filed a brief against the state, while an N.A.A.C.P. spokesperson expressed support for the state.



Government Speech:

- When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. Government cannot function unless it has freedom to select the messages it wants to convey.
- Texas "has effectively controlled the messages by exercising final approval authority over their selection"
- Regulated in Manual on Uniform Traffic Devices.
- Necessary to identify property—"high voltage"
- Necessary to implement State laws—post "no trespassing"
- Good idea to mandate identification signs and establish a required dimensional limitation on identification signs based on the size of the structure and its distance from the public road. The signs should be sized to allow emergency responders to identify the property.



Important Points from Reed

1. Anyone (including candidate for office or billboard company) can bring a facial challenge to the code, and recover attorneys' fees. For this reason, a local government should amend its code before it is sued.
2. KEY: Do not require that additional temporary signage be used for the purpose it is designed for, except maybe if it's commercial temporary signage.
3. It appears the commercial/non-commercial distinction is still valid.
4. Safe with government speech - Can define government sign to include signs that are required to be placed by a government either directly or to enforce a property owner's rights.
5. It appears 6 judges would still uphold the on-site/off-site distinction.
6. Preambles important - List any past litigation, point to Clearwater pictures of transformation without billboards, Comprehensive Plan policies. Ensure all codes contain a strong well-articulated purpose provision, and include blight prevention, economic development, design creativity, prevention of clutter, protection of property values, encouragement of free speech, and scenic view protection, include studies and data in the findings section, including traffic safety studies.
7. Focus on signs in comprehensive plans.
8. Enforcement: Selective enforcement can give rise to liability. Consider your appetite for enforcement in adopting these rules.



Critical Areas To Review:

- Local government cannot be stricter on one type of temporary sign than another. If you really need the regulation, you would apply it uniformly.
- Consider whether the exceptions to permitting requirements further the asserted purpose of the sign code or are at least sufficiently limited to avoid undercutting the stated purpose. If express goal is to eliminate sign clutter, does allowing "Grand Opening Signs" nullify that aesthetic interest? Underinclusive. Or if a code allows noncommercial signs to be larger than real estate signs, is the government undermining its general interest in reducing driver distraction?
- Look carefully at how you differentiate among business types. No "speaker based" signs, giving priority to one type of business or to non-profits. For example, problematic to favor gas stations with higher signs and changeable copy, but limit tire stores to shorter signs without changeable copy.
- Best to have only 3 categories of signs—reduce sign categories as much as possible
 - Temporary/permanent
 - Onsite/offsite
 - Commercial/noncommercial
- Have different section of the code for temporary and permanent signs so they can be severed
- Use one standard for all commercial temporary signs (including garage sales) and one standard for all noncommercial temporary signs (applies year round, not just during elections; don't limit number, but have a spacing regulation)




- Reduce exceptions to permitting requirements and prohibitions. Slicing and dicing of sign categories will lead to litigation.
- Exempt signs based on activity on site, not sign content or speaker
- Protect the right of way and all public property by a complete ban on privately placed signs. Based on a government speech doctrine, you have broad discretion.
 - Don't open your right of way to any signs or you're subject to hate speech.
 - Remove traffic control devices from the sign regulations, and add findings that traffic control devices are in the public interest, and do not hamper aesthetics.
 - No banners over roads except where government is a sponsor for the event.
 - If you cannot ban signs in right of way, then you should limit with size, location and spacing criteria but cannot limit content!
- Define "sign" without reference to content based exclusions like murals/art, holiday decorations, flags, because you cannot "sever" the definition from the rest of the code, if it's found unconstitutional.
- Carefully review how the excepted signs are defined. Remove problem definitions such as political signs, religious signs, event signs, real estate signs, and holiday lights. These relate to core First Amendment protected speech so there is heightened sensitivity that leads to litigation.
- Include a substitution clause expressly allowing noncommercial copy to replace the message on any permitted or exempt sign
- Include a detailed severability clause just for the sign code.





Options for Cities from Reed

- Can distinguish between permanent and temporary signs, since easily distinguished based on structural characteristics—permanent signs are affixed to the ground or wall, while temporary signs are not. They are made of different material.
- Could allow a number of temporary signs and low lumens lights from Dec 1 to Jan 10, and one sign on July 4. Then place overall limit on the number or have a spacing restriction.
- Can say all temporary signs must be a certain size square feet.
- Could require anyone displaying a temporary commercial sign to register online with the government.
- Could allow one temporary sign on all properties at all times, and then one per candidate and per issue during election season, and then one when property is for sale.
- Can require removal or have signs expire 10 days after the generic "event" or "10 days after the election, sale, rental, lease or conclusion of the event which is the basis for the sign".
- Can regulate display time for temporary signs—say 90 days at a time.
- Can place size limits and numerical limits on total signs per property. Could provide: "Each parcel of real property shall be allowed, without a permit, an additional 32 square feet of temporary noncommercial signage, not to exceed four signs at any time, for a period not to exceed 90 days per calendar year."
- Can allow signs based on the status of the property or activities on site—[sign on real estate offered for sale, sign on property that has just been sold, leased or conveyed, no more than 2 weeks prior or 2 days following a registered event], but this could still fall under Reed. Reed calls this into question because of subtle content bias. But we cannot prohibit real estate signs, although maybe we can prohibit construction signs, grand opening signs, etc.



VI. Directional Signs:

- Have government provide them.
- Otherwise have to treat directional signs the same as other noncommercial signs.
- Rely on studies to support public safety reasons.
- Emphasize wayfinding on wall and monument signs- for 911 purposes- don't want people to get lost.

VII. Special Event Signs

- Allow to be erected only while special event is active OR issue temporary permits with expiration tied to the date of issuance. Example: Citizen/businesses can apply for a 7 day permit (online) for 7 days from issuance.

VIII. Mascots/Human Signs

- Is a mascot a sign? Some judges say yes, some no.
- If a mascot is a sign, cannot use the sign code to regulate what people wear.
- Two weeks prior to or following a registered event.



- Can prevent signage on ROW without the regulation turning on the "human" aspect of the sign. Take human signs out of your sign code because don't want to have to make distinction based on non-commercial/commercial (although that's still viable).

IX. Drive Through Allow a small extra sign when lot includes drive thru window

X. Menu Signs No need to outlaw signs such as menu signs. Allow businesses licensed to serve food to display a 2 square foot sign that says drive thru.



XI. Science Fair Signs - Could allow use where property is "open to the public" but limit duration.



6 Points Regarding the Future under Reed:

1. Anyone can bring a facial challenge and recover attorneys' fees. Could invalidate entire sign code. If you can amend before lawsuit, then no attorney's fees.
2. Businesses usually look to the bottom line when considering whether litigation will benefit them, but not for profits like churches are often represented by pro bono legal counsel and will spend time and money to preserve First Amendment rights.
3. Perhaps the Florida Constitution's guarantee of scenic beauty provides a compelling interest to justify some content based regulation.
4. Each sign code will reflect a risk analysis.
5. Avoid regulating signs that have negligible impact.
6. Even if you can't fix your sign code right away, advise permitting and enforcement staff to limit potential problems. Improper enforcement leads to serious trouble. Online registration system for temporary signs may help enforcement of t/p/m. Cite those who do not register.




QUESTIONS 