

Reed Your Sign Ordinance: Your Sign Ordinance After Reed v Town of Gilbert

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Ordinance Authority



- Chapter 216 of the Local Government Code:
Regulate, Remove, Relocate
- Chapter 393 of the Transportation Code:
Regulate in the Right of Way

Constitutional Limitations

- Free Speech rights under the First Amendment of the U.S. Constitution are not absolute; they are balanced against personal rights or interests of society—such as public safety and aesthetics
- Speech may be regulated, but restrictions must pass muster
 - **Intermediate scrutiny**
 - **Strict scrutiny**

Reed the Sign Ordinance

- *Reed v. Town of Gilbert*, No. 13-502 (**June 18, 2015**).
- If you must read a sign to regulate, the ordinance is **content based**.



How to *Reed*: The Facts

- Town of Gilbert ordinance distinguished between *political* (electoral), *ideological* (non-commercial), and *directional* signs with different rules for time, location, and size
- “Temporary Directional Signs”: signs intended to direct passersby to a “qualifying event” of a non-profit organization
- Must be < 6 sqft; no more than 4 signs on any property; and displayed < 12 hours before event and up to 1 hour after
- Church challenged ordinance



How to *Reed* – the Law

U.S. Supreme Court: a regulation can be *content based* in two ways:

- by distinguishing speech by the *topic discussed*
- if the regulation’s purpose or justification depends on the underlying *idea or message expressed*—i.e., regulation is facially content neutral but motives were content based.

“A law that is content based on its face is 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”

Reeding the Rules: Alito's Concurrence

Alito, Sotomayor, and Kennedy joined the opinion of the Court but added “*a few words of further explanation*” about rules that would not be “*content based.*” Cities may:

- Regulate the *locations* in which signs may be placed
- Distinguish between *free-standing signs* and those *attached to buildings*
- Distinguish between *lighted vs. unlighted signs*
- Distinguish between *fixed messages* and *electronic or variable*
- Distinguish between placement on *private* or *public property*
- Impose time restrictions on signs advertising a one-time event?

Reed Recap

AFTER REED:

- Rules based on message: if you need to read a sign to know how to regulate it, *content-based*
- *Non-commercial* signs: content-based regulations pass muster only by surviving **strict scrutiny**
- *Commercial* signs: content-based regulation may still be allowed under *Reed* with **intermediate scrutiny**



Austin Court *Reeds* State Sign Law



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Reeding Texas Highway Beautification Act

Auspro Enterprises v. TxDOT, Texas Court of Appeals, Third District (**August 26, 2016**)

- July 7, 2011: Auspro Enterprises placed a sign supporting Ron Paul's 2012 presidential campaign
- TxDOT sent a rule violation letter: political signs within 660' of a highway can only be up 90 days before and 10 days after an election
- Sign not removed; TxDOT sued. Auspro claimed Act violated 1st Amendment Free Speech because it was a “*content-based*” regulation and it cannot survive strict scrutiny
- Court granted Auspro motion to abate appeal, pending *Reed*

Austin Court of Appeals

Auspro court: “under Reed's framework, the Texas Act's outdoor-advertising regulations and associated Department rules are, on their face, content-based regulations of speech”

- Such regulations must meet strict scrutiny test
- This is close to a regulatory death sentence because meeting strict scrutiny is extremely difficult

Life after *Reed*

Much—but not all—lost. *Auspro*: “provisions in Subchapter I are not affected [...] because they *authorize the State to regulate commercial speech along certain specified highways, specifically off-premise signs displaying messages regarding ‘goods, services, or merchandise’*”



Good Billboard Bill that “fixes” *Auspro*

S.B. 2006 makes clear that TxDOT can still regulate signs that:

1. Advertise goods and services.
2. Where primary purpose of the sign is advertising.

Texas Supreme Court Vacates *Auspro*

- In April 2018, the Supreme Court of Texas granted review over the *Auspro* decision and vacated the lower court's ruling. This was in response to the amendments made to the Texas Highway Beautification Act by the Texas Legislature. S.B. 2006
- The decision to vacate does not mean the *Auspro* holding was wrong, but that the issue in the case was resolved and made moot by the actions of the state legislature.
- Future cases can still make the same arguments made in *Auspro* against a sign regulation.



Lower Court Rulings

Signs: The Ninth Circuit has held that regulations on the height and size of signs were content neutral. *See Herson v. City of Richmond*, No. 11–18028, 2016 WL 284430, at *1 n.1 (9th Cir. Jan. 22, 2016).

Signs: Another 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. Dec. 14, 2015).

Signs: 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 U.S. App. LEXIS 15375 ,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).

Lower Court Rulings

Signs: A District Court held that commercial speech can be treated differently than noncommercial speech in regard to on- and off-premise signs. The distinction in noncommercial speech regulation for on- and off-premise signs is not content-based but rather location based. *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).

Signs: A District Court concluded the distinction in regulation of noncommercial speech for on- and off-premise signs is actually content-based and subject to strict scrutiny because regulation depends on a review of the contents of the sign to determine if it is on the premise. *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).

Potential Political Sign Problems

District Court 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. Calif July 10, 2017).



Election Season: LGC 216.903

In the same vein, Loc. Gov. Code. 216.903, 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.],” is unconstitutional under *Reed*. TEX. LOC. GOV'T CODE § 216.903. **Content-based**

Political Signs

Choices:

- 1. Regulate political signs the same as all other temporary non-commercial signs;**
- 2. Limit size of political signs to other non-commercial signs; or**
- 3. Increase allowed size of all non-commercial signs.**

Still keep all signs out of right-of-way.

Other Potential Problems: Real Estate Signs



- Commercial or Non-Commercial?
- Temporary signs with dates (read the sticker not the sign)
- Prohibit?
- Allow only on Sundays?

Other Potential Problems: Art(?)



Murals: A District Court held that a design review process for a mural permit is a content-based regulation of speech because the design's 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).

Taking Billboards to New Heights-Another Change to Ordinances

SB 312 allows signs existing on March 1, 2017;

Can be as tall as 85 feet high

Can rebuild such a sign without getting a new permit if the sign is in the same location and is the same height as before

WHAT DOES IT REALLY MEAN? :

1. TxDOT will decide which billboards this new height limit applies to.
2. Each city should ensure that it has height limitations in its sign ordinance if it doesn't already.

Keep an eye on TxDOT rules.

Enforcing Current Ordinance

- Ensure all regulation is content-neutral
- Only enforce those regulations that are content neutral
- Decide whether to continue treating commercial and non-commercial differently

Can any sign of that size and type be in that location? Do you have to read the sign to see a violation?

Planning for *Reed*

- Ensure ordinances and other planning regulations are content neutral.
- If reviewing sign plans or sign permits for enforcement purposes, interpret the sign regulations to be content neutral.
- Best Practice: Rewrite sign regulations to be by land use type or zoning district and by size, type, and location of signs rather than content such as political or event sign.

Model Sign Ordinance

- Firm drafted Model Sign Ordinance based on IMLA Model Sign Ordinance, sign ordinances from various Texas cities, and on federal and state cases and laws from the past thirty years.
- *It is just a model-please consult with your city attorney before adopting a new or amended sign ordinance!*
- [Contact us for a copy of our Model Sign Ordinance](#)



General Provisions

- Findings, Purpose & Intent, and Interpretation
 - *Signs obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. The purpose of this ordinance is to regulate the size, illumination, movement, materials, location, height, and condition of all signs placed on private property for exterior observation, thus ensuring the protection of property values, the preservation of the character of the various neighborhoods, the creation of an attractive and harmonious community, and protection against interference with the historic character of designated areas, including the downtown district. This ordinance allows adequate communication through signage while encouraging aesthetic quality in the design, location, size, and purpose of all signs...*

Scenic City Program

- Scenic Texas is a non-profit dedicated to the preservation of our state's visual environment, particularly as seen by the traveling public
- Scenic City Certification Program:
 - 1) Trees and/or landscaping along city streetscapes, such as major roadways, city streets, street medians or in parking lots
 - 2) Prohibition of new off-premises signage (billboards)
 - 3) Permitting process and size, placement, and quantity requirements for on-premises signage



Scenic City Program

- Additional sign criteria (including but not limited to):
 - Ban on wind devices, roof signs, portable signs
 - Restricted digital signs
 - Mechanism to bring grandfathered signs into conformity
 - Process for removal of significantly damaged or destroyed signs
 - No advertising on right-of-way amenities (bus shelters, park benches, transit stations, trash cans, etc)



Signs Checklist

Sign Ordinance Checklist		
Basic Ordinance Must-Haves	Yes	No
Findings	<input type="checkbox"/>	<input type="checkbox"/>
Statement of Purpose/Intent; Interpretation	<input type="checkbox"/>	<input type="checkbox"/>
Scope	<input type="checkbox"/>	<input type="checkbox"/>
Definitions	<input type="checkbox"/>	<input type="checkbox"/>
Permitting Process-including application, review criteria, approvals process	<input type="checkbox"/>	<input type="checkbox"/>
Variances and appeals	<input type="checkbox"/>	<input type="checkbox"/>
Types of Signs Permitted	<input type="checkbox"/>	<input type="checkbox"/>
Types of Signs Prohibited	<input type="checkbox"/>	<input type="checkbox"/>
Regulations for existing signs (may grandfathered or non-conforming signs)	<input type="checkbox"/>	<input type="checkbox"/>
Penalty	<input type="checkbox"/>	<input type="checkbox"/>
Repealer & Severability	<input type="checkbox"/>	<input type="checkbox"/>

Constitutional Requirements	Yes	No
Does your sign ordinance regulate signs by zoning district?	<input type="checkbox"/>	<input type="checkbox"/>
Does your sign ordinance treat different categories of signs differently? (i.e. political signs and real estate signs are regulate differently from other tvpes of signs)	<input type="checkbox"/>	<input type="checkbox"/>
Does your ordinance allow for exemptions from permitting process? If yes, list of exemptions will need to be examined	<input type="checkbox"/>	<input type="checkbox"/>
Are any signs regulated by having to read the	<input type="checkbox"/>	<input type="checkbox"/>
Are commercial signs given preferential treatment over non-commercial signs?	<input type="checkbox"/>	<input type="checkbox"/>
<u>Political Signs</u>	<input type="checkbox"/>	<input type="checkbox"/>
a) Are political signs singled out and treated by	<input type="checkbox"/>	<input type="checkbox"/>
b) Or, are political signs regulated by time/place/manner (ie additionl sign(s) allowed temporarily during fixed time period-	<input type="checkbox"/>	<input type="checkbox"/>
<u>Holiday Decorations</u>		
a) Are holiday decorations/signs regulated by time/place/manner (ie fixed period of time coinciding with holidays)?	<input type="checkbox"/>	<input type="checkbox"/>
b) Or, or holiday decorations regulated by	<input type="checkbox"/>	<input type="checkbox"/>
Waivers-does your ordinance provide fee waivers or expedited permit process for certain institutions or individuals?	<input type="checkbox"/>	<input type="checkbox"/>

Additional (Voluntary) Sign Regulations for Scenic City Certification

Yes

No

Strict limits on size, placement, and quantity of signs per business. All permanent signs require permits separate from the building permit. [The

Minimum requirement - signs require permits separate from the building permit.

Strict limits on quantity of signs per business.

Strict limits on size (both square footage and height), placement, and quantity of signs per side/property frontage.

Banned signage: All wind devices, roof signs and portable signs.

Restricted digital signage: All electronic changeable message (digital) signs are banned outright or restricted to special districts within city limits. If digital signs are allowed, clearly-stated regulations strictly limit size, height, and brightness of such signs, and prohibit moving images and frequent rotation of fixed images on such signs. Regulations written so that signs are designed to be in context with the natural and built environment.

City Goals



- 1. Keep ordinances content neutral on their face.*
- 2. Look at peddler, lights, or any other ordinance that has exceptions or definitions that inherently speak of content or message.*
- 3. Be wary of enforcement of current ordinances that may not be content neutral.*
- 4. Take the chance to amend ordinance to relate to Scenic City standards.*

Questions?

