The Content Challenge: A Practitioner's Guide to Sign Ordinances after *Reed*

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Municipalities across the country have been struggling to find the right response to the U.S. Supreme Court's ruling on sign ordinances in *Reed v. Town of Gilbert*.[1] Three justices concurring with the majority in *Reed* predicted this outcome, writing that the Court's ruling would cast doubt on the ordinances of "thousands of towns," many of which were "entirely reasonable" to begin with.[2]

Municipalities had a sign ordinance on the books before the ruling for a reason: they regulate issues that make a difference in the lives of their residents. Sign ordinances impact public safety, the local economy, politics, and a place's look and feel. As a result, when a municipality acts to change its ordinance or fails to conform established ordinances with First Amendment jurisprudence, passions run high.

But there are effective ways for municipalities to comply with *Reed* while accomplishing their public policy goals. We have been partnering with municipalities to do that over the past few years and have learned valuable lessons about what works and what does not. If you have not revised your jurisdiction's sign ordinance yet – or if you have and are looking for additional analysis – this article is for you.

The Starting Point: *Reed v. Town of Gilbert*

Before launching into a rewrite of a sign ordinance, it is important to have a thorough understanding of the *Reed* decision. In *Reed*, the Town of Gilbert, Arizona had a sign code prohibiting the display of outdoor signs anywhere without a permit but exempting 23 categories of signs.[3] The code provided more or fewer restrictions on signs based on the *type* of message the sign was conveying. Ideological signs, political signs and temporary directional signs all had different applicable time, place or manner regulations. For example, ideological signs could be much larger than other types and could be placed in all districts without time limits; but temporary directional signs could be no bigger than six square feet, were limited to specific locations and could be out no more than twelve hours before an event.[4]

There was no evidence in *Reed* that the town was regulating the signs differently based on any disagreement with the messages conveyed.

Before *Reed*, many courts determined whether a sign ordinance was content-based by first examining whether the government adopted the sign ordinance because of disagreement with the message the sign was conveying.[5] In a 9-0 decision, the Supreme Court repudiated the approach of relying principally on the government's motivation in regulating speech.[6] Writing for the majority, Justice Clarence Thomas held the inquiry must *start* with whether a regulation, on its face, draws distinctions between speech depending on the message of the sign.[7] If the regulation distinguishes between speech based on the message, the regulation is content-based. In other words, the Court found a regulation to be content-based that other courts had been finding to be content-neutral; it applied the content-based inquiry regardless of the municipality's intent in enacting the ordinance. (The Court also confirmed that an evaluation of the motivation behind a regulation may be a necessary second determination if regulations do not distinguish between speech based on the message of the sign).

Gilbert's ordinance was content-based as it was regulating signs based on their type of speech: ideological, political or directional. From that determination, the Court applied strict scrutiny to the ordinance and concluded Gilbert's approach was unconstitutional under the First Amendment.[8]

Reed tells us that municipalities (and where applicable, courts) must closely examine sign ordinances to make sure the ordinance does not impose different regulations on signs based on the content of the sign's message. If an ordinance does distinguish between signs based on what the sign says, the regulation must be narrowly tailored to meet a compelling government interest.[9] In First Amendment jurisprudence, when a municipality imposes a content-based restriction on speech, the municipality bears the heavy burden of proving that it has a compelling reason for prohibiting or regulating that speech.[10] The municipality also must show that it prohibited the least amount of speech possible to protect its interest. Only a small number of the municipality's interests would be considered compelling, and itis extremely difficult to meet this standard.

Justice Elena Kagan, joined by Justices Stephen Breyer and Ruth Bader Ginsburg, observed in a concurring opinion that the practical reality of the holding in *Reed* meant municipalities "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."[11] Justice Breyer, also writing a concurring opinion, highlighted that the majority opinion has the potential to decrease a municipality's ability to be practical and directly address certain problems – even beyond sign ordinances. "Virtually all government

activities involve speech, many of which involve the regulation of speech,"[12] Breyer wrote. "Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[13] Indeed, some of the evolving case law deals not with how this new ruling affects signs but how broadly the rule may be applied to other types of ordinances.[14]

Justice Samuel Alito, on the other hand, joined by Justices Anthony Kennedy and Sonia Sotomayor, provided additional guidance on how counties can "enact and enforce reasonable sign regulations."[15] Justice Alito set out a non-exhaustive but helpful list of those regulations that would still be deemed content-neutral, and therefore easier to defend. Some of those suggestions, detailed more fully in the concurring opinion, include regulating the size of signs based on any content-neutral criteria and regulating the locations in which signs may be placed if the sign is free-standing or attached to a building.[16]

In addition, the majority opinion in *Reed* noted that the ruling *should not* prevent cities from using certain signs for public safety. "A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny,"[17] Justice Thomas wrote. Because the signs at issue in Reed were "far removed from these purposes," the Court easily found the ordinance did not meet strict scrutiny.

Though the suggestions seem straightforward, the difficult part for any municipality will be aligning the need for regulation with the type of regulation allowed. Practically, it is simple to use content-based regulations because it is clear what the ordinance is seeking to regulate and why. But First Amendment principles do not bend to accommodate practicality. Thus, municipalities must re-evaluate the necessity for a regulation that distinguishes between signs based on message. If the regulation is still necessary, the municipality should seek to revise the manner in which those public policy needs are met.

Revising Your Ordinance

The Process

Before revising your municipality's ordinance in compliance with *Reed*, you will need an agreement from elected officials that an evaluation and revision of a sign ordinance is necessary. Signs are a politically sensitive subject and are likely to bring out many competing stakeholders and interest groups. It would be reasonable to expect sign companies, real estate firms, developers, fast food franchisees, car dealers, billboard companies, the Sierra Club and others to have an intense interest in this issue. And even though it is rarely said out loud, elected officials themselves have a vested interest in the regulations as they apply to campaign signs (which are sometimes the worst offenders). A lawsuit in a nearby community, in your state, or against your local government will help get their attention, but do not expect elected officials to be excited about taking on this controversial topic.

If there is a guiding philosophy to the average sign ordinance, it may be as simple as allowing new advertising innovation while minimally regulating to protect roadway safety and keep sign clutter to a tolerable level. It is at least worth considering whether to use the rewrite forced by *Reed* as an opportunity to consciously adopt a guiding policy to drive sign regulations.

The manager, planning director and city attorney also must agree that the ordinance needs to be brought into compliance with current case law so that each party is willing to carry their share of the load to accomplish the goal. The manager can help guide elected officials through the policy decisions required and help manage industry and constituent reactions. The planning director can catalog and analyze problems particular to the municipality, as well as issue spot for "real life" situations that have been overlooked or do not fit into any new proposed language. The city attorney must master the case law and translate the old content-based regulations into new content-neutral time, place and manner provisions, wherever possible.

Outlining the Issues

A threshold question is whether to use this forced rewrite of the sign regulations as an opportunity to alter the guiding philosophy behind the existing regulations.

A fair criticism of many sign ordinances is that they are merely a collection of *ad hoc* regulations developed over time as each new sign product made its debut in the community. When flashing signs arrived in the 1980's, many communities enacted a regulation prohibiting flashing signs in the right of way in an effort to prevent distracted drivers. When car dealers started flying American flags the size of a football field, planning directors asked for limits on the number and size of flags on commercial properties. When digital billboards with changeable copy came on the scene there was a rush to regulate the length of time the message could or should be displayed. The point is that many sign ordinances are nothing more than a historical collection of one-off fixes for discrete issues.

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Regardless of whether the project aims to blaze a new path, some policy decisions simply must be addressed in the process. Two obvious questions are:

1. Whether the rewrite is simply designed to

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allow a rough continuation of what exists, or whether some "clean up" is desired. period.

2. Whether to take on the proliferation of temporary signs in the right of way.

If some "clean up" is desired, be prepared for the existing merchant community to cry foul, that their signage is likely to be made non-conforming and that they will have to spend money at some point to come into compliance. From our experience, the sign companies will be fine with most changes as long as the new regulations are not overly restrictive. The sign companies figure out pretty quickly that some number of businesses will need new signs and that their business may actually increase, or at least won't suffer.

The second issue that needs to be addressed is how to treat the proliferation of temporary signs in the right of way. (Warning: this is the part where elected officials will realize the new regulations are going to apply to them and their campaign signs). If your jurisdiction is experiencing a clutter of temporary signs in the right of way (such as directional signs to the newest subdivisions, a declaration that "we buy ugly houses," signs informing the public that they can sell their used cell phones for cash – now! – campaign signs, or, in some parts of the country, simply "Thank You Jesus"), the rewrite may be an opportunity to reset how the community regulates the use of the public right of way.

Speaking a New Language

Moving from content-based regulations to content-neutral regulations requires a realization on our part that simply saying "time, place and manner" won't mean much to non-lawyers trying to understand why a rewrite is necessary in the first place. It does not take much explanation for a lay audience to understand exactly what is required by a sign ordinance provision regulating menu boards at drive-in restaurants. But when the city attorney explains that now we can only regulate menu boards by describing signage that can be at a drive-in restaurant in a permitted zone, in particular locations on the site, but not based on what the sign says, you can expect some confusion.

The path to success requires using language and examples that make sense to a lay audience. Early in the discussion, it helps to simplify the *Reed* decision down to an easily understood phrase:

"If you have to read the sign to know how to regulate it, the regulation is content-based, and we can't regulate signs that way anymore."

We sincerely apologize to any attorney who is offended by such a gross over simplification of a complex First Amendment issue. Really, we are sorry. However, if we want our clients to understand the concept that we can now only regulate signage by time, place and manner, we have to speak in plain English. "Time" translates to permanent versus temporary. "Place" translates to land use zones or locations of permitted uses. And "manner" translates to construction materials, internal or external lighting versus no lighting, size, ground mounted versus pole mounted, and other physical features of the sign.

Examples of What Works

By way of illustration, here is how some "old, content-based" sign ordinance provisions could be translated into "new, content-neutral" sign ordinance provisions. (These examples do not address whether a particular municipality could pass intermediate scrutiny.)

1. **Tenant signs in a strip shopping center.** Old version would allow one tenant identification sign per business. Revised version allows one sign per entrance on a building that houses one or more non-residential uses. No reference to content.
2. **Flags.** Old version would allow flags of the United States, the state, a local government or other enumerated entities. Revised version would allow up to a limited number of flags on poles no higher than a specified height. No reference to what the flag depicts. Here, it is important to scrutinize the definition of flag to make sure the definition also does not contain a content-based qualification.
3. **Business entrance signs.** Old version would allow specified signs such as "entrance," "exit," "parking," "no trespassing" and "no soliciting." Revised version would allow a specified number of signs at entrances or exits. No reference to content.
4. **Construction announcement, grand opening and going out of business signs.** Old version would allow these temporary signs with stated size, placement and period of time they could be displayed. Revised version will allow a temporary sign of stated size and period of time it may be displayed, but with no reference to content.
5. **Political signs, real estate signs, subdivision entrance signs, fuel island canopy signs, time and temperature signs, and any other sign defined by what the copy on the sign says.** Old version would allow these signs with specific regulations for each type of sign. Revised version would allow signs at various places, with defined physical characteristics (including size and height) and specify how long or when a temporary sign may be displayed, but with no reference to what the signs may say.

In explaining this change to elected officials and planning-board members, someone will inevitably ask whether this means that, for example, the local gas station could put "Stop the War" on their fuel island canopy instead of the brand name of the gasoline they sell. The city attorney will answer, "Yes, that's exactly what it means." In response to the puzzled or incredulous looks the city attorney receives, the best reply is that this is what the U.S. Supreme Court now requires, and that we should rely on common sense and people's self-interests to believe that most businesses will use their allowed signage to advertise the goods and services that they are in business to provide.

Examples of What Does Not Work

1. **Doing nothing.** It is highly likely that if you haven't updated your ordinance since *Reed*, it would not hold up in court. For that reason, it is only a matter of time before a constituency group brings a lawsuit, which would either force you to begin the process of compliance or pay the legal costs of fighting it. Though, if elected officials are not on board with engaging in the process of revisions, doing nothing might be the only thing you can do.
2. **Holding onto one or two "old" provisions.** Resist the temptation to retain provisions with a unique local history and that were enacted to handle one particular sign or situation. This only makes the new ordinance vulnerable to challenge.
3. **Copying content-neutral regulations from another municipality** without **tailoring to your needs**. Remember, content-neutral regulations must be narrowly tailored as well. What has worked for other municipalities can be a good starting point, but only if you then tailor it to the exact needs of your community.
4. **Make everything "commercial."** It might be tempting to exploit the fact that commercial vs. noncommercial regulation appears to remain intact (see discussion below). Stating that a regulation only applies where the activity is "commercial," though, might not achieve any of your needs and goals as it relates to signs.

Additional Issues to Consider From the Evolving Case Law

1. **What if it's commercial speech?** The distinction between commercial versus noncommer-

cial regulations might remain intact.[18] This might seem counterintuitive based on the simple message learned from *Reed* – how else do you determine a sign is for a commercial versus a noncommercial purpose other than by reading it? However, the majority in *Reed* dealt only with noncommercial speech, and courts interpreting its reach have not applied it any farther. But, be careful that simply calling something "commercial" or "noncommercial" does not give you the all-clear to create other distinctions. As a federal district court found in a case after *Reed*, an Indiana city and county's sign ordinance "clearly subjected noncommercial opinion signs to restrictions different from other sign types that also received exemptions from the [...] requirement, including, inter alia, 'real estate signs' and 'temporary signs for grand openings and city-recognized special events,' all of which were also defined by their content."[19]

2. **Can my ordinance be grandfathered in?** Courts applying *Reed* have found provisions grandfathering in old signs to be content-neutral.[20] However, *Reed* made the point that even terms which grandfather in old signs must be reviewed to make sure the speakers grandfathered in are not being favored over new speakers simply based on the content of the regulated speech.[21]
3. **How much evidence is required in court?** Many local governments hesitate to initiate a process that requires showing regulations meet the needs of specific interests. Unless your municipality does seek to regulate based on the content of the message, the burden of tailoring ordinances that are content-neutral is not insurmountable and can be based in large part on what other municipalities are doing or common sense. As a district court in Missouri put it, "A municipality may rely upon any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest, which may simply include common sense."[22] And a Minnesota court noted its post-*Reed* jurisprudence has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even ... to justify restrictions based solely on history, consensus, and simple common sense." (internal quotation marks and citation omitted).[23] This all depends, of course, on the provisions and rationale being relevant in your municipality.
4. **What about overbroad applications?** *Reed* is powerful because its holding is simple. However, as with most rules in constitutional law, simplicity leads to a potentially overbroad application. The most difficult issue courts appear to deal with post-*Reed* is whether its holding should be applied in the same manner to other regulated acts. It is easy to come up with a list of ways to distinguish between signs based simply on their appearance, size, type of lighting or location – and not based on their content. But the simplicity that applies to physical signs does not carry over to other types of ordinances, such as panhandling and aggressive solicitation ordinances.

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Use of Outside Counsel

A growing number of law firms and planners now offer sign ordinance revision as a service. One reason to consider outside assistance is that the firms who offer this service have probably already done several rewrites for other communities and have drafted language that covers most of the common sign regulation issues, and they have learned some lessons about how to present this issue to elected officials and the community so that it's understandable. Sign ordinance revision is a relatively straightforward project when the drafter has already done a few previously, but it requires significant research and a steep learning curve for a first-time drafter.

Some bidders charge by the hour for this work while others are willing to quote a flat fee. An issue to watch out for in a flat-fee proposal is limits on particular line items of service. For example, the bidder may limit the number of on-site meetings or hearings that are covered by the fee or may limit the number of drafts/rewrites that can be done without incurring hourly charges for additional work. These are reasonable protections for outside counsel to request, and it is incumbent upon the city attorney to know their planners, elected officials and business community well enough to predict whether a flat-fee proposal will work.

NOTES

1. 135 S. Ct. 2218 (2015).
2. *Id., 135 S. Ct.at 2239, 192 L. Ed. 2d 236 (Kagan concurrning).*
3. *Id., 135 S. Ct. at 2224-25.*
4. *Id.*
5. *See e.g.*, Hensel v. City of Little Falls, 992 F. Supp. 2d 916, 923 (D. Minn. 2014) (*citing* Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989)).
6. *Reed, 135 S. Ct. at 2227.*
7. *Id.*
8. *Id., 135 S. Ct. at 2231-2232.*
9. *Id.*
10. *Id.*
11. *Id. at 2237 (Kagan, concurring).*
12. *Id. at 2234.*
13. *Id.*
14. Panhandling and aggressive solicitation ordinances are two examples. Most, if not all, courts that have analyzed panhandling ordinances enacted before *Reed* have found them to be unconstitutional in its aftermath. Although we do not have room here to detail compliance tips for these potentially thorny *topics, it* is worth noting that the same First Amendment analysis that requires a complete reexamination of sign ordinances also requires a reexamination of panhandling and aggressive solicitation ordinances. This is another area where it can be valuable to consult with outside counsel, especially because panhandling ordinances are controversial due to their inextricable link to issues of homelessness.
15. *Reed, at 2233.*
16. *Id.*
17. *Reed, at 2232, 192 L. Ed. 2d 236 (2015); ArchitectureArt, LLC v. City of San Diego, 231 F. Supp. 3d 828, 840 (S.D. Cal. 2017), reconsideration denied, No. 15-CV-01592-BAS-NLS, 2017 WL 1346899 (S.D. Cal. Apr. 4, 2017)*
18. *See Citizens for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015).*
19. *See Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, 187 F. Supp. 3d 1002, 1014 (S.D. Ind. 2016), appeal dismissed sub nom. Geft Outdoors, LLC v. Consolidated City of Indianapolis (June 17, 2016).*
20. *Citizens for Free Speech, supra note 18, at 968.*
21. *Reed, at 2231.*
22. *See Willson v. City of Bel-Nor, 298 F. Supp. 3d 1213, 1220 (E.D. Mo. 2018).*
23. *Hensel, supra* note 5, at 927; City of Los Angeles v. Alameda Books, Inc., *535 U.S. 425, 438–39, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002).*

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