

REED V TOWN OF GILBERT

Recently, the U.S. Supreme Court considered the issue of how freedom of speech impacts the municipal regulation of signs. In this case, the town of Gilbert, Arizona adopted an ordinance involving the display of outdoor signs. The ordinance did not allow outdoor signs to be displayed without a permit, but contained an exemption for 23 different types of signs. The relevant exemptions included: (i) Ideological Signs "communicating a message or ideas for noncommercial purposes," (ii) Political Signs including any "temporary sign designed to influence the outcome of an election called by a public body" and (iii) Temporary Directional Signs Relating to a "Qualifying Event" including signs "intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" Qualifying events include an "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Each type of sign was regulated differently under the ordinance, including different restrictions on size and areas where they could be placed.

The Supreme Court held that the sign ordinance's restrictions were content-based regulations of speech that did not survive strict scrutiny, the most difficult level of review the courts utilize on constitutional issues. It found the sign ordinance to be "content based on its face" because "[t]he restrictions in the Sign Code that apply to any given sign...depend entirely on the communicative content of the sign." Put another way, the sign was treated differently by the town based solely on the purpose of the sign and not on the size, shape, location or other "content neutral" restrictions.

Because the signs were content based, they were required to meet the strict scrutiny standard. In order to survive strict scrutiny, the town had to demonstrate that the regulations furthered a compelling governmental interest and are narrowly tailored to that end. The town cited aesthetics and safety as the reasons. Regarding aesthetics, the Court found that temporary directional signs were no greater of an eyesore than political signs, yet they were treated

differently under the code. Similarly, the Court found no greater traffic safety concerns between the two categories of signs. Thus, the ordinance was struck down as unconstitutional.

APPLICATION OF *REED* AND RELATED CASE LAW TO YOUR ZONING ORDINANCE

As a result of the decision in *Reed*, your community should review your sign ordinance and be aware of the following:

Content Based Signs: If your code enforcement officer has to read the sign in order to determine whether a regulation applies, the ordinance provision will likely be subject to challenge. So, as an example, a regulation that applies only to garage sales or political signs may be struck down. In its place, the public body should consider content-neutral substitutes. For example, political, real estate, community special event and construction are all types of “temporary signs.” So, your community should review the ordinance and determine which signs may be content based, and whether regulating those signs instead as “temporary signs” would be acceptable and survive scrutiny.

Directional/Safety. The public body may be able to regulate directional signs or other safety signs differently as long as it can articulate valid reasons. The Supreme Court in *Reed* stated that “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.” Thus, your community should seek legal review to determine whether the regulation is narrowly tailored for safety issues.

Overregulation. Many zoning ordinances and sign ordinances define a number of different types of signs, but then have no substantive regulations of those particular signs. For example, your ordinance may define a pole sign, but then not mention pole signs in any regulation. Streamlining those provisions to remove unnecessary definitions or types of signs you are unlikely to

encounter is a good idea. However, if you may find that regulating those specific types of signs is desired, you may need to address that particular sign in the regulations.

Regulation based on Duration or Number of Signs. Many current ordinances restrict the number of days that a particular type of sign may be installed and maintained. Time restrictions must be carefully evaluated. For example, the Michigan Court of Appeals struck down as unconstitutional a City of Wyoming ordinance that restricted temporary signs to only 60 days within a calendar year. A federal court struck down another city's political sign ordinance because it limited the duration of the sign to 45 days before the election and allowed only one sign per candidate or per issue. The limit on the number of signs was also impermissible because it infringed on the homeowner's right to express support for more than one candidate or allow two voters in the same household to show opposing views. At least one federal court has determined that limiting all *temporary* signs to a certain time before or after an "event" is "content based." As in *Reed*, the reasoning is that the enforcement officer *would have to read the sign to determine if the sign was in violation of the code*, signaling that there may be a problem with your ordinance. So, we recommend legal review of any regulation addressing the number or duration of signs.

Regulation of Municipal Property. Municipalities still have freedom to regulate their own property. In *Members of City Council v Taxpayers for Vincent*, 466 US 789; 104 S Ct 2118; 80 L Ed 2d (1984), the Supreme Court upheld a city ordinance that prohibited the posting of signs on public property. Given that there was a legitimate interest served by the ordinance (eliminating visual blight), its content neutrality, and the availability of alternative channels of communication, the ordinance was constitutional.

The *Reed* case demonstrates the degree to which our courts will scrutinize a community's efforts to regulate signage and how those regulations impact free speech. Depending on the type of regulation, different standards of review are utilized by the courts. This political season is a good opportunity to review your

regulations in light of this new Supreme Court decision. We understand the need to control signage and how to craft lawful ordinances. Please contact the lawyers at Foster Swift if you need assistance with your sign regulations.

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