



## The New World of Municipal Sign Codes Strategies for Legal and Planning Practice

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## Session Outline

- Overview of legal aspects of sign regulation after *Reed v. Town of Gilbert*
  - Focus on case law since *Reed*
- Planning concepts in sign regulation
- Practical sign regulation strategies

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## General Reminders

- Every sign carries some form of First Amendment protection
- Government regulation of signs loses the normal presumption of constitutionality and is subject to heightened scrutiny
- Sign litigation is common, expensive, and risky
- Most sign ordinances contain at least a few provisions of questionable constitutionality, particularly following *Reed*

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## General Reminders

- Sign codes should reflect a careful balance of...
  - Community tolerance for legal risk
  - Community desire for aesthetic beautification



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## Post-Reed Sign Code Updates

- Review and revise based on *Reed*
- Opportunity to provide education to elected officials, staff, community
- Opportunity to revisit other constitutional and statutory issues, practical problems
- New sign technology merits new regulation
- Opportunities to smooth administrative processes

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## Legal Issues in Sign Regulation



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## First Amendment Concepts

- ✓ Content (or message) neutrality
- Time, place or manner regulations
- ✓ Commercial vs. non-commercial speech
- ✓ Off-site vs. on-site signs
- ✓ Bans and exceptions
  - Permits and prior restraints
  - Vagueness and Overbreadth
  - Public forum doctrine




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## Commercial Speech Doctrine

- Commercial speech is reviewed differently from noncommercial speech
  - Commercial speech gained First Amendment protection in 1975
  - Content neutrality not required (but...)
- *Central Hudson* test: (1) lawful speech, (2) substantial governmental interest, (3) regulation must directly advance governmental interest, and (4) no more extensive than necessary




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## Content Neutrality

- Content neutrality looks at **subject matter**
- Viewpoint neutrality looks at **point of view**
  - a ban on **all signs** is content neutral *and* viewpoint neutral
  - a ban on **all political signs** is *not* content neutral but *is* viewpoint neutral
  - a ban on **signs that criticize government** is neither content neutral nor viewpoint neutral




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## Content and Viewpoint Neutrality

"The numerical limits on signs in this district do not apply to signs relating to a specific event of a *nonprofit organization*, so long as those signs contain *no commercial speech*."

If the law is enforced against this sign based on the "Target Corp." logo, would it make the law content-based?



Source: John Baker

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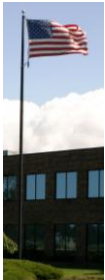
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## Content and Viewpoint Neutrality



- Content: "No sign shall contain any political message."
- Viewpoint: "No sign shall contain any message advocating the election of a Republican candidate."

*"Flags shall be prohibited, except that each property owner shall be permitted one pole-mounted governmental flag."*

--Content problem? Viewpoint problem? Both? Neither?

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## Content and Viewpoint Neutrality

*"Signs containing a political message are permitted in residential zoning districts."*

As enforced against this sign, is this provision viewpoint neutral?

Content neutral?

What if another regulation allowed *ideological* signs in this setting?



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## Content and Viewpoint Neutrality

“Directional signs indicating only the direction of pedestrian and vehicular circulation routes on the lot on which the sign is located.”



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## Examples of Time, Place and Manner Regulations

- Maximum size/height
- Maximum number per lot/building/support structure
- Specific sign locations
  - corner lots
  - setbacks/spacing
  - zoning districts
  - uses
  - corridors
- Prohibited signs
- Regulations of materials, lighting and form
  - internal/external lighting
  - flashing/animation
  - neon
  - materials/colors\*
  - monument/pole signs
  - design review and incentives
  - Cabinet/channel letter wall signs

\*Note: Federal protection of color of federally-registered trademarks/logos.

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## Content Neutrality: Implications

- A regulation that is “content-based” will be subject to strict scrutiny: compelling governmental interest, least restrictive means, and narrow tailoring
- A regulation that is “content-neutral” will be subject to intermediate scrutiny: significant/important governmental interest unrelated to suppression of speech, substantially related means, narrow tailoring, and ample alternative channels for communication
- Regulations of commercial speech are subject to the *Central Hudson* intermediate scrutiny test

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## Content Neutrality Summary

	Strict Scrutiny	Intermediate Scrutiny (Central Hudson Test)	Rational Basis
Triggers	<ul style="list-style-type: none"> <li>Content-based regulation of speech</li> <li>Fundamental constitutional right (i.e., life, liberty, property, First Amendment rights) being deprived—in due process cases</li> <li>Protected class (i.e., members of one race) being intentionally discriminated against, with disparate impact</li> </ul>	<ul style="list-style-type: none"> <li>Content-neutral regulation of speech</li> <li>Regulations applying specifically to commercial speech</li> </ul>	<ul style="list-style-type: none"> <li>Non-fundamental constitutional right (i.e., right to profit, right to do business, etc.) being deprived or diminished—in due process cases</li> <li>Any equal protection claim asserting discriminatory intent and disparate impact between members of non-protected classes (i.e., business owners, property owners in different zoning districts, etc.)</li> </ul>
Governmental Interest Requirement	Compelling—traffic safety and community aesthetics are NOT compelling	Substantial—traffic safety and community aesthetics are substantial	Legitimate—traffic safety and community aesthetics are legitimate
Tailoring Requirement	Regulation must be narrowly tailored to serve the governmental interest	Regulation must directly advance the governmental interest and not be more extensive than necessary to serve the interest	Regulation must rationally relate to the governmental interest
Likelihood that the Government Will Prevail	VERY LOW	MODERATELY HIGH	HIGH

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## Reed v. Town of Gilbert: Background



§ 4.402.A requires all signs to be permitted, unless excepted by § 4.402.D

§ 4.402.D contained 23 exceptions to permitting requirement, including:

- “Political signs”
- “Ideological signs”
- “Temporary directional signs relating to a qualifying event”

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## Gilbert Sign Code

- **Political signs:** “A temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general or special elections relating to any national, state or local election.”
  - Up to 16 square feet on residential property, 32 square feet on nonresidential property, up to 6 feet in height
  - Must be removed 10 days after election
- **Ideological signs:** “Sign communicating a message or ideas for non-commercial purposes” (that is not also another sign type)
  - Up to 20 square feet, 6 feet in height

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## Gilbert Sign Code

- **Temporary directional signs:** Temporary sign "intended to direct pedestrians, motorists and other passersby to a 'qualifying event.'" Qualifying event is an event sponsored or hosted by religious, charitable, community service, educational, or other nonprofit organization.
  - 6 feet in height, 6 square feet in area, 4 signs per property
  - May be placed 12 hours before event, must be removed 1 hour after




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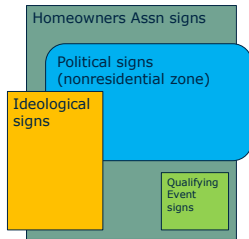
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## Gilbert Sign Code




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## Reed v. Town of Gilbert: Outcome

- Distinctions between forms of noncommercial speech are content based
  - "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."
  - "[C]ommonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."




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## Reed v. Town of Gilbert: Outcome

- Application of strict scrutiny
- Law was not narrowly tailored to Town's proffered interests
  - Town failed to show that limiting temporary event signs more than other temporary signs reduced visual clutter, etc.

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## Post-Reed Case Law Update

- **Political signs**
  - Courts have little tolerance for special regulations restricting political speech
- **Billboard laws and commercial speech**
  - Courts have generally confirmed that *Reed* does not apply to commercial speech—billboard restrictions are still okay
  - BUT challenge to outdoor advertising acts might affect billboard regulation
- **Government speech doctrine**
  - Some evidence of expansion of government speech doctrine
- **Artwork, public forum doctrine, etc.**
- **Panhandling/solicitation laws**
  - Courts have struck down several cities' panhandling laws on grounds that prohibition on certain speech was content based

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## Recent Decisions under *Reed*

### Political signs

- **Marin v. Town of Southeast**, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 5732061 (S.D.N.Y. Sep. 30, 2015) (special treatment for political signs invalidated)
- **Vosse v. City of New York**, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7280226 (Nov. 18, 2015) (ban on illuminated signs more than 40 feet above sidewalk upheld)
- **Peterson v. Vill. of Downers Grove**, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 8780560 (N.D. Ill. Dec. 14, 2015) (ban on painted wall signs upheld)

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# Recent Decisions under Reed

### Commercial speech doctrine

- **GEFT Outdoor, LLC v. Consolidated City of Indianapolis and County of Marion**, 1:15-CV-01568-SEB-MJD, slip op. (S.D. Ind. May 20, 2016) (substitution clause saves billboard regulation)
- **Lamar Central Outdoor, LLC v. City of Los Angeles**, \_\_\_ Cal. Rptr. 3d \_\_\_, 2016 WL 911406 (Cal. App. Mar. 10, 2016) (commercial-noncommercial distinction remains valid under California Constitution)
- **Contest Promotions LLC v. City & Cnty. of San Francisco**, 2015 WL 4571564, at \*4 (N.D. Cal. 2015) (concluding that "at least six Justices continue to believe that regulations that distinguish between on-site and offsite signs are not content-based, and therefore do not trigger strict scrutiny")
- **Citizens for Free Speech, LLC v. Cnty. Of Alameda**, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 4365439, at \*13 (N.D. Cal. 2015) (*Reed* does not alter the analysis for laws regulating off-site commercial speech)

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# Recent Decisions under Reed

### Government speech doctrine

- **Vista Graphics, Inc. v. Va. Dep't of Transp.**, \_\_\_ F. Supp. 3d \_\_\_ (E.D. Va. Mar. 18, 2016) (state rest area information kiosks are government speech, no First Amendment application)



Source: ij.org

### Artwork

- **Cent. Radio, Inc. v. City of Norfolk**, 811 F.3d 625 (4th Cir. 2016) (sign code that exempted artwork is content based)

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# Post-Reed Clarifications

- Get rid of content based distinctions among and between noncommercial speech
  - Political signs, religious signs, election signs, construction signs, real estate signs\*, event signs, etc.
- Commercial speech doctrine remains valid
  - Prohibitions on offsite commercial advertising
  - Content based distinctions, subject to the *Central Hudson* test
- Government speech doctrine is expanding
  - Take advantage of it!

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## Remaining Vexing Issues

- Defining “sign”
  - Suggest: use minimal definitions of sign and apply them broadly
- Artwork exemptions
  - Suggest: avoid special regulation or exceptions for artwork
- Architecture/design regulation
  - Suggest: business as usual for now, but weigh against risk tolerance

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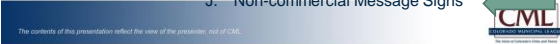
## Potential Problem Areas

### Example 2

#### 14.04.08. Sign Standards



- A. Purpose
- B. Prohibited Signs
- C. Sign Permit Required
- D. Signs That Do Not Require A Permit
- E. Nonresidential Use Signs
- F. Residential Use Signs
- G. MU-UMS District Sign Standards
- H. C-SGD District Sign Standards
- I. Highway 95 Sign Standards
- J. Non-commercial Message Signs




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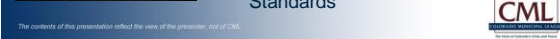
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## Standard Sign Code Structure

### Example 3

#### 29-4.10 Sign Standards

- (a) Purpose
- (b) Applicability
- (c) Prohibited Signs
- (d) Regulations Based on Land Use and Area
- (e) Regulations Based on Type of Sign
- (f) Area, Height and Placement Standards




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## Practical Suggestions



Source: avondale.org

1. Review your sign code NOW for potential areas of content bias.
2. If fixing your sign code will take a while, coach permit and enforcement staff to avoid enforcing content-based distinctions.

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## Practical Suggestions

3. Add a strong severability clause if you don't have one.
  - Yes, even if you have a general severability clause for the entire zoning code
4. Be sure your code contains a substitution clause.
  - A non-commercial message may be substituted for a commercial message on any sign permitted by this code



Source: dailycamera.com

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## Practical Suggestions

5. Make sure your sign code has a strong purpose statement.
6. Review exceptions to permitting requirements, and reduce wherever possible
7. Check for the common "problem areas" of sign regulation, including political/ideological signs, religious signs, event signs, real estate signs, and holiday lights



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## Practical Suggestions



Source: uprinting.com

- 8. Reduce the number of sign categories – particularly for non-commercial signs
- 9. Tie the purpose statement and regulatory approach to data, wherever possible.
- 10. Change sign regulation vocabulary to think more about the function, less about the message.

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## Practical Suggestions

- 11. If you allow LED signs (electronic message centers), consider the emerging standard parameters
  - No moving images (except maybe in pedestrian areas)
  - Max 6-8 images/minute
  - Change images in < .25 sec
  - Auto shutoff if short/lightning
  - Adjust to ambient light
  - Max  $\leq 5000$  nits day and  $\leq 500$  nits night




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## Practical Suggestions

- 12. Focus on what you can enforce -- and want to enforce:
  - That will make a real difference to the character of the community; and
  - That is worth the staff time available to enforce it

Often general number, size, and height restrictions make more difference to community character than other controls




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## Practical Suggestions

13. Think about new/difficult types of commercial signs that you may or may not want to regulate.

- Projected light displays
- Signs inside stores clearly designed to be read from outside
- Ice machine, dumpster (and other) wraps



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## Practical Suggestions

14. Think about moving away from the on-premises/off-premises distinction – it's going to get harder to enforce



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## Content Based Sign Categories

- Political Signs
- Private Parking Traffic Directional Sign
- Real Estate Project Directional Sign
- Real Estate Sign
- Special Event Signage
- Special Sale Sign
- Community Event Sign
- Construction Sign
- Development Sign
- Directional Sign
- Garage Sale Sign
- Grand Opening Sign
- Historic Marker
- Informational Sign

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## New Sign Categories

- Classification based on structure
  - Attached permanent sign
    - e.g., wall, awning, window
  - Detached permanent sign
    - e.g., pole, monument
  - Attached temporary sign
    - e.g., window sign, poster, banner attached to building
  - Detached temporary sign
    - e.g., site sign, swing sign, yard sign, banner

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## Definitional Considerations

- Real estate signs: define according to the for-sale status of property
- Construction signs: define according to building permit status on property
- Directional signs: allow as part of a general allowance for temporary freestanding signs
- Grand opening signs: allow extra signage for set time period after issuance of business license

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## Same Old Issues

- Public forum doctrine
  - Application to public property: parks, right-of-ways, sidewalks, schools, etc.
- Prior restraint doctrine
  - Clear review criteria for issuance of sign permits
  - Short timeframes for review and avenues for appeal

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## Additional Resources

- Rocky Mountain Sign Law Blog ([www.rockymountainlaw.com](http://www.rockymountainlaw.com))
- *Local Government, Land Use and the First Amendment*, Brian Connolly, ed. (ABA, forthcoming 2016)
- Brian J. Connolly & Alan C. Weinstein, *Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty*, 47 Urb. Law. \_\_\_\_ (2015)
- Daniel Mandelker, John Baker and Richard Crawford, *Street Graphics and the Law*, revised edition (American Planning Association, forthcoming 2015)



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## Questions and Answers



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