

COUNTY OF ALBEMARLE



MEMORANDUM

TO: Albemarle County Board of Supervisors

FROM: Greg Kamptner, Deputy County Attorney

DATE: November 30, 2015

RE: *Zoning; regulation of signs; Reed v. Town of Gilbert*

This memorandum addresses how localities may regulate noncommercial signs in the wake of the United States Supreme Court's June 18, 2015 decision in *Reed v. Town of Gilbert*.

1. Introduction

Signs take up space, obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), quoting *City of Ladue v. Gilleo*, 512 U.S. 43 S. Ct. 2038 (1994). Localities may regulate signs to improve traffic safety and to improve their aesthetics. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (traffic safety); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (aesthetics).

2. The First Amendment's Free Speech Clause and the important terms and concepts that apply to the governmental regulation of signs

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The federal courts have identified two key functions of the First Amendment's Free Speech Clause: (1) to preserve an *uninhibited marketplace of ideas* in which truth will ultimately prevail; and (2) to ensure that the government has *not regulated speech based on hostility – or favoritism –* towards the underlying message expressed. Under the First Amendment's Free Speech Clause, a locality "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The federal courts also have created concepts that apply to the analysis of the government's regulation of signs and the application of those concepts guides how the government may regulate signs, and how it must justify its regulations. The most relevant concepts pertain to: (1) whether the regulations apply to *commercial speech* or *noncommercial speech*; (2) whether the regulations apply depending on the content of the speech or some other criterion (*i.e.*, whether the regulations are *content based* or *content neutral*); and (3) what the government must show to justify its regulations (*i.e.*, whether the regulations are justified by a *compelling governmental interest* or a *substantial governmental interest*). These six highlighted concept are briefly described below. A table in Section 3 shows how these concepts interrelate.

- Commercial speech: Speech that is related solely to the economic interests of the speaker and its audience; *i.e.*, advertising.
- Noncommercial speech: Speech that is not commercial speech; *e.g.*, political signs and protest signs.
- Content based regulations: Regulations that apply to a particular sign because of the topic discussed or the idea or message expressed.
- Content neutral regulations: Regulations that apply to a particular sign and pertain only to when the sign may be erected, where it may be located, and the height, area, and other physical attributes of the sign.
- Compelling governmental interest: A governmental interest of the highest order; *e.g.*, the government's interest in allocating and collecting taxes, maintaining the social security system, eradicating racial discrimination.
- Substantial governmental interest: A governmental interest of intermediate order; *e.g.*, the government's interest in preserving aesthetics, promoting traffic safety, and protecting property values.

3. The local regulation of noncommercial signs before and after *Reed*

Before the United States Supreme Court's decision in *Reed*, many localities' regulations pertaining to noncommercial signs included distinctions based on the function or the message of the sign (*e.g.*, "political signs" that "pertain to a candidate or an issue in an upcoming election"). Regulations such as these, which neither promoted nor discouraged a particular viewpoint, were considered to be *viewpoint neutral* and were found by many courts to not be content based regulations that violated the First Amendment. The Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, took this approach in a number of cases. *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013).

In *Reed*, the town's sign ordinance regulated the duration and size of a number of noncommercial signs differently depending on their content. For example, temporary directional signs for a religious event could be up to 4 square feet in size and be posted no more than 12 hours before the event or 1 hour after the event; an ideological sign could be up to 20 square feet in size and be posted for an unlimited duration. When a small church was cited for zoning violations because its signs were being posted more than 12 hours before church events, it challenged the town's zoning regulations, arguing that the town's sign regulations violated the First Amendment.

The issue in *Reed* was whether the town's sign ordinance was invalid as content based because it created categories of noncommercial signs that were based on the message of the sign. The Court held that the town's sign regulations were content based on their face because, for example, temporary directional signs were defined on the basis of whether a sign conveyed the message of directing the public to church or some other "qualifying event"; ideological signs were defined on the basis of whether the signs "communicat[e] a message or ideas" that did not fit within the sign regulations' other categories. The United States Supreme Court held that the town's sign regulations were content based and, as such, they were "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. The town failed to prove that its regulations were either narrowly tailored or served a *compelling* governmental interest.

As noted in Section 2, *compelling governmental interests* are interests of the highest order and are rarely found to exist to support a governmental regulatory scheme. In the context of sign regulations, the majority opinion in *Reed* indicated that it may find certain content based distinctions for noncommercial signs that would satisfy strict scrutiny:

[The] presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers – such as warning signs marking

hazards on private property, signs directing traffic, or street numbers associated with private houses – well might survive strict scrutiny.

Reed, 135 S. Ct. at 2232.

The following table summarizes the state of the law after *Reed*.

Governmental Regulation of Signs After <i>Reed</i>				
Type of speech	Regulation type	Examples	When justified	Justifications
Commercial (e.g., advertising)	Content based ¹	“... a sign that advertises the sale, lease, rental, or development of the lot on which the sign is located ...” “... a sign that advertises an upcoming auction ...”	Substantial governmental interest	Preserve aesthetics; promote traffic safety; protect property values
	Content neutral	“... a sign located on a lot that is for sale, lease, rental, or development ...” “... a permanent sign that is supported from the ground and not attached to another structure ...” “... the sign area shall not exceed 32 square feet ...” “... the sign height shall not exceed 16 feet above the ground ...” “... a sign with flashing lights or moving parts is prohibited ...”		
Noncommercial (e.g., protest signs, political signs, ideological signs)	Content based	“... a sign that advocates for a candidate for elected office or for an issue to be voted on in an upcoming election ...” “... a sign that protests the action of the county government or any elected official ...”	Compelling governmental interest	Protect public safety by guiding vehicular and pedestrian traffic; identifying hazards
	Content neutral	“... a sign containing copy this is exclusively noncommercial speech ...” “... a permanent sign that is supported from the ground and not attached to another structure ...” “... the sign area shall not exceed 32 square feet ...” “... the sign height shall not exceed 16 feet above the ground ...” “... a sign with flashing lights or moving parts is prohibited ...”	Substantial governmental interest	Preserve aesthetics; promote traffic safety; protect property values

¹Unlike noncommercial signs, under the current law, content based regulations that apply to commercial signs may be justified by a substantial, rather than a compelling, governmental interest.

4. Content neutral time, place, and manner regulations are permitted for noncommercial signs under *Reed* and prior cases, provided they further a substantial governmental interest, are narrowly tailored, and leave open alternative forms of communication

If a regulation is determined to be content neutral, reasonable time, place, and manner restrictions may be imposed on commercial or noncommercial signs. Some examples of these types of restrictions are included in the table in Section 3. The following is a brief, and not exhaustive, list of sign qualities that may be regulated in a content neutral manner:

- The maximum square footage of a sign’s “face” and the aggregate square footage of all signs allowed on a parcel.
- The number of signs allowed on a parcel.
- The height of a sign.

- Where a sign may be located on a parcel, such as through setback regulations applicable only to signs.
- The physical nature of the sign, such as whether it may be a freestanding sign, a wall sign, or a sign affixed to another element of a building such as a canopy or awning.
- The materials that may be used in a sign.
- Whether a sign may have moving elements.
- Whether and how a sign may be illuminated.
- Whether the message on a sign must be fixed or whether it may have an electronic message that changes.
- If an electronic message may change, how frequently it may do so.
- Whether a sign must be permanently attached to the ground (*e.g.*, a freestanding sign) or whether it may be portable and under what circumstances.
- Whether a sign may be permanent or temporary (duration) and under what circumstances.

5. Conclusion

The County's sign regulations must be amended to comply with *Reed* because the regulations applicable to noncommercial signs must be content neutral, and not merely be viewpoint neutral, as was the law in Virginia before *Reed*. The sign regulations have been amended to ensure that the regulations that apply to noncommercial signs are content neutral, and have been analyzed to ensure that they satisfy the standard of review under the First Amendment.