

M E M O R A N D U M

DATE: May 12, 2021
TO: Mercer Island Planning Commission
FROM: Daniel P. Kenny
RE: Sign Code Revisions

In 2015, the United States Supreme Court issued a ruling (*Reed v. Town of Gilbert*) which changed the way sign codes are analyzed for First Amendment issues. As a result of the Supreme Court's ruling, municipalities across the United States are adjusting and/or rewriting their sign codes.

Summary of *Reed v. Town of Gilbert*

Reed v. Town of Gilbert is a United States Supreme Court case that addresses First Amendment issues in local sign codes.

This case centers on the City of Gilbert, Arizona's sign code, which prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here.

- "Ideological Signs," defined as signs "communicating a message or ideas for noncommercial purposes" that do not fit into other Sign Code categories, may be up to 20 square feet and have no placement or time restrictions.
- "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season.
- "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church), held Sunday church services at various temporary locations in and near the Gilbert. In order to identify the location for the current week's service, the Church posted temporary signs early each Saturday bearing the Church name and the time and location for the next day's service. The Church left the signs up from Saturday until around midday Sunday, the day of the service. The Church left the signs up for longer than 1 hour after the event and was cited for exceeding the time limits prescribed for "temporary directional signs." The Church filed suit claiming that the Code abridged their freedom of speech. The case was appealed up to the United States Supreme Court.

The Court held that the Gilbert sign provisions were content based on their face. This required the Court to consider whether a regulation of speech "on its face" draws distinctions based on the message the speaker provides. If the regulation of speech is content based on its face, then it is subject to strict scrutiny. Strict scrutiny is a level of judicial review that is rarely met and is therefore nearly always fatal.

Each of Gilbert's sign code categories were defined based upon the message that the sign conveys. Consequently, those restrictions were subject to strict scrutiny.

The heightened scrutiny for content-based regulations extends not only to restrictions on particular viewpoints but also to prohibition of public discussion of an entire topic. Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.

Gilbert's sign regulations failed to meet strict scrutiny and were held to be impermissible content-based regulations.

Basic Rule

The basic principle that should guide your review of your existing sign code is this: If a code enforcement officer must read the content of the sign to determine in which category the sign falls, and therefore which regulations apply, then the sign code regulation is content based on its face and is subject to strict scrutiny.

Mercer Island Sign Code

Similar to many jurisdictions across this country, the Mercer Island sign code has some provisions that should be altered to conform to *Reed v. Town of Gilbert*. Fortunately, the existing Mercer Island sign code relies less on content-based regulations as compared to Gilbert and other local Washington jurisdictions. Therefore, the goal would be to bring you revisions which are targeted as opposed to wholesale redrafting of the code.