

PRACTICE TIPS

Municipal Sign Ordinances after *Reed v. Town of Gilbert:* Do's and Don'ts

By: New Hampshire Municipal Association

Because the Town of Gilbert sign code placed stricter limits on temporary events signs but more freely allowed ideological and political signs—despite the fact that all three sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement of strict scrutiny.

As a result of *Reed*, a sign code that makes any distinctions based on the message of the speech is content based. Only after determining whether a sign code is neutral on its face would a court inquire as to whether the law is neutral in its justification.

Municipalities should review their sign codes carefully, with an eye toward whether the code is truly content neutral. If the sign code contains some potential areas of content bias—for example, if the code contains different regulations for political signs, construction signs, real estate signs, or others—consider amending the code to remove these distinctions.

In cases where a sign code update might take time, local planners and lawyers should coach enforcement staff not to enforce distinctions which might cause problems.

Check to be sure your sign code has all of the "required" elements of a sign code.

- The code should contain a purpose statement that, at the very minimum, references traffic safety and aesthetics as purposes for sign regulation.
- The code should contain a message substitution clause that allows the copy on any sign to be substituted with noncommercial copy.
- The code should contain a severability clause to increase the likelihood that the code will be upheld in litigation, even if certain provisions of the code are not upheld.
- In preparing the purpose statement, it is always best to link regulatory purposes to data, both quantitative and qualitative. For example, linking a regulatory purpose statement to goals of the local master plan, such as community beautification, increases the likelihood that the code will survive a challenge.
- If traffic safety is one of the purposes of the sign code (it should be), consult studies on signage and traffic safety to draw the connection between sign clutter and vehicle accidents.

In conducting the review of the sign code recommended above, planners and lawyers should look to whether the code contains any of the sign categories that most frequently lead to litigation. For example, if the code creates categories for political signs, ideological or religious signs, real estate signs, construction signs, temporary event signs, or even holiday lights, it is likely that the code is at greater risk of legal challenge. As a general rule, the more complicated a sign code is—i.e., the more categories of signs the code has—the higher the risk of a legal challenge.

Sign Code Guidance from the Court (Alito's Concurrence):

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.

The requirements of your ordinance may distinguish among signs based on any content-neutral criteria. Here are some specific standards the Court might uphold:

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event.

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.

Possible Sign Code Changes:

Increase the overall allotment of temporary signs to accommodate the maximum demand for such signage at any one time, and allow that amount of temporary signs. A regulation that singles out off-premises signs that does not apply to a particular topic, idea, or viewpoint is probably valid because it regulates the locations of commercial signs generally, without imposing special burdens on any particular speaker or class of speakers.

Define government signs and Traffic Control Devices as signs, but specifically authorize them in all districts. Provide a base allotment of signs, and allow additional signs in relation to activities or events. Every property has a designated amount of square feet of signage that they can use for any temporary signs on their property, year round. For example: [x]

square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and perhaps with spacing of signs from one another. All properties get additional noncommercial signs at certain times, such as before an election or tied to issuance of special event permit. They key is to tie the additional sign allowance to the use of the property, rather than the content of the sign. Consider the following:

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new occupational license (real estate or grand opening signs).
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater (drive thru, gas station price, and theater signs).
- Allowing additional sign when special event permit is active for property (special event signs). Key: not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity.
- Grant an exemption allowing an extra sign on property that is currently for sale or rent.
- Grant exemptions allowing an extra sign (up to 10 sq. ft., up to 48 inches in height, and up to six feet from a curb cut), for a lot that includes a drive-through window.

Every parcel shall be entitled to one sign up to 36 sq. inches in surface area to be placed in any of the following locations: On the front of every building, residence, or structure; on each side of an authorized United States Postal Service mailbox; on one post which measures no more than 48 inches in height and 4 inches in width.

Provide a content-neutral application process: Citizens can apply, by postcard or perhaps online, for seven-day sign permits, and receive a receipt and a sticker to put on the sign that bears a date seven days after issuance, and the municipality's name. The sticker must be put on the sign so that enforcement officers can determine whether it's expired. Because the expiration date is tied to the date of issuance, there is no risk of content-discrimination. The sticker itself would be considered government speech.

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help keep food fresh and how long food can sit before it spoils. We have shared information following a disaster on places to stay and places to find resources that are not legal in nature. And once the issues discussed have spilled mostly over into "non-legal" matters, we can shift the conversation over to the Water Cooler for further advice to help get us through the life challenges we face following an emergency.

I recall reaching out to folks in Missouri, Alabama and Oklahoma following tornadoes, and to the folks down in Florida following a series of hurricanes several years ago. I even helped our Town Administrator arrange to send some of our utilities workers down to Florida to help with the manpower needs that come after a devastating storm. They brought water and shovels and other equipment to help the municipal workers recover and dig out from under the damage. Needs such as these are frequently discussed on the ListServ.

Following Hurricane Katrina, I volunteered with the Red Cross in helping at an evacuation center in Columbia. I encountered people who had no idea where their loved ones were located, whether they were alive, or what conditions were like back home. I was able to get reports from folks on the ListServ as to conditions back home, and as to when folks might be allowed to return. I even located a relative for an elderly man. All of this is a spinoff from getting involved in and participating with the IMLA ListServ. As much of our lives as we devote to the "law," we're all part of our hometowns and this great country. We can and should use our electronic resources to help each other even when it goes beyond legal matters. It helps make our profession greater, but more importantly can help our fellow citizens out of difficult circumstances.

Those of us in the United States live in and come from all fifty states, and must apply different state law to a given situation. Obviously, this affects the type of advice we can give, though the common guiding principles do not waiver. But, we do all follow federal law and share great discussions of constitutional issues which affect us all. One of the most recently discussed issues on the ListServ involved efforts of the ACLU and DOJ and their recently increased focus on fines and fees. In a specific case, the ACLU had apparently sued a municipality, and the city agreed to settle on the issue of "debtor's prisons." Obviously, these were eliminated many years ago, but according to the ACLU had slipped in the back door and had essentially started operating again in the form of jailing indigents for failure to pay court fines.

Most folks understand the unique issues involved concerning indigent folks and non-payment of "legal debts." But, I couldn't help but wonder if I was the only one thinking of the possible unintended consequences of such lawsuits. After reading a couple of the cases I found that I was not, as shown in former Justice Blackmun's concurring words in one such case:

> *"The Court's opinion is couched in terms of being constitutionally protective of the indigent defendant. I merely add the observation that the reversal of this Texas judgment may well encourage state and municipal legislatures to do away with the fine and to have the jail term as the only punishment for a broad range of traffic offenses. Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible Eighth Amendment considerations... If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable."*

Whether this result is desirable may be another issue for debate, but Justice Blackmun makes a valid point. In order to stay out of the way of the issue, some governing bodies could very well seek to "solve" the issue by eliminating the possibility of the fine. I fear this may result in a situation that is unfair to even more people, and one where the result will end up being that the very people who were being protected from an "unfair" jail sentence will end up there anyway. I'm not sure there is an easy answer for this one.

Lastly, to make it through the tough times in this job, I would suggest there is often a place for recognizing humor or irony to help us along the way. This often is shared on the Water Cooler.

I recently had a defendant named Jack Daniels come to court. The charge? You guessed it – DUI. According to officers, he reportedly smelled like a distillery when he was arrested. Fact is often stranger than fiction...

The prosecution rests, your honor... ML