



Staff Report

TO: City Council
FROM: Christina Taylor, Deputy City Manager
DATE: April 4, 2023
SUBJECT: April 4, 2023 Staff Report - Proposed Sign Code Amendment.docx

Description Review of Code Section 17.07 – Signs for compliance with recent case law.

Background and Analysis:

The United States Supreme Court in *Reed v. Town of Gilbert* issued a decision in June 2015 against the town of Gilbert, Arizona, and its local sign ordinance. In that case, a church congregation did not have a fixed location; it conducted its Sunday services at different locations in the community every week. The pastor of this congregation placed temporary signs directing the congregation and anyone else interested to the site of the services. The pastor was cited for failing to include the event date on the signs and for failing to remove the signs within the short period of time allowed for removal of such signs under the local ordinance. The opinion of the court, written by Justice Clarence Thomas, struck down the town sign ordinance, finding that the town’s regulatory program was “content based” and as such was subject to “strict scrutiny.” (Please note that all nine justices concurred with the result; there were three separate concurring opinions).

A “content based” regulation is one that “applies to particular speech because of the topic discussed or the idea or message expressed.” The restrictions that apply to any given sign depended solely on the communicative content of the sign. Signs pertaining to elections were subject to different timing conditions than signs providing directions to a temporary event. Signs pertaining to other topics or ideas were required to comply with their own unique conditions.

The Court found the differential treatment among signs to be arbitrary and the Town’s ordinance failed the strict scrutiny analysis. If the Town was truly concerned about aesthetics and traffic safety, the Court noted there are several ways to regulate signs that have nothing to do with the sign’s message, including regulations regarding size, materials, lighting, number of signs allowed in a given area, distinctions between signs

on private versus public property, distinctions between fixed message signs and electronic signs with changing messages, moving parts, and portability.

Despite the bleak picture painted by Justice Thomas in the official opinion of the Court, Justice Alito, joined by Justices Kennedy and Sotomayor, suggested that cities are not “powerless” to enact reasonable sign regulations and offered some rules that these three justices opine “would not be content based.” The rules are as follows:

1. Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.
2. Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.
3. Rules distinguishing between lighted and unlighted signs.
4. Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
5. Rules that distinguish between the placement of signs on private and public property.
6. Rules distinguishing between the placement of signs on commercial and residential property.
7. Rules distinguishing between on-premises and off-premises signs.
8. Rules restricting the total number of signs allowed per mile of roadway.
9. Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.
10. In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.
11. The decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate aesthetic objectives.

As set forth above, *Reed v. Town of Gilbert* involved a temporary non-commercial sign. Non-commercial speech and signage are content-based and subject to strict scrutiny review. To survive strict scrutiny, the government must prove that the restriction furthers a compelling state interest and is narrowly tailored to achieve that interest. In contrast, content-neutral laws such as commercial speech are subject to intermediate scrutiny, which asks whether the law is narrowly tailored to serve a substantial government interest. Although the two standards sound similar, courts are significantly more likely to uphold laws under intermediate, rather than strict, scrutiny.

After *Reed*, any content-based sign regulation was called into question. However, subsequent court decisions have helped clarify the reach of this decision. For example,

in *Contest Promotions v. City and County of San Francisco* (2017) 874 F.3d 597, the Ninth Circuit held that *Reed* does not extend to the regulation of commercial signs. In that case, Contest Promotions, LLC rented advertising space from businesses in cities around the country, and placed third party advertising signs in that space, framed by text inviting passersby to enter the business and win a prize related to the sign. The City and County of San Francisco determined that Contest's signs violated local regulations pertaining to onsite commercial signage. Contest filed suit, alleging that San Francisco's sign-related regulations, by distinguishing between commercial and noncommercial signs, violated the First Amendment. The federal district court dismissed the complaint, and the Ninth Circuit affirmed.

The Ninth Circuit held that restrictions on commercial speech are subject to intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n* (1980) 447 U.S. 557, 100 S.Ct. 2343. The text of the city's signage ordinance explained that, when the ordinance was adopted, the "increased size and number of general advertising signs" in particular were "creating a public safety hazard"; that such signs "contribute to blight and visual clutter as well as the commercialization of public spaces"; and that there was a "proliferation" of such signs in "open spaces all over the City." The Ninth Circuit opined that San Francisco's decision to regulate commercial signs was directly related to its substantial interest in safety and aesthetics.

Furthermore, in *Act Now to Stop War and End Racism Coal. v. Dist. of Columbia* (2017) 846 F.3d 391, the District of Columbia Circuit held that a regulation imposing certain durational limits on special event signs was content-neutral, even though one needed to read the sign to determine whether the regulation applied. In that case, the Court upheld an ordinance, as applied to signs posting on public lamp posts, which allowed longer display times for event-related signs than for signs that were not event-related. It did not target "communicative content, but uniformly restricted display times under the commonsense understanding that, once an event has passed, signs advertising it serve little purpose and contribute to visual clutter." Justice Alito indicated, in his concurring opinion in *Reed*, that this type of ordinance was content-neutral. This case suggests that *Reed* does not necessarily invalidate ordinances regulating event signs.

In April 2022, the U.S. Supreme Court further narrowed *Reed* by holding in *City of Austin v. Reagan Nat'l Adver. of Austin, LLC* (2022) 142 S. Ct. 1464, 212 L. Ed. 2d 418 that a City of Austin's outdoor advertising ordinance, which allowed on-premises signs—but not off-premises signs—to be digitized, was facially content-neutral and was not subject to strict scrutiny under the First Amendment absent a content-based

purpose or justification. This was despite having to “read the sign” to regulate it. In overturning the Court of Appeals, the Court majority wrote:

“The Court of Appeals interpreted *Reed* to mean that if ‘[a] reader must ask: who is the speaker and what is the speaker saying’ to apply a regulation, then the regulation is automatically content based [...] This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court’s precedent. Unlike the regulations at issue in *Reed*, the City’s off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City’s distinction is content neutral and does not warrant the application of strict scrutiny.”

(*Id.* at 1471.)

Finally, in May 2022, in *Shurtleff v. City of Boston, MA* (2022) ___ US ___, 142 S.Ct. 1583, the U.S. Supreme Court held that a city violated the plaintiff’s free speech rights by refusing to display a flag bearing a cross on a flag pole in front of city hall. The Court observed that the flag pole had a long history of displaying flags that had nothing to do with city business, and could therefore not reasonably be interpreted as conveying government support of religion in contravention of the establishment clause.

Based on the above-decisions, municipalities now have a better understanding on how to revise its sign ordinances after *Reed*. First, cities are permitted to distinguish between noncommercial and commercial signs. Second, cities can also distinguish between on-premises and off-premises signs, as long as the distinctions are reasonable. Third, cities are permitted to impose certain durational limits on special event signs. Finally, cities desiring to exercise discretion regarding the flags flown (and not flown) by private groups on public property should enact local policies that, among other things, identify the flags that groups can and cannot fly and what those flags communicate (e.g., the city’s official sentiments).

Previous City Council Action:

On July 20, 2021, based on the directives of the Supreme Court, City Staff provided to City Council background on the U.S. Supreme Court holding in *Reed v. Town of Gilbert* and its impact on sign ordinances. In coordination with the City Attorney, City Staff drafted proposed changes to Municipal Code Section 17.07 – Signs to amend the regulations to comply with the U.S. Supreme Court case.

At that meeting, City Council provided further direction to City staff to make edits on proposed changes to Section 17.07, and bring it back for review. Specifically, it believed the 45 days for political signs was insufficient during election time. It also requested consideration of certain modifications to the placement requirements in the right-of-way.

ANALYSIS:

The primary takeaway of the *Reed* case is that local regulation of non-commercial signs must be content-neutral and that a sign code will be subject to “strict scrutiny” judicial review if it applies different standards based on a sign’s content. Therefore, Staff has redrafted its sign regulations to focus on a sign’s physical and other non-content-based attributes, rather than content-based categories that had been typical in codes, such as whether a sign is political or ideological in nature.

A summary of the most significant changes proposed are the following:

- Offers a detailed objective that recognizes that “commercial and residential areas within the City have different regulatory needs due to their inherent characteristics and may require different sign regulations based on the respective land uses, and that aesthetic impacts based on sign size, illumination, and placement may create a greater public nuisance in residential neighborhood areas than in commercial areas.” (See Sec. 17.07.020(12).)
- Clarifies City’s basic policy on message neutrality in light of *Reed v. Town of Gilbert*. (See Sec. 17.07.030(C).)
- Adds, revises and/or deletes certain categorization of signs under Section 17.07.040. For example, added definitions for “commercial signs” and “noncommercial signs.” (Sec. 17.07.040(D) and (N).) Clarifies other definitions, such as real estate signs and temporary signs. (Sec. 17.07.040(V) and (Y).)
- Adds an interpretation statement in its general provisions section that makes clear that the City does not restrict speech on the basis of its content, viewpoint, or message, and any classification of signs that permits speech by reason of the type of sign, identity of the sign owner, or otherwise, shall also be interpreted to allow noncommercial messages on the sign. (Sec. 17.07.070(A).)
- Adds an entirely new section to the City’s sign ordinance entitled “Temporary Signs.” (See Sec. 17.07.080.) It distinguishes between three types of temporary signs:

(1) *Non-Commercial Temporary Signs*: These types of temporary signs are not considered either on-site and off-site and may be displayed for a period not to exceed 60 days. Any time a temporary noncommercial sign is removed, it shall not be replaced by the same or other temporary sign for a period of not less than 90 consecutive days. (Sec. 17.07.080(A).)

(2) *Commercial Temporary Signs*: Commercial temporary signs distinguish between on-site and off-site. They include the following types of signs: (a) real estate signs; (b) on-site temporary window signs displaying a commercial message; (c) garage and yard sale signs; (d) construction signs; (e) future tenant identification signs; (f) commercial flags and banners for real estate sales and leasing; and (g) commercial flags on commercial, industrial, or agricultural properties. (Sec. 17.07.080(B).)

(3) *Temporary Signs for Special Events*: These types of signs are associated with a single event or series of events that occur on an infrequent or sporadic basis. For example, community events such as the Beaumont Cherry Festival would fall under this category of signs. (Sec. 17.07.080(B).)

- To address the City Council's concerns on placement requirements in the public right-of-way, the proposed amendment in Section 17.07.090(E) reduces the placement requirements from five (5) feet to a minimum of three (3) feet from edge of curb or street pavement if no curb exists. It also increases the maximum time limit for signs to be on displayed in the public right-of-way from 30 to 60 days. Finally, any time a temporary noncommercial sign is removed in the public right-of-way, it shall not be replaced by the same or other temporary sign for a period of not less than 90 consecutive days.
- Deletes previous Section 17.07.120 – Signs in special commercial areas, since those commercial areas no longer exist within Beaumont.

Minor changes include clarifying existing regulations and practices, removing unnecessary definitions or types of signs, and expanding the definition section of the document to assist with code interpretations. No significant changes are proposed to the number of signs allowed or the square footage limitations for principal signage in commercial and industrial zoning districts.

Please refer to Attachment "A" for a redlined version of proposed changes to Municipal Code Section 17.07 where underlined text is proposed to be added and text with a ~~strikethrough~~ is proposed to be deleted.

Fiscal Impact:

City staff estimates the cost for preparing the staff report to be \$2,500.

Recommended Action:

Direction to staff on proposed changes to Municipal Code Section 17.07-Signs.

Attachments:

- A. Current Code with Redlines