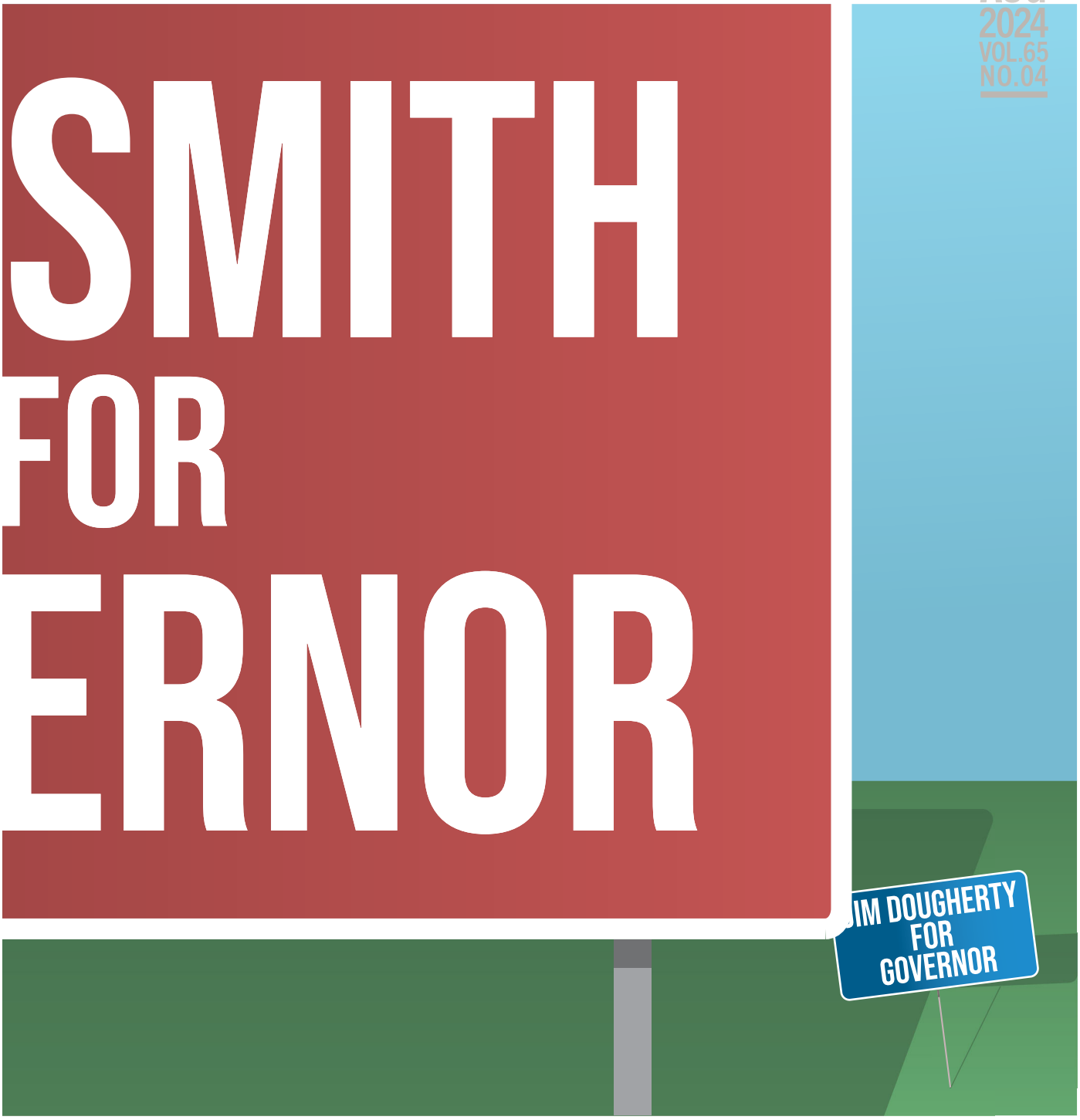
IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

JULY AUG 2024
VOL.65 NO.04



OFFICERS
President
Rose Humway-Warmuth
City Solicitor
Wheeling, West Virginia
President Elect
Jeffrey Dana
City Solicitor
Providence, Rhode Island
Immediate Past President
Lori Grigg Bluhm
City Attorney
Troy, Michigan
Treasurer
Susana Alcala Wood
City Attorney
Sacramento, California
General Counsel and Executive Director
Amanda Karras
International Municipal Lawyers Association
Rockville, Maryland
Board Of Directors
James R. Benjamin
County Attorney
Baltimore County, Maryland
Shauna Billingsley
City Attorney
Franklin, Tennessee
Alan Bojorquez
City Attorney
Bastrop, Texas
Beth Anne Childs
Town Attorney
Bristow, Oklahoma
Bradford Cunningham
Municipal Attorney
Lexington, South Carolina
Arthur Gutekunst
Sr. Assistant Corporation Counsel
White Plains, New York
Brian Loewen
Director of Legal Services
Lethbridge, Alberta
Wynetta Massey
City Attorney
Colorado Springs, Colorado
Paige Mims
City Attorney
Plano, Texas
Morgain Patterson
Director of Municipal Law & Training
Kentucky League of Cities
Lexington, Kentucky
Kimberly Rehberg
City Attorney
Durham, North Carolina
Todd Sheeran
City Attorney
Herriman, Utah
Amanda Stanley
City Attorney
Topeka, Kansas
Jennie Granahan Tarr
Chief Assistant County Attorney
Hillsborough County Hospital Authority
Tampa, Florida
Nancy Thompson
City Counselor
Columbia, Missouri
Randall Van Vleck
Town Attorney
Kirtland, New Mexico
Wendy Walberg
City Solicitor
Toronto, Ontario
Jeannine Williams
Chief Assistant City Attorney
St. Petersburg, Florida

CONTENTS

JULY / AUGUST 2024

REGULATION OF POLITICAL SIGNS AFTER *REED AND REAGAN NATIONAL ADVERTISING*

By: Eric Shytle, General Counsel, Municipal Association of South Carolina, Columbia, South Carolina and Sean Scoopmire, Planning and Law Associate, White & Smith LLC, Greenville, South Carolina

The parameters of First Amendment barriers to content-based sign ordinances continue to evolve in the wake of *Reed*. As our national electoral season approaches, a review of the permissible limits on political signage is in order. Our authors assess the current state of sign law and propose a content-neutral taxonomy.

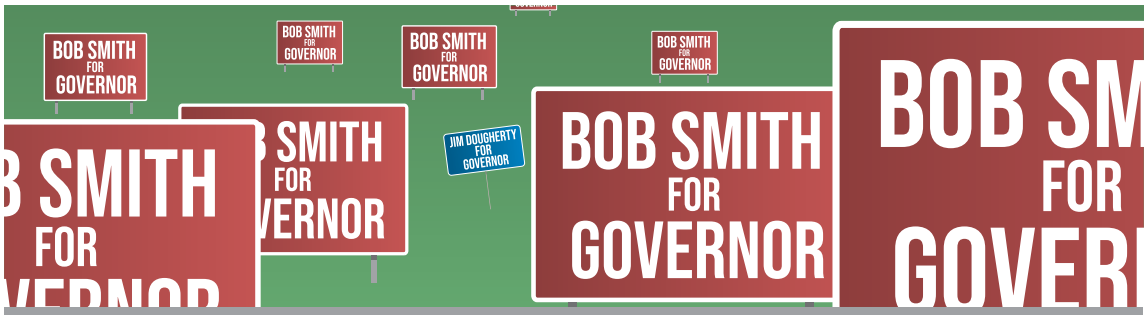
PAGE 6

INDEPENDENT CONTRACTORS AND OVERTIME EXEMPTIONS: THE DOL's LONG-AWAITED RULES

By: Michelle White, Employment Law Associate Attorney, Lloyd Gosselink, Austin, Texas

The question of when overtime is payable—or is not, due to one or more exemptions in the law—is hugely consequential, including to local governments who are collectively among the largest employers in the nation. Recent Department of Labor pronouncements provide additional clarity on the subject.

PAGE 12



DEPARTMENTS

16 DAY IN THE LIFE
Local Government Lawyer, Global Traveler!
By: Avery Morris, IMLA Editorial Staff
Meet world citizen Walter Wilson.

20 CONSTRUCTION
Use of Construction Manager At-Risk Contracts
By: Jennifer DeCurtis, Senior Assistant City Attorney, City of Irving, Texas
The benefits of CMARs.

24 LISTSERV
Are Lawyer Listservs Dead?
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
The ramifications of recent ABA pronouncements.

26 INSIDE CANADA
Kneeling Buses, Falling Trees, Wayward Trailers, and More.
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent Canadian cases of interest.

30 PRACTICE TIPS
What to Expect in a Land Survey
By: Marianne Landers Banks, Attorney at Law, Bojorquez Law Firm, Austin, Texas
There may be more than meets the eye.

32 AMICUS
A Frenzied Finish to the October 2023 Term
By: Erich Eiselt, IMLA Deputy General Counsel and Director of Legal Advocacy
Pivotal opinions at the last minute.

STAFF

EXECUTIVE EDITOR
Amanda Karras

EDITOR
Erich R. Eiselt

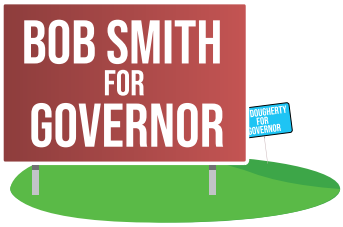
ART DIRECTION AND PRODUCTION
Trujillo Design

MARKETING
Caroline Storer

Views appearing in *Municipal Lawyer* are those of the authors. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2024 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada, offering its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. *Municipal Lawyer* is IMLA's membership magazine, published bi-monthly. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, Maryland 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome; email eeiselt@imla.org. *Municipal Lawyer* reserves the right to refuse or edit manuscripts submitted for publication.

Regulation of Political Signs After *Reed* and *Reagan National Advertising*

By: ERIC SHYTLE, *General Counsel, Municipal Association of South Carolina, Columbia, South Carolina and* SEAN SCOOPMIRE, *Planning and Law Associate, White & Smith LLC, Greenville, South Carolina*



INTRODUCTION

Municipal practitioners know well that the United States Supreme Court made a muddle of sign regulation in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). *Reed* effectively invalidated thousands of local sign ordinances across the country, with little practical guidance for the well-intentioned local government trying to maintain even modest aesthetic constraints on sign clutter. Despite the majority's insistence that its decision would "not prevent governments from enacting effective sign laws,"[1] Justice Kagan knew better: "This Court may soon find itself a veritable Supreme Board of Sign Review."[2]

The uncertainty resulting from *Reed* presents itself with particular force in the context of regulating political signs. In a presidential election year, only the most fortunate municipal lawyer will avoid difficult questions about election-related signs.

Many of these questions must await definitive answers. This article, however, attempts to provide practical guidance for the municipal lawyer in the meantime. We begin with a review of *Reed* itself. We then consider the one sign case decided by the United States Supreme Court since *Reed*, which upheld the continuing validity of distinctions between on-premises and off-premises signs.[3] Next, we discuss a recent illustrative case applying *Reed* and *Reagan National Advertising*. Finally, we propose a taxonomy of content-neutral distinctions among signs after *Reed* and discuss content-neutral rules for political signs within that taxonomy.

The *Reed* Decision

The Town of Gilbert, Arizona, had an unusually detailed sign code that created 23 separate exemptions from the general requirement that no outdoor sign could be displayed without a permit.[4] A "small, cash- strapped" church in Gilbert had no permanent house of worship and thus held its service in various temporary locations throughout the community.[5] To direct members to Sunday services, the church would post temporary signs throughout the town beginning on Saturday mornings and ending by Sunday afternoons.[6]

Gilbert's sign code classified these signs as "Temporary Directional Signs Relating to a Qualifying Event," which legally could not exceed six square feet and could be displayed no more than twelve hours before and no more than one hour after the event.[7] The church's signs violated Gilbert's sign code in several respects, including by exceeding the permitted posting duration.[8] After Gilbert issued two citations and confiscated signs, the church sued under the First Amendment. As described by the Supreme Court, the main issue was that other sign categories, including "Ideological Signs" and "Political Signs," received more favorable treatment under Gilbert's sign code.[9]

The Supreme Court unanimously held that Gilbert's sign ordinance violated the First Amendment, with six Justices concurring in the opinion. Three Justices (Breyer, Kagan, and Ginsburg) concurred only in the judgment, concluding that Gilbert's sign code violated the First Amendment by a more flexible analysis than the majority adopted.[10]

Justice Thomas, writing for the majority, favored a bright-line rule that would invalidate many, if not most, local sign codes. In his view, the First Amendment requires strict scrutiny of any "law [that] applies to particular speech because of the topic discussed or the idea or message expressed."[11] Courts refer to such laws as "content based," which in Justice Thomas's formulation means a law that "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[12] If a law is content based in this sense, strict scrutiny applies; only if the regulation

is content neutral on its face may a court inquire into the government's motives or purposes in enacting it. Commentators refer to this approach as the *Reed* two-step analysis.[13]

Applying this standard, the majority opinion made quick work of Gilbert's sign code. "The Town's Sign Code is content based on its face.... The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign."[14] Because the sign code was content based, strict scrutiny applied. In turn, the sign code failed the rigorous balancing test.[15] Commentators have concisely summarized the rule in *Reed* to be that if you must read the sign to know the rule, then strict scrutiny applies.

Justice Alito, concurring, offered examples of "reasonable sign regulations" that would survive the majority's standard.[16] Relevant to the *Reagan National Advertising* case discussed below, these examples included "rules distinguishing between on-premises and off-premises signs."[17] Relevant to regulation of political signs, these examples further included "rules regulating the size of signs," "rules regulating the locations in which signs may be placed," "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 restricting the total number of signs allowed per mile of roadway," and "rules imposing time restrictions on signs advertising a one-time event."[18]

The *Reagan National Advertising* Decision

Following *Reed*, the most pressing question was whether local governments could continue to distinguish on-premises signs from off-premises signs. Less than seven years after *Reed*, in *City of Austin v. Reagan Nat'l Advert. of Austin*, LLC, 596 U.S. 61 (2022), the Supreme Court ruled that they could. The City of Austin, Texas, distinguished between on-premises and off-premises signs in its sign code[19] and prohibited the construction of new off-premises signs after the code's effective date.[20] For grandfathered, nonconforming, off-premises signs, the owner could maintain the sign but could not "increase the degree of nonconformity," including by digitizing the sign.[21] Reagan National Advertising owned nonconforming signs that it wished to digitize. When Austin denied the application, Reagan National Advertising sued and argued that Austin's sign code was unconstitutional under *Reed*.

The Fifth Circuit Court of Appeals agreed with Reagan National Advertising. "To determine whether a sign is 'off-premises' and therefore unable to be digitized, government officials must read it. This is an obvious content-based inquiry, and it does not evade strict scrutiny simply because a location is involved."[22] Unsurprisingly, Austin's sign code did not withstand strict scrutiny.[23]

The Supreme Court reversed. The majority opinion first summarized the history of billboard regulation in the United States and noted that "jurisdictions have regulated outdoor advertisements for well over a century."[24] The Court then observed that the lower court's analysis, "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."[25] In the majority's view, although an enforcement officer must read a sign to classify it under Austin's sign code, the question to be answered by the reading is not *itself* content based. The referent is the sign's location, not its content. As explained by the Court, "it is regulations that discriminate based on 'the topic discussed or the idea or message expressed' that are content based."[26] Austin's distinction between on-premises and off-premises signs was different: "A given sign is treated differently based solely on whether it is *located on the same premises as the thing being discussed or not*. The message on the sign matters only to the extent that it informs the sign's relative location."[27] Thus had Austin attempted to regulate "the thing being discussed," the ordinance would have been content based; instead, Austin's sign code specified where that discussion could occur.

Justice Thomas dissented, joined by Justices Gorsuch and Barrett. "A sign that conveys a message about off-premises activities is restricted, while one that conveys a message about on-premises activities is not."[28] A blunt-force application of his *Reed* analysis – "a speech regulation is content based if it targets speech based on its communicative content"[29] – therefore compels strict scrutiny review.

In summary, although *Reagan National Advertising* left many questions

Continued on page 8



Eric Shytle has been General Counsel of the Municipal Association of South Carolina since March 2019. Before joining the Association, Eric was general counsel of the City of Sumter, South Carolina, for eight years and a municipal bond lawyer at Haynsworth Sinkler Boyd, P.A. for 12 years. He received his bachelor's degree from the University of Georgia, his J.D. from the University of South Carolina School of Law, and his master's in public administration from the University of North Carolina at Chapel Hill. He is the IMLA State Chair for South Carolina, an IMLA Local Government Fellow, and the recipient of the 2020 William I Thornton, Jr. IMLA Faculty Award.



Sean Scoopmire is a senior planning and law associate with White & Smith LLC in Greenville, South Carolina, where his practice focuses on all aspects of updating local governments' zoning and land development regulations to implement planning priorities. Sean's work particularly focuses on sign regulations, wireless communications, tree preservation, and zoning and subdivision procedures. Sean received a B.A. in economics from Davidson College, a J.D. from the University of South Carolina, and an MRCP degree from Clemson University.

unanswered, it did soften the impact of *Reed* for municipal practitioners: reading a sign's messaging to determine whether it is an on-premises or off-premises sign does not implicate strict scrutiny.

Illustrative Case: *Village of St. Bernard*

In *Norton Outdoor Advert., Inc. v. Vill. of St. Bernard*, 99 F.4th 840 (6th Cir. 2024), the court struck down a portion of a village's sign ordinance. St. Bernard's sign code distinguished between "advertising signs" and "business signs." The court concluded, and the parties agreed, that "these two categories essentially refer to those advertising a subject matter that is on-premises, and those advertising the same off-premises."[30] After *Reagan National Advertising*, this distinction is legal.

The provisions applicable to advertising signs (i.e., off-premises signs), however, exempted "signs primarily intended to promote the sale of goods, products, services, or events on the same premises as the sign; public traffic signs; signs located on property for sale; and public service signs which disclose information such as time or weather."[31] *Reagan National Advertising* justified the exemption for "signs located on property for sale," which "undeniably relates to something on the same premises of the sign— namely, real property for sale or rent."[32] And the court was untroubled by the exemption for public traffic signs: "Because such signs pertain to government speech, they cannot constitute content-based regulation of private speech."[33]

But the final exemption for "public service signs which disclose information such as time or weather" ran afoul of *Reed*. The lower court found the exemption constitutional on the assumption that, appearing in the section applicable to advertising signs, it applied only to commercial speech. The Court of Appeals rejected this argument:

> [T]here is a universe of signs that would be encompassed by the definition of outdoor advertising sign that is exempted by operation of the public-service-sign definition. Therein lies the problem. To exempt this universe of signs from the regulations pertaining to outdoor advertising signs, we must inherently look to the content of the signs.[34]

This conclusion, under *Reed*, inexorably led to the application of strict scrutiny and the invalidation of the provision.

Village of St. Bernard emphasizes some foundational issues post-*Reed*. First, it makes clear that even trivial departures from content neutrality (in this case, an ambiguous exemption from a rule that by its terms applies only to off-premises advertising signs) will lead to strict scrutiny. Second, it underlines the importance of definitional clarity and the risk of over-inclusiveness in regulating a "universe of signs." Finally, it dodged the question of whether distinctions between commercial signs and noncommercial signs, as well as distinctions applicable *only* to commercial signs, are subject to strict scrutiny under *Reed* or remain subject to intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

A Proposed Constitutional Taxonomy of Signs

The Supreme Court has held that, when reviewing a law that burdens "core political speech," it "applies 'exacting scrutiny,' [and will uphold] the restriction only if it is narrowly tailored to serve an overriding state interest."[35] The tension that arises in regulating political signs is thus between *Reed*'s demanding interpretation of content neutrality, which forbids carving out political speech from otherwise generally applicable rules, and pre-*Reed* precedent, which is significantly protective of political speech. This interplay raises two analytical challenges. The first is to find the narrowest taxonomy that can include political signs without reference to the content of the sign. The second is to find the most restrictive rules that can be applied to the entire resulting classification without overburdening political expression. Once these limits are determined, the municipal practitioner may determine to steer well clear of them – for example, by using broader classifications or less restrictive rules – or to test them to respond to pressing local concerns.

This section addresses the first analytical challenge, proposing a constitutional taxonomy that includes political signs. Despite the reach of *Reed*, governments remain free to regulate based on the physical characteristics of the sign.[36] The salient physical characteristic of the vast majority of political signs is that they are temporary; the foundational task is thus to define "signs" and to create a sub-class of "temporary signs." Governments may further classify temporary signs based on their location. Finally, although the question remains contested, it may be permissible to distinguish between commercial and noncommercial signs. In creating this taxonomy, however, the municipal lawyer must consider possibly preemptive state laws; this section offers examples of such laws.

Defining Signs

Defining the term "sign" requires careful drafting to ensure that it includes the devices and objects to be regulated while remaining content neutral. The definition of "sign" in the illustrative case of *Village of St. Bernard*, discussed above, provides

a useful example of the definitional pitfalls. The court quotes only portions of the definition of "sign" in the opinion. The Village's complete definition provides:

> A "sign" means any writing, pictorial representation, emblem, flag or any other figure or similar character which is a structure or part thereof or is attached to or painted on or in any means represented on a building or structure; and is used to announce, direct attention to, or advertise; and is visible from outside a building. When within a building, the sign shall include writing, representation, or other figure of similar character only when illuminated and/or located in a window. "Sign" includes "billboard" but does not include the flag, pennant, or insignia of any nation, state, city or other political unit, or any political, educational, charitable, philanthropic, civic, professional, religious or like campaign, drive, movement or event. Further, this definition shall not be held to include any board, sign or surface used to display any official notices, issued by any court or public office or posted by a public officer in the performance of a public duty.[37]

The court found that the plaintiff lacked standing to challenge this definition because it had applied for a billboard permit under another chapter of the code. However, the plaintiff argued that the definition is not content neutral, in that it exempts "the flag, pennant, or insignia of any nation, state, city or other political unit, or any political, educational, charitable, philanthropic, civic, professional, religious or like campaign, drive, movement or event." The definition exempts official flags but regulates flags bearing words like "Clearance!" or "Going out of Business!" as signs. While the court decided the plaintiff's contentions based on standing, this content distinction likely implicates Reed.[38]

Paring the definition of "sign" to the essential elements in the first sentence would improve its compliance with *Reed*.[39] A local government that insists on special treatment for official flags should create a separate section with exemptions, rather than including the exemption in the definition itself. This approach would allow a stronger argument for severability of the exemption in a facial challenge to the ordinance in a case not involving flags.

Therefore, the essential considerations in drafting the definition of "sign" are to make it no broader than necessary, to limit potentially content-based exemptions, and to separate any locally required exemptions from the definition itself.

Defining Temporary Signs

Generally, post-*Reed* sign codes should replace existing content-based categories such as political signs, special event signs, real estate signs, or construction signs with a content-neutral definition of "temporary signs" based on physical characteristics. Since *Reed*, municipalities have used a variety of new definitions to identify "temporary signs." The Unified Government of Wyandotte County and Kansas City, Kansas, adopted one of the first post-*Reed* sign codes in 2015 and defined a temporary sign as: "A sign typically made of lightweight or flimsy material that can be easily or quickly mounted or removed (such as cloth, canvas, vinyl, cardboard, wallboard, or other light temporary materials), with or without a structural frame, intended for a temporary period of display."[40] Oklahoma City adopted an updated sign code earlier this year and defined a temporary sign as: "A sign constructed of cloth, canvas, light fabric, cardboard, wood, wallboard, metal, or other light materials, with or without frames, which is intended to be displayed for a limited period of time only."[41] The IMLA draft model sign ordinance uses the following definition: "A banner, pennant, poster or advertising display constructed of paper, cloth, canvas, plastic sheet, cardboard, wallboard, plywood or other like materials and that appears to be intended or is determined by the code official to be displayed for a limited period of time (rather than permanently attached to the ground or a structure)."[42] The essential common element of these three definitions is the temporary nature of the sign's use regardless of its content.

Municipal practitioners should use their own judgment and the recommendations of the local planners to draft an appropriate definition of temporary signs. The key consideration is that the definition should be based on physical characteristics, with one caveat. In light of the Supreme Court's allowance of a "cursory inspection" in *Reagan National Advertising*, it may be permissible to allow the enforcement official to consider the content of the sign as an element in determining whether it is intended to be temporary. This question, however, remains open.

The practitioner should take particular care to avoid overbroad definitions of "sign" and "temporary sign" because they could lead to unnecessary exemptions and create difficulties with enforcement. For example, many definitions of "sign" include devices or objects that are intended to attract attention. This component of the definition leads to a concern that all objects or devices that attract attention are signs, including pennants, strings of lights, bunting, and holiday decorations, and must be exempted. Specific exemptions for these devices would likely be found content based. A narrower definition without exemptions would be more defensible under *Reed* and would be significantly easier to draft, interpret, and enforce.

Continued on page 10

Political Signs *cont'd from page 9*

State Preemption

State laws that protect signs based on content significantly complicate local regulation of temporary signs, including political signs. The practitioner should review the applicable state statutes and cases to identify state-level authorities that may preempt or prohibit the regulation of political signs and other temporary signs. For example, several states preempt or limit local governments' regulation of political signs by statute. These statutes include the preemption of regulation of political signs in the right-of-way[42] as well as on private property.[43]

If state law establishes a preference for political signs or other content-based sign types, the local government will find itself facing the horns of a dilemma; it may specifically respect the state law preference and risk violating *Reed*'s content-neutrality rule, or it may comply with *Reed* and risk violating the state's preemptive law. Local governments must therefore balance the risks of facial and as-applied challenges. An explicit exemption in the ordinance for the state's preferred signs risks a facial challenge under *Reed*, but using a content-neutral taxonomy while respecting the state's preference by way of selective enforcement risks an as-applied challenge.[44]

Perhaps a court would find that state statues preferring political signs or other content-based temporary signs violate *Reed* and are therefore unenforceable against a local government. Alternatively, a citizen or state official seeking to vindicate the state's additional protections of political signs could argue that the state law does not implicate the First Amendment at all because it limits the local government's authority to regulate political signs and not the citizen's right to display them.[45] Resolving such claims will depend not just on the parties and facts, but also on the source and scope of local government authority, including concepts such as Dillon's rule, home rule, and the relevant planning and zoning enabling act. Therefore, the resolution of preemption questions will differ significantly from state to state.

Location-Based Distinctions

Another important classification within a constitutional sign taxonomy is to distinguish signs based on where they are located. The most general location-based distinction would be between public property and private property. Local governments could further classify temporary signs based on zoning districts, overlay zones, historic preservation areas, or other land-use distinctions, provided that such distinctions do not depend on underlying or implicit content-based considerations.

In making this classification, however, the municipal practitioner should consider constitutional issues that arise irrespective of *Reed*. For example, the First Amendment provides greater protection for communicative expression on private property. With respect to public property, the local government may significantly restrict the display of temporary signs. The *Reed* majority opinion noted that "on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner."[46] Well before *Reed*, the Supreme Court upheld a Los Angeles ordinance that prohibited posting signs on public property in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The prohibition at issue applied only to certain city-owned infrastructure.[47] The Supreme Court found that the public property to which the prohibition applied was not a traditional public forum.[48] With that limitation, the Supreme Court held that a total ban on the posting of signs on public property was constitutional. The question of whether a government could completely ban signs in a traditional public forum was reserved for another day. The scope of *Vincent* has been debated, but for these purposes, it seems likely that a court would uphold a content-neutral law that prohibited the posting of temporary signs on public property.[49]

On the other hand, the local government must offer greater protection for temporary signs on private property. For example, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court struck down a city's ban of almost all residential signs. Likewise, in *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993), the Court invalidated an ordinance that limited residential property owners to only two campaign signs as overly restrictive of core political speech.

As discussed above in the section on state preemption, municipal practitioners must also consider state law in classifying signs by location. Many states have laws that protect the posting of political or other types of signs in specified locations.

Commercial and Noncommercial Distinctions

One of the most vexing questions after *Reed* is whether a local government may continue to distinguish between commercial and noncommercial signs. Historically, courts provided lesser protections for commercial speech than for noncommercial speech.

The primary authority that commercial signs may be regulated more strictly than non-commercial signs is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1980). In that case, San Diego adopted an ordinance restricting outdoor advertising signs. The stated purposes of the ordinance were traffic safety and the

appearance of the city. The ordinance included twelve exceptions, including one for "onsite" signs. The Court found the San Diego ordinance unconstitutional. The plurality opinion, applying *Central Hudson Gas & Electric Co. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), held that the limitations on commercial signs were constitutional.[50] But the Court further reasoned that the ordinance overreached by prohibiting some types of noncommercial on-premises speech: "[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech."[51] The Court noted that "we continue to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be."[52] It appears that two rules arise from *Metromedia*: Strict scrutiny does not apply to regulations of commercial speech, but such regulations cannot treat commercial speech more favorably than noncommercial speech. Unfortunately, the lack of a majority opinion in *Metromedia*, together with the numerous concurring opinions, makes application of the holding difficult.

The majority opinion in *Reed* did not distinguish between commercial and noncommercial speech. Perhaps the Court did not discuss this distinction because the opinion related only to noncommercial signs, or perhaps *Reed* foretells of heightened scrutiny for all content-based distinctions, even a simple binary distinction between commercial and noncommercial signs.[53] The conceptual issue is whether the first question for a court to ask arises from *Central Hudson* or from *Reed*. *Central Hudson* suggests that all regulations of commercial speech are subject to a form of intermediate scrutiny, while *Reed* suggests that any content-based distinction, perhaps including between commercial and noncommercial speech, is subject to strict scrutiny.

The municipal practitioner should note, however, that stricter regulations for commercial signs might not survive even the more permissive *Central Hudson* standard because the distinction does not clearly relate to the stated purposes of traffic safety and community aesthetics.[54] For now, then, the safe course would be to make no distinction between commercial and noncommercial signs. Municipal lawyers that feel compelled by local circumstances or political will to impose stricter controls on commercial signs should make as few content-based distinctions as possible – likely only between signs containing commercial speech as defined in *Metromedia* and all other signs – and should carefully document the government interests that justify the stricter regulation of commercial signs.

Content-Neutral Regulatory Approaches

With an appropriate sign taxonomy in hand, the municipal practitioner may turn to the regulations to apply within it. Neither *Reed* nor *Reagan National Advertising* made any claim to invalidate content-neutral time, place, and manner regulations. The applicable regulations, however, must respect the constitutional deference afforded to political signs within the regulatory taxonomy.

Duration of Display

Content-neutral regulations of temporary signs can impose uniform durational limits. Planning officials, however, might disfavor this approach for a number of reasons. A citizen could essentially evade such a durational limit by posting a formally different but substantially identical sign once the uniform durational limit expires, or a citizen might leave event-related temporary signs up well after the event is over.

One approach would be to allow each distinct parcel within the community to display temporary signs, regardless of content, for a maximum number of days during a year. This approach would reduce visual clutter while remaining content neutral but would require diligence to enforce on a per-parcel basis.

Another approach would be to adopt special durational limits to signs that relate to an event. Under *Reed*, such a regulation can make no distinction based on the nature of the event, whether it be a garage sale, an outdoor festival, or an upcoming election. Under *Reed*, even a regulation that says all temporary signs (regardless of content) relating to an event (regardless of the nature of the event) may be erected no more than ninety days before the event and must be removed no more than ten days after the event might be invalid because it requires the enforcement officer to read the sign to know whether it relates to an event.

At least one court has upheld an event-related durational limit after *Reed*. In 2017, the D.C. Circuit Court of Appeals upheld a local law that applied durational limits to temporary signs, while further distinguishing between temporary signs in general and temporary signs that relate to an event.[55] The law in question allowed "a posted sign to remain on a public lamppost for up to 180 days," but provided that "a sign relating to an event must be removed within 30 days after the event, whether the 180-day period has expired or not."[56] At least in some cases, this rule would treat event-related signs less favorably than other temporary signs. Having considered *Reed*, however, the Court of Appeals determined that the local law was content neutral and subject to intermediate scrutiny.[57] Applying intermediate scrutiny, the court upheld the District's lamppost law.[58] It is far

Continued on page 18

from clear, however, that the Supreme Court would uphold an event-based durational limit.

Another example of an attempted content-neutral regulation would be to allow temporary signs only during certain times of the year, or to provide longer durational limits during such times or around certain events like elections. Such approaches would likely violate *Reed* as favoring certain types of content. For example, the federal District Court for the Central District of California rejected a temporary sign ordinance that provided "an additional flag may be displayed for three days before and after Memorial Day, Independence Day, and Veterans Day -- but not for other holidays or celebrations."[59] The city argued that the ordinance was content neutral because it would permit the flying of any additional flag, regardless of its content. The court disagreed, reasoning that the ordinance's "authorization of an additional flag around Memorial Day, Independence Day, and Veterans Day reflects a content preference for speech concerning those particular holidays." *Id.* It follows that an ordinance applying special durational limits around elections, but not other events, would be vulnerable to challenge as a content-based regulation.

Any applicable durational limit must be sufficiently long to avoid overburdening political speech. Courts have divided over the issue and no constitutionally required minimum durational limit has emerged. Moreover, most cases considering durational limits, even pre-*Reed*, turned on the content-neutrality issue rather than on the permitted duration itself.[60] At least one court, however has invalidated an ordinance that imposed a 60-day pre-election limit on political signs.[61]

We therefore suggest a 90-day durational limit for all temporary signs; shorter periods may certainly be constitutional, but municipal lawyers should consider cases from their own circuit in using such shorter periods. The municipal lawyer should also consider whether the sign code should allow one "permanent temporary" sign (i.e., no durational limit) per parcel to allow real estate or other signs that necessarily may need to remain displayed for a longer period.

Local governments that are willing to test the limits of *Reed* to satisfy the community's desire to reduce visual clutter might consider an event-based durational limit that makes no reference to the nature of the event. The remaining approaches discussed above should probably be rejected – in the case of a per-parcel durational limit because of enforcement difficulties, and in the case of seasonal or other timing-based limits because of the risk that such as approach is implicitly content based.

Number of Signs

Local governments may impose limits on the number of temporary signs permitted, either on a per-parcel basis or on other objective criteria like street frontage of square footage. A per-parcel limitation would be easiest to enforce but might in extreme cases expose the local government to as-applied challenges. For example, an owner of a very large parcel might argue that a per-parcel limitation overburdens political speech of the owner relative to the owner of a much smaller parcel.

As with durational limits, the municipal lawyer should be careful to avoid overburdening core political speech with a numerosity limit. As an example, in striking down an ordinance that allowed only two political signs on private property in residential districts, the Fourth Circuit applied "exacting scrutiny" because "the two-sign limit … infringes on political speech."[62] A review of existing sign codes suggests that an appropriate numerosity limit is between six and ten temporary signs per year.

Size of Signs Allowed

Finally, local governments may impose uniform size limitations on all temporary signs. As with both durational and numerosity limits, the challenge is to find a size limitation that prevents visual clutter, preserves traffic safety, and adequately regulates the universe of all temporary signs without overburdening the subset of political signs. In practice, a logical starting place would be to consider the largest existing size limitation for temporary signs in the area to be regulated and to apply that limit to all temporary signs in the area. A review of existing signs codes suggests that an appropriate size limitation in residential areas would be between four and six square feet and in commercial areas would be between 16 and 32 square feet. Smaller size limits might be constitutional even as applied to political signs, but municipal attorneys should consult caselaw within their jurisdiction for guidance.

Summary Recommendation

Following *Reed* and *Reagan National Advertising*, it appears that a municipality has limited options to directly regulate political signs. On the other hand, courts would likely approve a general regulation of temporary signs. As explained more fully below, we offer the following recommendations:

- Local governments should carefully draft definitions of "sign" and "temporary sign" based on the physical characteristics of the sign and should place political signs within the definitional category of temporary signs.
- Local governments may classify signs based on location but should consider possibly preemptive state laws.
- The safe course would be to refrain from distinguishing between commercial and noncommercial signs. If the local government makes any such distinction, it must make no distinctions within the classification of noncommercial signs and must not favor commercial speech over noncommercial speech.

- Local governments may impose uniform durational limits on temporary signs; more nuanced approaches, like event-based durational limits, risk challenge under *Reed* but may be constitutional. The durational limits must be sufficiently long to avoid overburdening core political speech.
- Local governments may limit the number of temporary signs that may posted, either on a per-parcel, street frontage, or square footage basis. The number limits must be sufficiently permissive to avoid overburdening core political speech.
- Local governments may limit the size of temporary signs, but again the size limits must be sufficiently permissive to avoid overburdening core political speech.

Although these limits appear modest, until the Supreme Court clarifies the outer reaches of *Reed*, municipal lawyers must exercise caution in drafting and updating local sign codes. ML

Notes

1. *Reed*, 576 U.S. at 172.
2. *Id.* at 185 (Kagan, J., concurring).
3. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61 (2022).
4. *Reed*, 576 U.S. at 159.
5. *Id.* at 161.
6. *Id.*
7. *Id.* at 160-61.
8. *Id.* at 161.
9. *Id.*
10. *See Reed*, 576 U.S. at 175 (Breyer, J., concurring in the judgment), and 576 U.S. at 179 (Kagan, J., concurring in the judgment).
11. *Reed*, 576 U.S. at 163.
12. *Id.*
13. As described by a commentator supportive of the *Reed* majority opinion: "Government purpose, in other words, cannot save content-based laws from strict scrutiny; it can only doom content-neutral laws that are content-discriminatory in their purpose or intent." Enrique Armijo, *The Content-Discrimination Two-Step Post-Reed and Austin*, Cato Sup. Ct. Rev., 2021-2022, 141, 147–48.
14. *Reed*, 576 U.S. at 164.
15. *Id.* at 171-72.
16. *Reed*, 576 U.S. at 174 (Alito, J., concurring). Justice Alito's concurrence should not be read to mean that the Court as a whole would find these distinctions permissible. This article uses his list only as a helpful catalog of regulations to consider.
17. *Id.* at 175.
18. *Id.* at 174–75 (cleaned up).
19. Austin's "sign code defined the term 'off-premise sign' to mean 'a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site.'" *Reagan National Advertising*, 596 U.S. at 66 (quoting the Austin city code).
20. *Id.*
21. *Id.*
22. Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 707 (5th Cir. 2020) (cleaned up).
23. *Reagan National Advertising*, 972 F.3d at 710.
24. *Reagan National Advertising*, 596 U.S. at 65. The Court's conservative majority has increasingly relied on a "text, history, and tradition" approach to other constitutional guarantees, but not (yet) to the Free Speech Clause of the First Amendment. See Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 Duke J. Const. L. & Pub. Pol'y 59 (2023). The *Reagan National Advertising* majority did not explicitly adopt a "text, history, and tradition" approach, but it was clearly influenced by the pervasive historical practice of regulating billboards.
25. *Reagan National Advertising*, 596 U.S. at 69.
26. *Id.* at 73–74.
27. *Id.* at 71 (emphasis added).
28. *Id.* at 90 (Thomas, J. dissenting).

Continued on page 28

Day in the Life *cont'd from page 17*



of as municipal law, such as intellectual property rights and admiralty law. The opportunity to become conversant to so many substantive areas is a huge benefit of working in the County Attorney's Office. Not to be overlooked is that fact that I benefit greatly from working with some fantastic colleagues and also have a great working relationship with the staff of every County agency to which I am assigned as general counsel.

What does a typical day look like for you in and out of the office?

On a typical day, my emails can be non-stop. Most of those emails have documents attached to them, and the documents can be anything from an MOU that needs to be reviewed and edited to a draft decision and order from one of my quasi-judicial boards that I need to review and edit and send back to the Chair of the hearing panel. A lot of the emails are requests for legal opinions, and some can be answered really quickly, some may require legal research. That's another interesting thing that has changed over the time that I've been here. When I first started, requests for legal opinions used to come by a memo from a client and then you would write a nice extensive memo. Now, everything comes by email! In terms of what I do outside of work, I try to work out every day. On weekends if the weather is nice I ride my bike. My biggest hobby is international travel. At this point, I have been to 82

Continued on page 23

29. *Reagan National Advertising*, 596 U.S. at 87–88 (quoting *Reed*).
30. *Village of St. Bernard*, 99 F.4th at 842 (internal quotations removed).
31. *Id.* at 843 (cleaned up).
32. *Id.* at 848.
33. *Id.*
34. *Id.* at 850.
35. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 334–35 (1995)
36. *See*, *e.g.*, *Reed*, 576 U.S. at 174 (Alito, J., concurring) (identifying "rules that would not be content based" to include size of signs, lighted or unlighted signs, and fixed messages or electronic signs).
37. Codified Ordinances of The Village of St. Bernard, Oh § 1185.1(a) (2024).
38. Although the definition may be challenged as unconstitutionally content-based, the Village's flag exception is practically important because it exempts many commonly used flags, like the flags of nations, states, cities, and organizations while regulating flags with other content. This type of exemption allows residents who fly official flags to do so without a permit or review. If a local government seeks to accomplish this outcome, then it should allow all flags without regard to content but subject flags to a limit on the number of flags, the size of the flags, and the height of the flagpoles.
39. For a particularly helpful discussion of crafting and evaluating exceptions for content neutrality, *see* Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 The Urban Lawyer 569 at 612-14 (2015).
40. Code of The Unified Government of Wyandotte County/Kansas City, Kan. § 27-729(b)(1).
41. Oklahoma City, Ok, Ordinance No. 27,526 (adopted Feb. 13, 2024) (Sign Code § 59-16119.B.).
42. IMLA Model Sign Code, 6th Draft, https://imla.org/resource/library/sign-code-6th-draft/ (last accessed June 26, 2024).43. *See* Minn. Stat. § 211B.045 (preempting local governments' regulation of all noncommercial signs during election season); Tex. Elec. Code Ann. § 259.003 (preempting regulation of all political signs on private property).
44. *See, e.g.*, Hoye v. City of Oakland, 653 F.3d 835, 854 (9th Cir. 2011) ("Courts must be willing to entertain the possibility that content-neutral enactments are enforced in a content-discriminatory manner. If they were not, the First Amendment's guarantees would risk becoming an empty formality….").
45. For example, the Arizona Attorney General concluded that Ariz Rev. Stat. § 16-1019 is not invalidated by *Reed* because it does not limit the right to speech by citizens, but instead limits government authority to prevent the display of political signs. *See* Ariz. Att'y Gen. Op. I15-011 (2015).
46. *Reed*, 576 U.S. at 173.
47. Specifically, it prohibited posting signs on "any sidewalk, crosswalk, curb, curbstone, street lamp post, hydrant, tree, shrub, tree stake or guard, railroad trestle, electric light or power or telephone or telegraph or trolley wire pole, or wire appurtenance thereof or upon any fixture of the fire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, life boat or other life saving equipment, street sign or traffic sign." *Vincent*, 466 U.S. at 792 n.1.
48. *Vincent*, 466 U.S. at 815.
49. As previously noted, however, governments must resist the temptation to inject content-based considerations through exemptions. For example, the regulation at issue in *Vincent* exempted "the installation of a metal plaque or plate or individual letters or figures in a sidewalk commemorating an historical, cultural, or artistic event, location or personality." *Vincent*, 466 U.S. at 792 n.1. Under *Reed*, the emphasized language is not content neutral.
50. The four-part test provides a framework for evaluating "the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." *Metromedia*, 453 U.S. at 507 (summarizing the test in Central Hudson Gas & Electric Co., 447 U.S. at 563-66).
51. *Metromedia*, 453 U.S. at 512.
52. *Id.* at 506.
53. The only substantive discussion of the distinction was in the concurring opinion of Justice Breyer: "Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court's many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to commercial speech. But I have great concern that many justifiable instances of content-based regulation are non-commercial. And, worse than that, the Court has applied the heightened strict scrutiny standard even in cases where the less stringent commercial speech standard was appropriate." *Reed*, 576 U.S. at 178 (Breyer, J., concurring) (cleaned up).
54. *See* Morris v. City of New Orleans, 399 F.Supp.3d 624 (E.D. La. 2019) (finding that a distinction between commercial and noncommercial murals does not pass the intermediate scrutiny test because "[i]nsofar as that purpose is related to community aesthetics, there is nothing in the record to suggest that commercial messages in artwork are more unsightly than non-commercial messages in artwork.")
55. Act Now to Stop War & End Racism Coal. v. District of Columbia,

846 F.3d 391, 396 (D.C. Cir. 2017).
56. *Act Now to Stop War*, 846 F.3d at 396.
57. The court noted that the local law applied to postings on the District's lampposts, which were a limited or designated public forum. "But once [the District] allows members of the public to post signs on its lampposts, the government lacks the power to restrict expression because of its message, its ideas, its subject matter, or its content." *Act Now to Stop War*, 846 F.3d at 403 (cleaned up). Therefore, the court's holding did not depend on forum analysis, and its conclusion should permit similar laws applicable even to traditional public forums.
58. The Fifth Circuit Court of Appeals considered and rejected the D.C. Circuit's analysis in *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020) – the very case about off-premises sign regulations that was reversed by the United States Supreme Court in *Reagan National Advertising*, 596 U.S. 61. "We do not see, as the D.C. Circuit does, an exception for mere 'cursory' inquiries into content in the holding of *Reed*." *Reagan Nat'l Advert. of Austin*, 972 F.3d at 705. zUnfortunately, the Supreme Court, in reversing this decision, did not discuss event-based durational limits in its opinion.
59. *www.RicardoPacheco.com v. City of Baldwin Park*, No. 216CV-09167CASGJSX, 2017 WL 2962772, at *7 (C.D. Cal. July 10, 2017).
60. *See, e.g.,* Whitton v. City of Gladstone, 54 F.3d 1400, 1408 (8th Cir. 1995).
61. Collier v. City of Tacoma, 854 P.2d 1046, 1057 (Wash. 1993) ("Tacoma has not shown that its restrictive time period of 60 days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of political speech.").
62. Arlington Cnty. Republican Comm. v. Arlington Cnty., 983 F.2d 587, 593 (4th Cir. 1993).

was already scheduled before the Board, the Appellant argued it had a legitimate expectation that the hearing would be proceed: Second, the Appellant relied on the doctrine of estoppel relying on *Immeubles Jacques Robitaille Inc. v. Quebec (City)*, 2014 SCC 34 for the principle that when a public authority makes a clear and unambiguous promise to its citizens to induce the citizens to perform certain acts, the public authority is estopped from not following through on the promise. The Appellant argued that after it filled an appeal it received a hearing notice letter from the Board which constituted a promise that the hearing would proceed. Third, the Appellant relied on the doctrine of relief from forfeiture, relying on *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 SCR 490 to put forward the argument that it had an honest belief the appeal was submitted on time and there would be no prejudice to the City if the appeal were to proceed.

The Board disagreed with the Appellant. The Board's authority to hear an appeal is clearly outlined in both the By-law and the *Act* and neither provides authority to the Board to vary a timeline or extend a deadline. In doing so the Board would be in contravention of both. The Board held that the doctrines of legitimate expectation and estoppel do not apply; furthermore there was no reasonable expectation nor promise that the Board would hear and decide an appeal regardless of whether the appeal deadlines had been followed. Appeal dismissed.

If a Tree Falls on a Motorhome, Is it the City's Fault?
Morissette v. City of Courtenay, 2024 BCCRT 528 https://canlii.ca/t/k542h
The Applicant, a resident of the City of Courtenay ("City") filed a claim seeking property damage caused by a City tree that fell on his motorhome. The City submitted that it is not legally responsible for the damage caused by the fallen City tree as it acted reasonably and in accordance with its Tree Removal Policy ("Policy").

HELD: Claim dismissed.

DISCUSSION: The Applicant submitted that the City was negligent by not dealing with the trees in the vicinity of his property in a timely manner despite ongoing complaints. The City submitted that it responded to the Applicant's complaints in compliance with its reactive Policy and sent an arborist to review and assess the trees in the vicinity of the Applicant's home. The 2018 arborist risk assessment found that the trees located within the vicinity of the Applicant's home were at a low risk of falling, a follow up re-assessment was completed in 2020 which recommended mitigation of the trees in one year or less. In compliance with the assessment, the City removed some of the trees in the area; however, one tree that was toppled but not removed fell on the Applicant's motorhome. The City argued that it did not breach a standard of care as it followed the steps of its Policy by completing a risk assessment reactively when it received a complaint, and removed the trees based on a risk assessment and available resources. Furthermore, the Applicant bears the onus to prove that the City's actions fell below the required standard of care. The Court was not satisfied that the Applicant provided any persuasive evidence from an arborist or expert to suggest that the City's risk assessment was unreasonable. Therefore, the Court held that the City was not negligent. Claim dismissed. ML