

The Importance of Bringing Your Sign Code Up-to-Date

October 29, 2015 by [Steve Butler](#)
Category: [Sign Control](#)



The U.S. Supreme Court's decision in *Reed v. Town of Gilbert* is a major case with far-reaching impacts on local government. While the *Reed* case addressed regulation of temporary directional signs, its ramifications go beyond just that one category of sign regulation. The potential impacts of this case may also extend beyond the regulation of signs. With that said, this post will focus just on sign codes.

Summary of Major Findings from the *Reed* Case

Content neutrality is not a new issue for sign regulations. Before the *Reed* case, however, the U.S. Supreme Court and other courts would consider the *intent* of a sign regulation and strike down “content-based” regulations only when the courts determined they were “adopted to suppress speech with which the government disagreed.” With *Reed*, the new standard is that any law or regulation of speech that is based on the content of the speech is presumptively unconstitutional and subject to “strict scrutiny,” which is the most rigorous standard for First Amendment review. Strict scrutiny requires a challenged regulation to be “narrowly tailored to serve a compelling governmental interest,” with legal experts stating that such scrutiny is almost always fatal to the regulation in question. See the MRSC blog post, [US Supreme Court Issues Significant Sign Code Decision](#), for a more detailed summary of the *Reed* case.

The primary takeaways of the *Reed* case are that local sign regulations must be content-neutral *and* that a sign code will be subject to “strict scrutiny” judicial review if it applies different standards based on:

- a sign's content (i.e., what is written or portrayed on the sign);
- the purpose of the sign; or
- who is putting up the sign.

In other words, if you have to differentiate the type of sign being regulated by reading the sign's content or knowing the sign message's author, then the regulation is probably unconstitutional. Before *Reed*, most regulations, if challenged, would have been subject to a “lesser” scrutiny test.

With the *Reed* decision, you can still regulate noncommercial signs in a content-neutral “time, place, or manner” approach, using such factors as:

- Location, such as commercial vs. residential locations or zoning districts (for example, highway commercial, downtown commercial, and single-family residential);
- Size and height;
- Type of structure (for example, freestanding signs, monument signs, permanent façade signs, banner signs, and inflatable roof signs);
- Use of materials;
- Maximum number;
- Lighted vs. unlighted signage;
- Fixed message signs vs. signs with changing messages (electronic or otherwise);
- Moving parts;
- Portability (for example, A-frame or sandwich board signs).

Less clear are restrictions on signs advertising a one-time event or regulations differentiating between on-premise vs. off-premise signs (even though those two types of signs are included on a list in Supreme Court Justice Alito’s list of “rules” for effective regulations that are not content-based, set out in his concurring opinion in *Reed*), since such restrictions could be viewed as counter to *Reed*’s generalized rule that, “if you have to read what a sign says to determine whether it complies with the sign code, then the sign code is impermissibly content-based.”

There is also the open question of whether the *Reed* case pertains only to noncommercial signs, with a lesser constitutional standard being applied to commercial sign regulations (see the [recent MRSC blog post](#) for more details about this issue).

What Can Local Governments Do to Regulate Signs?

All is not lost. Local government can still regulate signs, albeit with a narrower, more content-neutral focus than they may have applied in the past.

With the *Reed* case raising many issues about local sign regulations, the following is a partial list of how cities, counties, and towns might be able to deal with some specific sign situations:

- **Signs on public property:** Since *Reed* indicates that a local government can regulate a sign’s location, then it would appear permissible to prohibit or restrict signs on public property. If you enact limitations, however, you will need to treat all signs equally, based on such factors as size and location. So, for example, if you allow political campaign signs on public property, you would need to allow other types of temporary signs on public property also.
- **Public safety signs:** It is permissible – and necessary – for cities, towns, and counties to exempt these signs (such as speed limit and stop signs) from regulation under sign codes and to allow their placement in the ROW, where other signs are not allowed.
- **A-frame/sandwich board signs on public sidewalks** (usually commercial signs related to an activity): Local action on portable signs, such as A-frames, depends upon one’s reading of the *Reed* case. If it applies only to noncommercial signs, then your existing regulations for such signs would only be reviewed under the “lesser scrutiny” constitutional test and may not need to be changed. On the other hand, if *Reed* is deemed to extend to

commercial speech, then a local government may need to decide whether to either prohibit them altogether or allow all such signs, subject to numerical and locational limits (based on local needs and preferences).

- **Political signs:** Regulating political signs will prove to be a particularly sticky issue. Local regulations will not be able to differentiate political signs from other types of temporary noncommercial signs in a content-neutral manner. As such, the common post-election durational limitation on election campaign signs will have to go. Again, it appears that local governments may apply size, numerical, locational, and other limits to such signs, although that may not be a popular approach to some people.
- **Attention-getting device/inflatable signs:** If you want to regulate such signs, add them as a specific type of sign and develop standards for them, based on their structural characteristics. Examples include large rooftop balloon signs and air-activated graphics signs (e.g., inflatable “waving man” signs).

Helpful Tips

While not meant to be comprehensive in scope, the following list contains tips that we recommend you consider when reviewing and updating your sign regulations:

1. Review your sign code to identify any content-based standards and amend them to eliminate any standards based on content (which is the primary point being discussed in this article).
2. Do not enforce any existing content-based sign regulations.
3. Have a strong purpose statement (based on such factors as traffic safety and aesthetics) and link it closely to your sign regulations.
4. Have the adopting ordinance cite specific factual studies and analyses that relate to your sign code’s purpose and intent (you can either prepare your own study, or rely on one done by another entity if its findings are pertinent to your jurisdiction).
5. Revise your sign definitions to ensure they are not based on content. One example would be to define “temporary signs” based on **material** (since they are usually made of cardboard or wood, rather than metal and heavy plastic) and **size** (since they are usually much smaller than a permanent sign).
6. Add a severability clause (for example, “If one or more sections of this sign code are found to be invalid, the remaining sections stand on their own and are still valid”), either in the adopting ordinance or the code itself.
7. Add a substitution clause to avoid claims of favoritism towards signs with commercial or noncommercial messages (one example is “Whenever a commercial message is allowed to be displayed, then a noncommercial message will be automatically allowed as well”).
8. Avoid having exemptions in your sign code, because they are usually not content-neutral (common examples are exemptions for “grand openings” or “special events”).
9. Work closely with your municipal or prosecuting attorney!

Even though it raises a lot of unanswered questions, the *Reed* case makes it clear that local governments need to review their sign codes and update them in response to a changing legal landscape. It is important for Washington cities, counties, and towns to heed that advice, and embark upon the significant work of regulating signs in a manner that both meets local expectations and passes constitutional muster.

Good Reference Materials

1. A detailed research paper entitled "[Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty](#)," written by Alan C. Weinstein and Brian J. Connolly, The Urban Lawyer, Quarterly Journal of the ABA Section of State & Local Government Law, 2015
2. A YouTube video of a [webinar](#) titled "[Reed v Town of Gilbert: The Supreme Court's New Rules for Temporary – and Other – Signs](#)," sponsored by the National Planning Webcast Series Consortium, July 30, 2015.

Photo courtesy of [Graham Ballantyne](#)

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About Steve Butler

Steve joined MRSC in February 2015. He has been involved in most aspects of community planning for over 30 years, both in the public and private sectors. He received a B.A. from St. Lawrence University (Canton, New York) and a M.S. in Urban and Regional Planning from the University of Wisconsin-Madison. Steve has served as president of statewide planning associations in both Washington and Maine, and was elected to the American Institute of Certified Planner's College of Fellows in 2008.

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