

New Rules for Your Sign Code

By Gerald E. Dahl, Murray Dahl Kuechenmeister & Renaud LLP, and Martin Landers, AICP, Plan Tools LLC principal

Introduction

Sign codes are tricky. They host a variety of sign types with no common nomenclature - is that a ground sign, freestanding sign, monument sign, or...all of the above? Sign codes require frequent updates as sign technology keeps evolving at all levels, from the temporary wave banners popping up in landscape buffers to recent innovations in electronic message centers.



Wave Banners



Electronic Message Center on a Freestanding Sign

Variations are often requested for greater sign height and more sign area. Actively enforcing the sign code can also strain relationships with the business community, especially when temporary signs are involved. With so many potential points of conflict, it's no surprise when the legal basis for sign codes is tested.

New Rules of the Game: Reed v. Town of Gilbert

The ground rules for sign codes are changing once again as a result of *Reed v. the Town of Gilbert AZ*, a rare unanimous Supreme Court decision. In June of this year, the Court considered a challenge to certain portions of the Gilbert, Arizona sign code, and in so doing, announced a sweeping new standard for the requirement that such regulations be "content neutral." Despite an effort by Justice Alito in a concurring opinion to interpret the majority opinion somewhat less broadly, the effect of the decision, written by Justice Thomas, will likely be that key features of most local sign codes will now be considered "facially content-based" and thus subject to strict constitutional scrutiny – a high bar that few are likely to clear.

The Gilbert sign code contained a series of exemptions, including three which became the basis for appeal and the Supreme Court decision: "ideological signs," defined as "communicating a message or idea", "political signs," "designed to influence the outcome of an election," and

“temporary directional signs,” directing the public to a church or other “qualifying event.” Each category of sign carried with it a different set of requirements on size and duration.

The plaintiff, Clyde Reed, was the pastor of a church without a permanent location. The church posted signs advertising the location and time for the next day’s services. The town cited the church for failing to include an event date and for exceeding the time limits for display of this type of (temporary directional) sign. The town prevailed through the Ninth Circuit Court of Appeals, but the Supreme Court reversed, holding the town’s requirements content-based on their face, and because of this, unconstitutional under the First Amendment – prohibiting the enactment of laws “abridging the freedom of speech.”

Because the Gilbert regulations depended for their enforcement upon the content of the sign, may be justified only if the town could prove they were narrowly tailored to serve a “compelling state interest.” In practice, this is a very high standard, and the Court held the regulations did not measure up.

A content-based regulation, as applied to a sign code, means that if you have to read the sign to determine how it is regulated, it is content-based. Many sign codes, including the Gilbert sign code- do exactly that, by referring to the sign’s content (political, ideological, special event), then applying differing restrictions based on those categories. After reviewing prior case law, Justice Thomas held the code could only survive if it passed the two-part “strict scrutiny” test: (1) the regulations must be narrowly tailored (2) to achieve a compelling governmental interest. Here, the code addressed visual clutter and pedestrian and traffic safety as the governmental interests, but were not narrowly tailored – for example the Court reasonably asked why political signs were permitted to be larger, and temporary directional signs smaller, as not really serving the governmental interest in reducing clutter.

Justice Kagan, in a spirited concurring opinion (agreeing with the result, but not the broad scope of Justice Thomas’ opinion) warned that the effect of the decision would be to unnecessarily invalidate countless ordinances across the country. She argued that the Court could easily have voided the Gilbert regulations on more narrow grounds, saying that the gilbert ordinance did not pass “ the laugh test,” let alone strict scrutiny

Nevertheless, the majority opinion in *Reed v. Town of Gilbert* is now controlling law on the subject of content-based local sign regulations, and until modified or conditioned by later decisions, it must be followed.

Keys to creating a Reed-compliant sign code

Tip No. 1: Focus on type, not message

Perhaps the most important lesson of the *Reed* decision is to cast a critical eye on how sign types are named and regulated. Here’s a short list of sign type names that are “in” or “out” (not because of their physical structure *per se*, but instead whether or not the enforcing official must read their content to know how they are regulated):

OUT

Construction signs

Political and ideological signs

IN

Site signs

Yard signs

Real estate signs

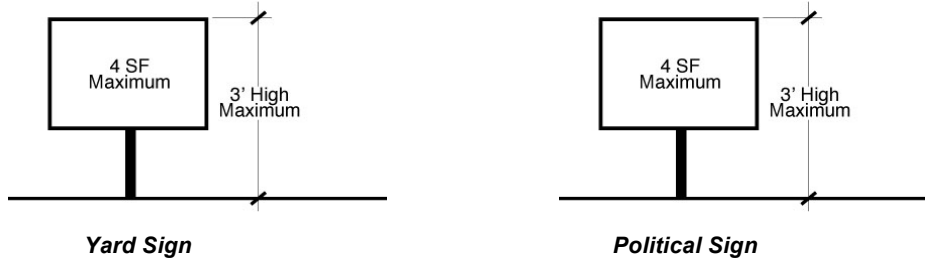
Yard signs and Swing signs

Special event banners

Banners

The structure of a sign code can go a long way toward expressing clarity in content-neutral sign types and regulations. Employ charts to categorize permissible sign types by residential or non-residential zoning district, and incorporate graphic illustrations to depict sign types and their standards.

THIS.....NOT THIS!



Tip No. 2: Craft a compelling purpose statement

Courts are required to give deference to the legislative intent of the elected officials in enacting local regulations. Accordingly, it is important to take the opportunity to better articulate the compelling governmental interests underlying the local sign code. Taking some cues from the *Reed* decision, enhance the purpose section of the code by going beyond a simple statement of “promoting public health and safety.” Instead, emphasize:

- Promoting safety of persons and property by regulating signs so as not to confuse or distract motorists or impair drivers’ ability to see pedestrians, obstacles, other vehicles, or traffic directional signs
- Promoting efficient communication of messages
- Promoting the public welfare by reducing visual clutter
- Assisting in wayfinding
- Providing fair and consistent enforcement.

Tip No. 3: Scrub definitions to reduce/eliminate content-based references

After creating a series of content-neutral sign types in the regulation, as suggested above, make sure that those types are described in content-neutral terms. The lens is always, “do I have to read the sign to determine what the restrictions are?” if so, the definition fails the content-neutrality test. Here is an example of a content-based definition that has been scrubbed:

Sign, external use means a sign located outside of a principal commercial use on accessory commercial structures

Tip No. 4: Structure exemptions to avoid content-based distinctions

Every sign code can and should legitimately contain a list of signs exempt from some or all of its requirements. The Town of Gilbert exempted sign types (political, ideological, temporary directional) by describing what the signs actually said or contained – a classic content-based

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Deleted: that provides information to customers in motor vehicles about the products or services available on that premises.

distinction, and thus easy for the Supreme Court to invalidate. In describing the list of exemptions in a *Reed*-compliant sign code, stay with the sign type:

- signs erected by the city
- flags
- signs being carried by people
- window signs
- wave banners

Notice these exemptions do not require the sign to be read to be placed in the exempt category. If the jurisdiction has taken the first tip (rely on sign type) seriously, it will be easy to create exemptions based on these types and stay well clear of the need to rely on content.

Finally, Justice Thomas identifies two content-based sign types that might survive even the strict *Reed* test: warning signs on private property, signs directing traffic, and private house street number signs.

Despite the apparent inflexibility of Justice Thomas' majority opinion, Justice Alito, in a short concurring opinion, took a crack at "some rules that would not be content based":

- Rules regulating the size of signs and the locations in which signs may be placed. These rules may distinguish between free-standing 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. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.
- 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.

It is important to note that in this list Justice Alito goes beyond the limits of Justice Thomas' majority opinion in identifying as permissible (1) signs advertising a one-time event (the actual case in *Gilbert*), and (2) signs pointing out historic sites and scenic spots. Neither of these two sign types can be inferred from Justice Thomas' majority opinion.

Difficult issues not neatly addressed in Reed

Two particular types of signs are not addressed in the *Reed* decision, but are of great importance to any local jurisdiction: (1) off premise signs, including billboards, and (2) murals or works of art. Most troublesome are off-premise signs. The only way to determine if a sign relates to the premise on which it is located is to read it, and many localities ban or highly restrict such signs. We believe that there are only two ways to address this: (1) continue to regulate off-premise signs, but emphasize the importance of the community's interest in reducing visual clutter, or (2) treat such signs as simply a sign on the land where it is located.

Murals and works of art are a lesser problem. One way to approach this is to define them and state they are exempt. From a litigation perspective, it is much less likely that this approach, which may or may not be content-based, will in practice cause real problems.

Looking Ahead

Over time, lower courts will attempt to clarify the majority and concurring opinions of Justice Thomas and Justice Alito. There is no perfect solution, and some communities may decide to error on the side of Justice Alito and live with certain content based code provisions. Codes are living documents, so the prudent approach may be to resolve to update your sign code consistent with basic *Reed v Town of Gilbert* content-neutrality guidance and remain nimble for future decrees.