

PRESENTED AT
Scenic Hill Country-City Hall Essentials
July 11, 2019
Fredericksburg, Texas

Reeding your Sign Ordinance for Regulation and Revision

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Updated July 2019

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State Regulation of City Regulation of Signs

Defending reasonable sign regulation from First Amendment challenges has become increasingly difficult following *Reed v. Town of Gilbert* and its progeny. *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)¹. Understanding the basics of municipal sign regulation is key to understanding the far-reaching implications of *Reed* in municipal law. This article will endeavor to both convey the intricacies of sign regulation and the far-reaching implications of *Reed*.

How a city may regulate some signs, but not others, depends on many factors. For example, a city generally may regulate signs on the basis of size, but not regulate signs solely on the basis of content without showing that the restriction is narrowly tailored to meet a compelling interest. *See id.* at 2231. However, some cases have upheld the ability of cities to distinguish based on the type of sign being regulated. For example, a city can often regulate offsite advertising more strictly than onsite advertising. *See, e.g.,* TEX. LOC. GOV'T CODE § 216.035; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981); *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 17-15909, 2017 WL 3499800 (9th Cir. Aug. 16, 2017).

Cities have authority to regulate or prohibit most signs or billboards in the city or the city's extraterritorial jurisdiction (ETJ). TEX. LOC. GOV'T CODE §§ 216.003; 216.902. A city's purpose for such regulation usually involves protecting the appearance or aesthetics of the city, which helps with property values and improving traffic safety. *See, e.g., Luce v. Town of Campbell*, No. 15-2627 (7th Cir. Sep. 22, 2017) ("It does not take a double-blind empirical study, or a linear regression analysis, to know that the presence of overhead signs and banners is bound to cause some drivers to slow down in order to read the sign before passing it.").

¹¹ When I checked the number of sources that have cited the *Reed v. Town of Gilbert* Supreme Court Decision on September 24, 2017, the number was over 1,400.

A city ordinance may prohibit or regulate most signs and all billboards so long as the ordinance's provisions do not abridge the constitutional rights of a sign owner, nor conflict with any state statute. If a city council decides to regulate billboards in a way that affects existing billboards, a city may require removal, relocation, or reconstruction of existing billboards pursuant to the authority of Chapter 216 in the Local Government Code. TEX. LOC. GOV'T CODE ch. 216. To regulate existing billboards in this way, a city must strictly follow the procedures in Chapter 216.

Texas law has affirmed that both general law and home rule cities have some authority to regulate signs and billboards in the ETJ. TEX. LOC. GOV'T CODE § 216.902(a). The statute granting cities the authority to regulate within the ETJ makes no distinction between general law and home rule cities, so either type of city may do so. However, in lieu of regulating signs in the ETJ, a city may request that the Texas Transportation Commission regulate the signs within the city's ETJ. A city that chooses to regulate in its ETJ should ensure that its ordinance clearly extends the regulation to that area.

Additionally, a city has the authority to regulate and prohibit signs in public rights-of-way. A sign owner must request a city's permission before a sign may be legally placed in a city's rights-of-way. TEX. TRANSP. CODE. Ch. 393. Absent city regulation, state law generally prohibits signs in city's rights-of-way. TEX. TRANSP. CODE. §393.0025. Under Chapter 216 of the Local Government Code, a city may require a sign's removal, relocation, or reconstruction. TEX. LOC. GOV'T CODE ch. 216. While a city may regulate any sign, these regulations most often regulate large outdoor signs that are hired out for commercial advertising, commonly known as billboards. Cities usually only prospectively ban or regulate signs because the removal, relocation, or reconstruction of an existing sign often costs the city money and may result in litigation.

In order to require removal of a conforming sign, a sign that was legal when the ordinance was adopted, the city must first determine compensation for the sign owner through a municipal sign board. The sign board's membership is provided by state law, and the board determines the amount of compensation. TEX. LOC. GOV'T CODE § 216.005. Before the board makes a determination on the amount of compensation, the city must give the sign owner an opportunity for a hearing. Once a regulatory action is taken and compensation for the sign is determined by the municipal sign board, "any person aggrieved by a decision" may appeal to district court. TEX. LOC. GOV'T CODE § 216.014. Compensation may be examined by a court for its reasonableness. If the compensation payments are provided over a period longer than one year, the duration's reasonableness will also be examined.

Besides state authorization and limitation of sign regulation, the city must also consider the First Amendment protections afforded to signs with a noncommercial or political message when drafting and enforcing sign ordinances. The courts have dealt with signs with a noncommercial or political message that are located on residential property, and have held invalid city regulations that would prohibit or severely regulate such signs. *See City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994).

Reed v. Town of Gilbert Reinforces Rules of Sign Regulation

A recent case from the Supreme Court of the United States reviewed how sign regulations and all land use regulations should be examined for being content-based. *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). The Town of Gilbert, Arizona, enacted a sign ordinance that defined various types of signs and restricted the different types of signs in various ways. For example, the ordinance included definitions for temporary directional signs, ideological signs, and political signs. Based on the type of sign, it then limited how long the sign could be posted. (Temporary

directional signs could be posted no sooner than 12 hours before an event and for one hour after the event, but ideological or political signs could be posted for much longer.)

A church in the town regularly changed the location of its services. Each week, the church used temporary directional signs to guide parishioners to the appropriate location. *Reed*, 135 S.Ct. at 2225-26. The signs were in place longer than allowed by the town's ordinance, and the town cited the church for the violations. The church sued the town, arguing that the shortened time frame for temporary directional signs versus the longer time frame for ideological and other signs was a "content-based" restriction on speech that is prohibited by the First Amendment to the U.S. Constitution. The town countered that the shorter time frame for temporary directional signs was not content-based because anyone's temporary directional sign had to follow the same restrictions, not just churches, in essence arguing that the sign regulation was not content-based because it did not discriminate based on viewpoint. *Id.* at 2229.

The Court held that the ordinance's varying durations for posting based on the type of sign was based on the content of the sign because a city employee had to read the sign to enforce the ordinance. *Id.* at 2231. When a restriction on speech is content-based (as opposed to a reasonable time, place, or manner restriction,) it will be upheld only if a city can show that the restriction is "narrowly-tailored to meet a compelling governmental interest." That test is referred to by the courts as "strict scrutiny." *Id.* A law or ordinance that is subject to strict scrutiny rarely survives a First Amendment analysis.

The Court invalidated the ordinance because the town did not prove that the content-based distinction was narrowly tailored to achieve the town's interests of aesthetics and traffic safety. As support for its position, the Court noted that the ordinance allowed a great number of signs to be placed for long periods of time. That fact, in and of itself, refuted the town's stated interests of

aesthetics and traffic safety. Moreover, the court concluded that the various exceptions in the ordinance for certain signs made the restriction of other signs insupportable.

The impact of *Reed* on the grand scheme of regulatory regulation is apparent—“a law that is content-based on its face will be subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Reed*, 135 S. Ct. at 2228. The Supreme Court in *Reed* declared “government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed.” *Id.* at 2227. Courts have interpreted this to mean that a law that distinguishes between permitted and prohibited speech based on the subject matter, function, or purpose of the speech is content-based on its face. Additionally, even a facially-neutral law will be deemed to be content-based if it either cannot be justified without reference to the content of the speech or if enforcement of the ordinance causes discrimination based on the speaker’s point of view.

The Texas Court of Criminal Appeals has also held that a content-based law is presumptively invalid and the government bears the burden to rebut this presumption, overturning both a statute regulating sexually explicit communications with a minor and a photography law regarding taking photos of individuals without their consent. *See Ex Parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2013) (sexually explicit communication); *Ex Parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014) (photography). The Court also applied the “most exacting scrutiny to regulations that suppress, disadvantage, or impose different burdens on speech because of its content.” *Lo*, 424 S.W.3d at 15. “To satisfy strict scrutiny, a statute regulating speech must be necessary to serve a compelling state interest and be narrowly drawn.” *Id.* “A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus

between the government's compelling interest and the restriction.” *Id.* The law does not satisfy strict scrutiny if there is a less restrictive means of achieving the state's compelling interest that would be at least as effective as the statute under review. *Id.* at 15–16. However, a statute may not be held overbroad merely because “...one can perceive of some impermissible application.” *United States v. Williams*, 553 U.S. 285, 303 (2008). If the challenged ordinance regulates speech protected by the First Amendment but is content-neutral, the law is subject to intermediate scrutiny, and it “need not be the least restrictive means of advancing the State's interests.” *Thompson*, 442 S.W.3d at 345. The restriction must, however, be “narrowly tailored to serve a significant governmental interest.” *McCullen v. Coakley*, 134 S.Ct. 2518, 2534 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). To be narrowly tailored, the “regulation [must] promote a substantial governmental interest that would be achieved less effectively absent the regulation.” *Thompson*, 442 S.W.3d at 345. Additionally, the regulation must not be “broader than is necessary to achieve the government's interest.” *Id.*

In *Reed*, the Court struck down a town ordinance that treated signs differently based on content, namely directional signs versus ideological signs. *Reed*, 135 S. Ct. at 2227. The Court invalidated the ordinance because the town could not show that the content-based distinction furthered a compelling interest and was narrowly tailored to achieve the town’s interests. *Id.* Practically, this case means that any ordinance provision that requires a city employee to read the content of a sign before taking action will be subjected to strict scrutiny by a court. This heightened review would include restrictions on political signs, and it could include restrictions on onsite versus offsite signs as well as restrictions based on commercial versus non-commercial speech.²

² The Ninth Circuit upheld a city’s right to prohibit billboards based on an onsite vs. offsite distinction. See *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 17-15909, 2017 WL 3499800, at *14 (9th Cir. Aug. 16, 2017). See also *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 606 (1980).

However, a city sign code can still prohibit all signs on city property and limit the size, building materials, and other aesthetic aspects of a sign. A sign ordinance could—in theory—have content-based restrictions, but the standard to uphold these restrictions is very strict.

Ultimately, most content-based regulations will likely be struck down, unless the restrictions can meet the strict scrutiny test set out by the courts. *Id.* at 2224; *Metromedia*, 453 U.S. at 514. Regardless of the inherent validity of an exception or distinction, exceptions that defeat the stated purposes of an ordinance by being overinclusive or underinclusive (for example, aesthetics or traffic safety) can result in an entire ordinance being struck down. *See id.*

REEDing Alito's Concurrence: Rules to Consider

Justice Alito filed a concurrence to the *Reed* opinion where he laid out his interpretation to the holding and what regulations would still be allowed:

“Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.
Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding 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.”

Reed, 135 S. Ct. at 2233 (Alito, J. concurring). While these rules are good guidelines, the text of the majority opinion should be the primary basis of any amendments to the sign or other potentially content-based ordinances. For example, Alito would allow rules that impose a time limitation for

one-time events, but this analysis appears to contradict the majority holding of *Reed*. Rules imposing restrictions on temporary signs generally may be more enforceable.

REEDing Texas Highway Beautification Act

The Third Court of Appeals in Austin has applied *Reed* to the state’s Highway Beautification Act, which regulates advertising, among other things, on state roads. *Auspro Enterprises, LP v. Texas Dep’t of Transp.*, 506 S.W.3d 688 (Tex. App.—Austin- 2016, pet. filed). In *Auspro*, the Texas Department of Transportation filed an enforcement action against Auspro because it maintained a political sign on the owner’s commercial property past the time that such signs are allowed. The court stated that “...under *Reed*’s framework, the Texas Act’s outdoor-advertising regulations and associated Department rules are, on their face, content-based regulations of speech.” *Id.* However, the court of appeals also held that “the provisions in Subchapter I are not affected by our decision here because they authorize the State to regulate commercial speech along certain specified highways, specifically off-premise signs displaying messages regarding ‘goods, services, or merchandise.’” *Id.* The Third Court of Appeals held that portions of the Highway Beautification Act are unconstitutional but also preserved the state’s right to regulate commercial advertising. The Supreme Court of Texas granted review but vacated the decisions of the lower courts after amendments to the Highway Beautification Act made the issue moot. *See TxDOT v. Auspro*, 17-0041 (April 3, 2018 vacated as moot); TEX. TRANSP. CODE § 391.001(1-a).

Texas Legislature Interprets *Reed* and *Auspro*

Senate Bill 2006, enacted in 2018, makes clear that the state, through the Texas Department of Transportation (TxDOT), intends to regulate “commercial” signs that: (1) advertise goods and services; and (2) whose primary purpose of the sign is advertising. S.B. 2006, 85th R.S. (Tex.

2017); TEX. TRANSP. CODE § 391.001(1-a). The bill narrowed the applicability of its outdoor advertising rules to “commercial signs” that will be leased or used to display “any good, service, brand, slogan, message, product, or company.” Under the bill, “commercial signs” do not include a sign leased to a business that is located on the same property as the business or on property that is owned or leased for the primary purpose of displaying the sign.

Senate Bill 312 extended the legal height limit of signs to 85 feet high for all signs existing as of March 1, 2017. S. Res. 312, 85th Sess. (Tex. 2017). Signs can be rebuilt without a new permit if the sign will be rebuilt in the same location and at same height as before. This effectively treats rebuilding signs as “routine maintenance.” The bill will increase the allowed maximum height of billboards within a city’s limits, unless the city has lower height limitations in its ordinance. Cities should ensure they have height limitations in their ordinances if they do not already.

TxDOT also updated its rules in response to Senate Bill 312. Commercial signs built after March 1, 2017 may not exceed an overall height of 42-1/2 feet. 43 Tex. Admin. Code § 21.189(a). There is a condition that the height restriction will expand to a maximum of 85 feet on September 3, 2019 if the Texas Legislature does not establish a maximum height restriction by September 3, 2019. *Id.* Signs existing on March 1, 2017 may be rebuilt without obtaining a permit, if the sign will be rebuilt at the same location and the height will not exceed the previous height measurement, including signs that are 85 feet or less. *Id.* § 21.189(g). Routine maintenance now includes the replacement of minor parts if the materials are the same type as those being replaced and the design or structure of the sign is not altered. *Id.* § 21.191(a)(6). It also includes the changing of all or part of the sign structure but only if the materials are similar to those being replaced are used. *Id.* § 21.191(a)(7).

Other Courts Read into *Reed*

The United States Ninth Circuit has held that regulations on the height and size of signs were content-neutral. *See Herson v. City of Richmond*, 631 Fed. Appx. 472, 473 (9th Cir. 2016). The Ninth Circuit has also upheld a city's right to prohibit billboards based on an off-site vs. on-site distinction. (*See Contest Promotions, LLC v. City & Cty. of S.F.*, No. 17-15909.13, 14 (9th Cir. Aug. 16, 2017)). The court determined that the regulation was a restriction on commercial activity and therefore subject to intermediate scrutiny. *See id.* at 7. The regulation survived intermediate scrutiny based on the four-step analysis set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*. *Id.* at 8. *See also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 566, 606 (1980)(“...must concern lawful activity and not be misleading...we ask whether the asserted governmental interest is substantial...if both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more than extensive than necessary to serve that interest”).

In Texas, courts have found that a city ordinance which prohibits pedestrians from selling, soliciting, or distributing materials to occupants of cars stopped at traffic lights to be content-neutral and constitutional on its face. *Watkins v. City of Arlington*, 123 F.Supp.3d 856, 870 (N.D. Tex. 2015). One Texas Federal District Court has also held that commercial speech signs may be treated differently than noncommercial speech signs in regard to on- and off-premise sign regulation because commercial speech is subject to intermediate scrutiny under *Metromedia*. *See Reagan National Advertising of Austin, Inc., v. City of Cedar Park*, No. AU-17-CA-00717-ss, 2019 WL 2234792 at *7-*8, (W.D. Tex. May 23, 2019); *see also Reagan National Advertising of Austin, Inc. v. City of Austin*, No. 1:17-CV-673-RP, 2019 WL 1375574 at *9, (W.D. Tex. Mar. 27, 2019). Yet, there appears to be an inconsistency in the lawful regulation of noncommercial speech for on-

and off-premise signs. One court held that the distinction for on- and off-premise signs is not a content-based regulation, but rather a location-based regulation, which consists of a determination of whether the subject matter of the sign is on the premise and does not involve a review of its contents. *Reagan National Advertising of Austin, Inc. v. City of Austin*, 2019 WL 1375574 at *8. Another court held that the distinction of noncommercial speech for on- and off-premise signs is indeed a content-based regulation subject to strict scrutiny because a sign could be regulated differently due to its contents being on- or off-premise. *Reagan National Advertising of Austin, Inc., v. City of Cedar Park*, 2019 WL 1375574 at *8.

Outside of Texas, a district court has declared a village's ban on painted wall signs to be content-neutral. *Peterson v. Village of Downers Grove*, 150 F. Supp.3d 910, 933 (N.D. Ill. 2015). Another district court held that a design review process for a mural permit is a content-based regulation of speech because the design contents needed to be approved by city officials. *Morris v. City of New Orleans*, 350 F.Supp.3d 554, 556-557 (E.D. La. 2018). Finally, one district court has held that language allowing additional signs (regardless of content) during election season was unconstitutional. *WWW.RICARDOPACHECO.COM et al. v. City of Baldwin Park, No. 2:16-cv-09167-CAS(GJSx)*, 2017 WL 2962772 (C.D. Cal. July 10, 2017).

And it is not only city ordinances that will be under scrutiny based on the *Reed* case. Section 216.903 of the Texas Local Government Code, which provides that “a municipal charter provision or ordinance that regulates signs may not, for a sign that contains primarily a political message and that is located on private real property with the consent of the property owner: (1) prohibit the sign from being placed...[etc.]” could be considered unconstitutional under *Reed*. *Id.* As this regulation prima facie looked at the content of signs it would require strict scrutiny review under *Reed* and could not easily meet the compelling government interest requirement.

Reading Your Ordinances

First, each city should review its ordinances for content neutrality as written. If a regulation has definitions or exceptions that are based on the content of speech, for example a regulation of political signs, questions would be: Does code enforcement need to read a noncommercial sign to regulate it? Does the code enforcement officer need to talk to a person handing out pamphlets, or read the pamphlets themselves, to determine whether a person can pursue their activity at their chosen location? If so, the ordinance and its enforcement need to be changed.

Another example: a city ordinance restricting the use of “holiday lights” on certain dates or hours of the day could implicate *Reed*. Here, an argument could be made to the underlying First Amendment reasons in restricting the content of “holidays.” This regulation could avoid *Reed* by simply focusing instead on categories of lights (i.e. size, luminosity, etc.) rather than their content-based function.

Signs Point to Yes!

Finally, in terms of commercial speech, because *Reed* involved *non-commercial* speech, the *Metromedia* rule, which applies to *commercial* speech, is most likely still binding. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981). This analysis is supported by a long-standing history of requiring intermediate scrutiny for regulation of commercial speech. Additionally, and as mentioned above, Justice Alito asserted in his concurrence that distinctions between “on-premises” and “off-premises” signs remain valid post-*Reed*. This is to say that commercial sign regulation based on content will still be challenged on intermediate scrutiny under *Reed* by at least some courts. One example is the Ninth Circuit which upheld a city’s right to prohibit commercial billboards based on an offsite vs. onsite distinction. *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 17-15909.13, 14 (9th Cir. Aug. 16, 2017). The court determined that intermediate

scrutiny continued to apply to regulations of commercial activity. *See id. at 7.* The regulation: (1) concerned a substantial interest; (2) advanced the governmental interest; and (3) was not more burdensome than it needed to be. *Central Hudson Gas & Electric Corporation v. Public Service Commission. Id. at 8 citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 566, 606 (1980).* While at least one Federal District Court in Texas has held such a distinction to be unconstitutional, the main body of law allows for differentiation of commercial content.

Example Sign Language Modifications

(These are only examples; each city should consult with legal counsel before making modifications to the enforcement or text of ordinances)

Purpose: limiting visual blight from too many signs or dilapidated signs and preventing traffic safety issues by not allowing signs in the right of way.

Political Signs

Standard Language:

Political sign. Any sign which is designed to influence the action of the voters for the passage or defeat of a measure or for the election or defeat of a candidate for nomination or election to any public office, but the sign shall not include the name of the sponsor, the name of the business promoting the activity, or advertising for the business.

Political signs

Political signs shall be regulated as follows:

- (a) Size. The size of the on-premises sign shall be limited to a maximum of six square feet.
- (b) Number per lot. One sign per candidate or cause per lot or tract of land.
- (c) Location. No political sign shall be posted or otherwise affixed to or upon any sidewalk, crosswalk, streetlamp post, hydrant, tree, electric light or tower, telephone pole, wire appurtenance, or upon any lighting system. No political sign may be placed within the right-of-way of public streets or highways within the city.
- (d) Lighting. Indirect.
- (e) Timing. The sign shall be taken down 72 hours after the election for which it was erected has terminated.
- (f) Permit, fee. No permit and no fee shall be required

New Language:

Temporary. A banner, poster, or advertising display constructed of paper, cloth, plastic sheet, cardboard, plywood, or other like materials that appears to be intended to be displayed for a limited period of time. *(Although this could lead to issues based on who determines temporary intent and how they do so)*

Signs in Residential Districts

- (a) No sign shall be allowed in residential districts except for the following categories of signs that comply with the provisions of this chapter and have received approval when necessary:
 - (1) One temporary sign on any property zoned residential not to exceed two (2) square feet;
 - (2) One sign no larger than 8.5 inches by 11 inches in one window on the property at each time;

- (3) One temporary sign not to exceed six square feet in size per lot may be located on the owner's property for a period of ninety (90) days prior and seventy-two (72) hours after an election involving candidates for a federal, state, or local office that represents the area in which the property is located or an election that involves a measure on the ballot of an election within the area; and
 - (4) One temporary sign on a lot where the owner consents and the property is being offered for sale or lease while for sale or lease and up to seventy-two (72) hours after the property is sold or leased.
- (b) Signs in this section do not need a permit if they meet the requirements of this section and all other applicable provisions of the sign code.

Senate Bill 2006-85th Legislative Session. Effective September 1, 2017.

<http://www.capitol.state.tx.us/tlodocs/85R/billtext/html/SB02006F.htm>