Reed Your Sign Ordinance: A Guide on How to Update Your Sign Ordinance After Reed v Town of Gilbert

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Introduction

- Laura Mueller
  - Prior to joining the Bojorquez Law Firm, Laura worked at the Texas Municipal League for nine years, serving the last six as Assistant General Counsel. Laura received her Doctor of Jurisprudence from the University of Texas School of Law. She authored amicus curiae briefs on the following subjects: Billboard Regulation, Takings, Open Meetings, Open Liability, Land Use, and Annexation. Laura is an accomplished public speaker having participated in over 100 speaking engagements including Sign Regulation, City Type, and Land Use topics.

- Ashby Grundman
  - Ashby is a City Planner for the City of West Lake Hills, and has several years of municipal planning experience. His work has included helping the City of West Lake Hills rewrite their sign ordinance and short-term rental ordinance. Prior to working for the City of West Lake Hills, he was a planner for the City of Pasadena, where he worked to help the City regulate billboards. Ashby received his Master of Public Administration from the University of Texas at Arlington, and his Bachelor of Science in Urban Planning from Texas A&M University.
Introduction

• Anjali Naini
  – Anjali has several years of state-wide planning experience and is certified by the American Institute of Certified Planners. Prior to joining the Bojorquez Law Firm, Anjali was a planner for GrantWorks, Inc., where she developed and wrote comprehensive plans for small cities and communities in Texas that received funding through the TxCDBG Program. Anjali received her Master of Science in Community and Regional Planning from the University of Texas at Austin, and her Bachelor of Arts in History from Trinity University.
Ordinance Authority

• Chapter 216 of the Local Government Code: Regulate, Remove, Relocate

• Chapter 393 of the Transportation Code: Regulate in the Right of Way
Ground Rules for Sign Regulation

Texas Law on Sign Regulation
Chapter 216 of the Local Government Code

- Types of Cities
- Types of Signs
- City Limits and ETJ
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
Pop Quiz

What chapters of the Texas Statutes regulate sign regulations?

What other legal documents should we review when analyzing sign permits or problems?
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”
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
Pop Quiz

Which sign regulations may have problems after *Reed*?

1. No signs in public right-of-way.
2. Political Signs excepted from permitting requirements.
3. Each Commercial zoned lot may have four signs.
4. Signs may be a maximum of 42.5 feet tall, unless they are an event sign for a non-profit event.
5. Signs must be made of natural materials and colors.
6. Only address signs may be illuminated.
Austin Court Reeds State Sign Law
**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*
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.
Pop Quiz

Name the state law that gives TxDOT the ability to regulate signs in the rights of way.

Bonus question: Which former first lady advocated for beautiful roads?
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).

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.
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.
Pop Quiz

May a city treat on-premise and off-premise commercial signs differently?
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
• 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...
Definitions

• After *Reed v Gilbert*, must ensure sign definitions, including definition of sign, don’t have to be read to be enforced
• Exception: determination if sign is commercial or non-commercial
• Sign: *A structure, sign, display, light device, figure, painting, drawing, message, plaque, poster, billboard, or other object that is designed, intended, or used that includes text or images to communicate. Signs located completely within an enclosed building and not exposed to view from a street shall not be considered a sign. Each display surface of a sign or sign face must be considered a sign.*
Prohibited Signs

• Does your city prohibit any particular types of signs?
• Electronic signs can be regulated in the city limits & ETJ per Title 43, TAC, Part I, §21.253
• Off-premise signs (billboards)
Design Review

• A City can regulate sign aesthetics
Regulations by District

- Commercial Districts
- Residential Districts
- Historic Districts
- Downtown Areas
- Coastal Areas
- ETJ
Administration

• Designate a sign administrator or designee who will process sign permits
• Permit application information
• Permit Fees—ensure they reflect cost of regulating signs as accurately as possible
Permit Not Required

- Clearly define which types of signs do not need a permit
- Changing commercial message to non-commercial message
- Routine maintenance
Variances

• Clearly outline variance process and duties of Board of Adjustment
• Types of variances allowed
  – Permit variance for setback, area, or height
  – Additional signage in excess of what is permitted
• Hardship claim
Destroyed Signs and Abandoned Signs

- Existing non-conforming sign in the city limits or ETJ may not be repaired or rebuilt in the case of obsolescence or total destruction by fire or other causes
- An abandoned or discontinued sign is a sign that advertises a business or project that has ceased operations in excess of one (1) year, unless the property is leased, in which case the sign shall be removed after two (2) years
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

<table>
<thead>
<tr>
<th>Basic Ordinance Must-Haves</th>
<th>Yes</th>
<th>No</th>
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<tbody>
<tr>
<td>Findings</td>
<td>☐</td>
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<td>Statement of Purpose/Intent; Interpretation</td>
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<td>Scope</td>
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<tr>
<td>Definitions</td>
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<tr>
<td>Permitting Process—including application, review criteria, approvals process</td>
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<td>Variances and appeals</td>
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<td>Types of Signs Permitted</td>
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<tr>
<td>Types of Signs Prohibited</td>
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<td>Regulations for existing signs (may grandfathered or non-conforming signs)</td>
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<td>Penalty</td>
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<td>Repealer &amp; Severability</td>
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<td>Constitutional Requirements</td>
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<tr>
<td>Does your sign ordinance regulate signs by zoning district?</td>
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<td>Does your sign ordinance treat different categories of signs differently? (i.e. political signs and real estate signs are regulate differently from other types of signs)</td>
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<td>Does your ordinance allow for exemptions from permitting process? If yes, list of exemptions will need to be examined</td>
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<td>Are any signs regulated by having to read the</td>
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<td>Are commercial signs given preferential treatment over non-commercial signs?</td>
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<tr>
<td><strong>Political Signs</strong></td>
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<td>a) Are political signs singled out and treated by</td>
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<tr>
<td>b) Or, are political signs regulated by time/place/manner (ie additional sign(s) allowed temporarily during fixed time period-</td>
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<tr>
<td><strong>Holiday Decorations</strong></td>
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<tr>
<td>a) Are holiday decorations/signs regulated by time/place/manner (ie fixed period of time coinciding with holidays)?</td>
<td>□</td>
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<tr>
<td>b) Or, or holiday decorations regulated by</td>
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<tr>
<td>Waivers—does your ordinance provide fee waivers or expedited permit process for certain institutions or individuals?</td>
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## Additional (Voluntary) Sign Regulations for Scenic City Certification

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<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
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<tbody>
<tr>
<td>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.</td>
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<tr>
<td>Strict limits on quantity of signs per business.</td>
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<td>Strict limits on size (both square footage and height), placement, and quantity of signs per side/property frontage.</td>
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<td>Banned signage: All wind devices, roof signs and portable signs.</td>
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<td>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.</td>
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Pop Quiz

• What are the sign-related criteria required to apply for Scenic City Certification?
• Do your sign definitions have to be content-neutral?
City of West Lake Hills

• Population: Approximately 3,000
• Size: Approximately 4 square miles
• Location: West of Austin, almost completely surrounded by the City of Austin
• Type A General Law City
Sign Ordinance Review

• The purpose of the review is to ensure regulations are consistent with state and federal laws, as well as West Lake Hills’ Master Plan.

• Clearly define what signs are allowed, and draft a clearer definition of sign.
Definitions

• Removed definitions of public information sign, residential name plate sign, and real estate sign.

• Commercial Sign – a sign which directs the attention of the general public to a business, goods, or services, or other commercial or business activity.
Prohibited Signs

• In addition to billboards, LED signs, and signs with direct lighting are prohibited.
Regulations by Zoning District

• Residential properties are allowed 1 sign, limited to 2 square feet.
• Commercial zoned properties are allowed 1 monument sign, and if in a multitenant shopping center, additional wall hanging signs for each tenant.
Allowed Signs

• Freestanding Monument Signs
• Wall Hanging Sign
• Directory Sign (Commercial)
• Traffic Control Signs (Government)
• City Code is more restrictive on commercial signs.
Sign Permits and Review Process

• Any commercial sign, unless part of a uniform sign agreement, is required to go to 3 public hearings, Building Design Committee, Zoning and Planning Commission and City Council for the permit.
Uniform Sign Agreements

• Allow shopping centers to have more flexibility in their signage, approved by City Council.
Design Review

• Signs must be harmonious with city scale;
• Material should be predominately natural;
• Signs shall be black and earth tone in color;
• Landscaping required for monument signs;
• All lighting shall be indirect
No Permit Signs

• Previously was residential nameplate signs, public information signs, real estate signs, political signs and driveway entry signs. This was content based.

• Revision allows properties zoned residential to have 1 sign not to exceed 2 square feet. All signs on commercial zoned properties require permits.
Code Enforcement

• If there is a violation, City gives written notice
• Failure to comply with abatement, the city can issue citations, and require removal of the sign.
Variance Process

• Sign Variances are granted by the City Council. They must show an undue hardship for approval.

• The City council reviews the proposal after the Zoning and Planning Commission makes a recommendation.
• Can cities have stricter regulations on commercial signage?
Questions?