2015

Land Use Law Update: Will Reed v. Town of Gilbert Require Municipalities Throughout the Country to Rewrite Their Sign Codes?

Sarah Adams-Schoen
sadams-schoen@tourolaw.edu

Follow this and additional works at: http://digitalcommons.tourolaw.edu/scholarlyworks

Part of the First Amendment Commons, and the Land Use Law Commons

Recommended Citation
29 Mun. Law 16 (Winter 2015)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact ASchwartz@tourolaw.edu.
Municipal officials and attorneys will want to watch the Supreme Court slip opinions in June for the Court’s decision in Reed v. Town of Gilbert. Depending on how the Court decides the case, municipalities may need to act quickly to amend their sign regulations. Indeed, Susan Trevarthen, who represented the American Planning Association in its amicus curiae brief in Reed, warns “that adoption of the strict scrutiny test [urged by the petitioner Clyde Reed] has the potential to invalidate nearly all sign codes in the country, and would thereby imperil the important traffic safety and aesthetic purposes underlying local government sign regulation.”

“Depending on how the Court decides Reed, municipalities may need to act quickly to amend their sign regulations.”

As local officials and attorneys know, local sign ordinances are generally recognized to be part of the local government toolkit for advancing substantial governmental interests such as traffic safety and aesthetics. However, effective regulation of sign placement and aesthetics typically requires the governing jurisdiction to categorize signs by type, and such categorization often requires the regulator to read the sign to determine its function, and therefore its category.

Thus, because these sign regulations require the regulator to review the content of the sign to determine its category, sign regulations pose distinct First Amendment problems for municipalities, which regulate the physical characteristics and placement of signs as part of the exercise of their police powers. Recognizing this, a unanimous Court observed in City of Ladue v. Gilleo that signs present regulatory challenges not applicable to other forms of speech:

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities’ police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

Nevertheless, numerous litigants have brought claims alleging that temporary sign regulations that differentiate between sign types based on the function of the sign are content-based and therefore subject to strict scrutiny review. Varied judicial responses to these claims have led to a split of authority and resulting uncertainty in this area of law.

The Court’s ruling in Reed may resolve this split. Plaintiffs/appellants in Reed are the Good News Community Church and its pastor, Clyde Reed (collectively, “the Church”). Defendants/appellees are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town’s Code Compliance Manager (collectively, “the Town”). The Church is appealing a Ninth Circuit order that affirmed a district court order granting summary judgment to the Town and denying summary judgment to the Church.

The basic facts are as follows. The Church rented space at an elementary school in Gilbert, Arizona, and placed signs in the surrounding area announcing the time and location of the Church’s services. The Town has a sign code that restricts the size, number, duration, and location of many types of signs, including “ideological signs,” “political signs,” and “temporary directional signs relating to a qualifying event.” Treating the Church’s signs as temporary directional signs, the Town issued a code enforcement notice to the Church, seeking to enforce the code restrictions applicable to temporary directional signs. The Church then sued the Town, claiming that the sign code violates the Free Speech Clause of the First Amendment.
and the Equal Protection Clause of the Fourteenth Amendment on its face and as applied to the Church.

Following Supreme Court precedent that requires intermediate scrutiny for content-neutral regulations, the district court found that the sign code was a content-neutral regulation that was reasonable in light of the government interests underlying the regulations, and therefore passed constitutional muster. The Ninth Circuit agreed and held that, even though an official would have to read a sign to determine what provisions of the sign code applied, the restrictions were not based on the content of the signs, did not censor speech or favor certain viewpoints over others, and the sign code left open other channels of communication for the Church.

The Town’s permitting exemption for temporary signs, and, more specifically, its classification of the Church’s signs as temporary directional signs, lies at the heart of the Reed case. The plaintiff/appellee church in Reed—joined by a host of amici representing various religious and libertarian interests, ten states, and the United States—argues that if a municipal official has to read the content of a temporary sign to determine what kind of temporary sign it is, the regulation is “content-based” and subject to strict scrutiny. As a result, the Church argues, the Town of Gilbert’s sign code is subject to strict scrutiny. Moreover, the Church argues that the Town’s code cannot survive strict or intermediate scrutiny because the code is not narrowly tailored and alternative channels for communication do not exist.

The United States, which filed a brief in support of the Church, argues instead that intermediate scrutiny applies to the Town’s sign code, but the code fails to satisfy that standard. Specifically, the United States argues

[Intermediate scrutiny applies in the particular context of a sign-regulation scheme premised solely on the government’s substantial and content-neutral interests in safety and aesthetics. Those interests have long been understood as valid bases for limiting the proliferation of signs; they can justify not only general limitations on signs, but also exceptions for signs whose content promotes (or does not significantly detract from) safety and aesthetics; and the existence of such exceptions should not in itself trigger strict scrutiny. Even under intermediate scrutiny, however, respondents’ ordinance...draws distinctions be-tween different types of signs that are not sufficiently connected to safety and aesthetic rationales.]

The Town—joined by amici representing municipal and planning interests—argues that intermediate scrutiny applies to sign ordinances that do not favor or censor viewpoints or ideas and the Town’s code does not favor or censor viewpoints or ideas. Moreover, amici in support of the Town argue that the Church’s absolutist test would wreak havoc on municipalities’ ability to further important traffic safety and aesthetic interests and is not necessary to protect speech because a municipality’s review of a temporary sign’s content to determine the sign’s function is not a content-based review.

How will the Court resolve the questions posed in Reed? Hopefully by recognizing that review of a sign’s text to discern its function does not equate to regulation of the sign’s content, but rather is most often a content-neutral safety or land regulation. Although clearly implicating free speech concerns, typical “[c]omprehensive sign regulations are not speech-licensing or censorship schemes but are chiefly concerned with the form and appearance of the development of land in a variety of zoning settings (residential, mixed-use, commercial, industrial, agricultural, and the like).” Indeed, many local governments, including the Town of Gilbert, include beauty, community appearance, and safety among the enumerated purposes in their sign regulations. These regulations cannot be effectively implemented if the municipality is hampered in its ability to discern the functions of the signs it regulates. As the National League of Cities argues in its amicus brief, Signs are speech and thus can be categorized or differentiated only by what they say. This makes it impossible to overlook a sign’s content or message in attempting to formulate regulations on signage or even make exceptions required by law. If the mere categorization of signs by function renders them “content-based,”... few sign regulations will meet the exacting strict scrutiny test.

An outcome that places local government sign codes under strict scrutiny whenever classification of sign types requires a review of the sign’s content to understand the function of the sign would arguably place local governments in an impossible position—and require local governments to act quickly to amend their sign codes.
According to the Court’s official website, the Court publishes slip opinions on its website “within minutes” of issuing its bench opinions. See SUPREME COURT OF THE UNITED STATES, 2014 TERM OPINIONS OF THE COURT, SLIP OPINIONS, PER CURIAMs (PC), AND ORIGINAL CASE DECREES (D), http://www.supremecourt.gov/opinions/slipopinion/14 (last visited Feb. 27, 2015).


See Wag More Dogs v. Cotart, 680 F.3d 359, 365 (4th Cir. 2012) (recognizing that categorization for legitimate regulatory purposes requires review of sign content); National Advertising Co. v. City of Miami, 287 F. Supp. 2d 1349, 1376 (S.D. Fla. 2003) (recognizing that general rule against regulation of viewpoints “is not applicable in cases where ‘there is not even a hint of bias or censorship in the [municipality’s] enactment or enforcement of an ordinance’”, rev’d on other grounds, 402 F.3d 1329 (11th Cir. 2005).


Id. at 48.

Compare Wag More Dogs, 680 F.3d at 365 (recognizing legitimate need to review sign content to categorize sign by function) with Matthews v. Town of Needham, 764 F.2d 58, 60 (1st Cir. 1985) (“[P]referring the ‘functions’ of certain signs over those of other (e.g., political) signs is really nothing more than a preference based on content.”).

The Ninth Circuit order is reported at 707 F.3d 1057 (9th Cir. 2013). The district court’s unreported order is available at No. CV 07-522-PHX-SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011).


See, e.g., City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428-29 (1992) (acknowledging that law prohibiting newsracks when they contain certain types of publications could be content-neutral if distinction based on neutral rationales).