INFORMATION MEMO

Sign Ordinances and the First Amendment

Learn how to design a sign ordinance for your city that meets the requirements of the First Amendment for protecting various forms of speech.

RELEVANT LINKS:

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

I. First Amendment principles

The First Amendment protects signs as speech, and, as a result, courts closely review attempts to regulate signs. In 2015, the U.S. Supreme Court decided a seminal case (*Reed v. Town of Gilbert*) that changed how courts review the validity of sign ordinances. Prior to this decision, courts generally presumed sign ordinances were valid and, in their review, would look to the intent behind the adoption of the ordinance, striking down only those ordinances where the court found evidence that the city "adopted (the sign regulation) to suppress speech with which the government disagreed" (commonly known as content-based).

Since *Reed*, courts now presume that sign ordinances that restrict speech (either expressly or implicitly) are unconstitutional. As a result, courts look first to the effect of the sign ordinance—whether the ordinance regulates signs differently based on the content or message of the sign—before conducting its analysis of the constitutionality of the ordinance. Based upon the court's determination, the court will apply one of two standards of review to the challenged ordinance. If the ordinance draws distinctions based on the message communicated by the sign, the court reviews these ordinances more harshly than if the ordinance regulates signs and their placement without regard to content.

A. Content-based

As referenced above, the *Reed* decision created a two-step analysis to determine if the ordinance restricts speech, commonly referred to as "content-based":

- Does the ordinance's actual language refer to the content or the message of the sign?
- If not, then does evidence exist that shows the city adopted the regulation specifically because of disagreement (or agreement) with the message expressed by the sign?

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RELEVANT LINKS:

In *Reed*, the Town of Gilbert's sign code required permitting for signs, but then listed out categories or types of signs exempt from permitting, including "political signs," "ideological signs," and "temporary directional signs." The ordinance in *Reed* also placed different physical restrictions on the separate types of signs. The Supreme Court found this ordinance content-based because the regulation "on its face" looked to the message on the proposed sign to determine how the city would regulate it.

As mentioned above, if a court finds the city expressly regulated or intended to regulate a message or content, then the court applies a more rigorous level of review to those ordinances. This heightened level of review is called "strict scrutiny," and the court will only uphold the ordinance if it furthers a compelling government interest and is narrowly tailored. Courts have found few governmental interests represent justifiable "compelling interests." As a result, in practice, few, if any, regulations survive strict scrutiny.

In the alternative, for sign ordinances that do not regulate the message or content of signs (commonly called "content-neutral"), courts apply a lower standard of review to the reasonableness of regulations and generally uphold regulations that further a significant government interest, as long as reasonable alternative channels for communication exist. As a result, courts uphold ordinances considered content-neutral more often than not.

B. Content-neutral

As stated above, when a local government's ordinance is content-neutral, courts review it with a much more relaxed standard, upholding regulations that meet the criteria below (often referred to as reasonable time, place, and manner restrictions). These ordinances:

- Do not reference the content of the sign.
- Are narrowly tailored to serve a significant governmental interest (rather than compelling interest).
- Leave open ample alternative channels for communication of the information.

To help avoid challenges when adopting sign ordinances, cities should:

- Not regulate based on content.
- Not favor commercial speech over noncommercial speech.
- Further substantial government interests, such as traffic safety or aesthetics, without regulating more than necessary to accomplish their objectives.
- Leave ample alternative channels for communication, such as limiting the size of signs but still allowing signs.

Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006).

Hensel v. City of Little Falls, 992 F. Supp.2d 916 (D. Minn. 2014).

RELEVANT LINKS:

C. Commercial speech v. noncommercial speech

Central Hudson Gas & Elec. v. Public Svc. Comm'n, 447 U.S. 557 (1980).

Courts treat commercial speech differently than noncommercial speech and do not afford it the same level of protection. Courts have defined commercial speech as speech that proposes a commercial transaction. Commercial speech enjoys some First Amendment protection but not as much protection as noncommercial speech.

Understanding commercial speech versus noncommercial speech can get confusing. Commercial speech is initiated by a person or company who engages in commerce, or is selling something; targets commercial audiences or audiences that are actual or potential consumers; and communicates a message commercial in nature, such as advertisements. Noncommercial speech, on the other hand, includes messages that do not promote commercial products or services, such as a message that has ideological or political content.

II. Drafting a sign ordinance

Sign Ordinance, City of Hopkins sample.

With the First Amendment concerns surrounding sign regulation, the below guidelines will help cities in drafting ordinances. Keep in mind that signs can pose distinct problems subject to a city's police power, such as taking up space, obstructing views, distracting motorists, and displacing alternative uses for land, so cities can regulate signs, they just must do so cautiously.

A. Provisions to include

1. Statement of purpose

This section of an ordinance explains the public purpose reason for the sign ordinance and how the city intends to apply the ordinance. The statement of purpose should state clearly that it does not intend to have content-based restrictions or content-based enforcement. Cities find it a best practice for the statement of purpose to delineate the governmental interests spurring the regulations.

2. Substitution clause

Adding a message substitution clause may avoid claims that an ordinance favors commercial signs over noncommercial messages. A substitution clause provides that for every commercial sign allowed, any noncommercial message could be legally substituted. Substitution clauses help protect against allegations of discrimination (based on content) because they always allow a noncommercial message on any sign. Many ordinances inadvertently define signs in terms of advertising and, as a result, may be interpreted as allowing only commercial messages.

RELEVANT LINKS:

A substitution clause may correct these mistakes by providing a catch-all allowance of noncommercial messages notwithstanding other provisions. A sample substitution clause reads as follows:

"Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs."

3. Severability clause

A severability clause provides that if a court finds any provision of the ordinance invalid, the remainder of the ordinance stands on its own. This clause may prevent a flaw in one part of the ordinance from invalidating the entire ordinance.

A sample severability clause reads as follows:

"If any section, subsection, sentence, clause, or phrase of this Sign Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Sign Ordinance. The City Council hereby declares that it would have adopted the Sign Ordinance in each section, subsection, sentence, or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid."

4. Election season pre-emption

Minn. Stat. § 211B.045.

A city's sign ordinance should contain acknowledgement of the election season pre-emption required by state law. Under this law, municipalities must allow noncommercial signs of any size or number during election season, which runs from 46 days before the state general primary until 10 days after the state general election. The statute does not define noncommercial sign. One Minnesota case does, however, and states that a "noncommercial opinion sign" is one which "does not advertise products, goods, businesses, or services and which expresses an opinion or other point of view." Courts consider campaign signs a subset of noncommercial opinion speech. Outside of "election season," including during non-general election years, a city's local sign ordinance governs. However, as stated before, even if not election season, local sign ordinances should not have the effect of prohibiting opinion speech.

Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. App. 1994), cert. denied, 514 U.S. 1036, (1995).

5. Time, place, and manner regulations

Best practices suggest cities should:

RELEVANT LINKS:

City of Ladue v. Gilleo, 512 U.S. 43 (1994). *Brayton v. City of New Brighton*, 519 N.W.2d 243 (Minn. App. 1994),), cert. denied, 514 U.S. 1036, (1995).

- Adopt sign ordinance regulations based on time, place, and manner concerns, not on content.
- Refrain from favoring commercial speech over noncommercial speech.

Examples of content-neutral restrictions include regulations based on size, brightness, zoning district, spacing, and movement.

B. Provisions to avoid

1. Unfettered discretion

Hensel v. City of Little Falls, 992 F. Supp.2d 916 (D.Minn. 2014).

Cities should avoid drafting ordinances that provide discretionary approval by the city staff. Ordinances that give staff discretion to grant or deny have the potential to favor some messages or messengers over others, regardless of whether an abuse of that discretion occurred. Sign ordinances should have transparent and objective permit requirements, making the decision to grant or deny ministerial, as opposed to subjective, in nature. So, for example, cities should avoid provisions allowing staff discretion to deny permits, even if the application satisfies all specific ordinance requirements, or provisions that treat signs as conditional or special uses.

2. Exemptions or favoritism

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

Cities should avoid exempting certain groups or messages, such as church signs or official flags, from permit requirements in the ordinance. Courts construe these types of exemptions as content-based discrimination because a decision is made based on the text, or content, of the sign.

Advantage Media v. City of Hopkins, 379 F.Supp.2d 1030 (D.Minn. 2005).

Also, municipalities may want to keep in mind that including specific exemptions in sign ordinances often has the effect of "watering down" the proof that the regulation furthers a substantial government interest. For example, if an ordinance includes a prohibition on temporary signs but allows a long list of exemptions, it suggests the city is not really concerned about temporary signs.

3. Over-defining signs

Cities should avoid drafting ordinances in ways in which noncommercial speech inadvertently gets treated less favorably than commercial speech. For example, some cities have run into trouble by defining a "sign" as "advertising." A court's analysis would be as follows:

- The city ordinance defines signs as advertising devices.
- The ordinance allows signs as defined.
- The ordinance, by its definition of signs as advertising, prohibits all other types of signs.

RELEVANT LINKS:

This arguably prohibits noncommercial speech, violating the First Amendment.

C. Include procedural protections

Cities that require permitting should include certain procedural safeguards in their ordinance, such as a:

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).

- Specification of the time within which the city will grant or deny a permit, keeping in mind judicial preference for brevity in the response time.
- Requirement that, if the city denies the permit, the applicant has access to prompt judicial review.

III. Common sign ordinance issues

A. Off-premise advertising (billboards)

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).

Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006).

Off-premise advertising consists of commercial signs that advertise for a business located somewhere else than at the location where the sign is placed. Large, freestanding billboards create unique problems for land use planning and development precisely because their design intends for them to stand out from their surroundings. Courts have found a legitimate local governmental interest in controlling the size and location of billboards, but not in controlling the sign's communicative aspects. Indeed, billboards can distract drivers, posing real danger to both motorists and nearby pedestrians and justifying regulation.

City of Cottage Grove v. Ott, 395 N.W.2d 111 (Minn. App. 1986).

In Minnesota, the court has upheld a sign ordinance that completely prohibited off-premise commercial advertising, but, did so cautiously and only because the ordinance did not regulate noncommercial signs. Because of the scrutiny applied in regulating speech, cities should use caution in adopting complete billboard prohibitions and work with their city attorneys.

B. Flags

Texas v. Johnson, 491 U.S. 397 (1989). *Young v. City of Roseville,* 78 F.Supp.2d 970 (D. Minn. 1999).

Courts have recognized that the display of flags can constitute expressive conduct protected under the First Amendment as well. Cities should use caution if regulating flags to avoid favoring some types of flags (particularly the United States flag) over other flags. Use of a substitution clause helps in these instances: if one type of noncommercial flag would be acceptable, any noncommercial flag should be allowed.

RELEVANT LINKS:

C. Yard signs, including political signs

City of Ladue v. Gilleo, 512 U.S. 43 (1994).

Goward v. City of Minneapolis, 456 N.W.2d 460 (Minn. App. 2990).

Courts have deemed yard signs constitutionally protected. Best practice suggests avoiding total bans on noncommercial lawn signs in residential areas, and using caution in adopting provisions that may favor some messages over others.

For example, exemptions from sign regulations for real estate signs or construction project signs favor commercial speech over noncommercial speech. However, general limitations on the number and size of signs have withstood constitutional challenges since such limitations have nothing to do with a sign's message, and they further governmental interests in protecting property values, preventing distractions for drivers, or avoiding clutter.

Again, as stated before, a city's sign ordinance should contain acknowledgement of the election season pre-emption required by state law. Under this law, municipalities must allow noncommercial signs of any size or number during election season, from 46 days before the state general primary until 10 days after the state general election.

D. Electronic signs

SRF Consulting Group, *"Dynamic Signage: Research Related to Drive Distraction and Ordinance Recommendations"*, June 7, 2007.

La Tour v. City of Fayetteville, Ark, 442 F.3d 1094 (8th Cir. 2006). *State v. Dahl*, 676 N.W.2d 305 (Minn. App. 2004).

Electronic signs present new challenges, especially with ever-changing technology capable of new levels of brightness, movement, flashing, and potential distraction. Most sign ordinances do not adequately address these issues and how they may impact traffic safety or aesthetics. Courts have upheld regulations on electronic or flashing signs, so long as the regulations are not tied to the content of the signs, serve a substantial governmental interest, and leave open ample alternative channels for communication. For example, courts have found that allowing non-electronic signs, or even operating the electronic sign in a non-flashing mode, represents ample alternatives.

E. Signs adjacent to highways

Minn. Stat. Ch. 173. Minn. Stat. 160.2715. Minn. DOT Billboard Permits and Guidance. Minn. DOT Community and Guide Signage.

Minnesota statutes specifically regulate signs adjacent to highways. Minnesota law states, in part, that it is unlawful to paint, print, place, or affix any object within the limits of any state highway; but provides for some specific signage that meets certain Department of Transportation criteria. Furthermore, Minnesota's Outdoor Advertising Control Act prohibits advertising devices on private land without the consent of the owner or occupant; on public utility poles; on trees or shrubs; and by painting or drawing on rocks or natural features.

RELEVANT LINKS:

LMC Research Department, 651-281-1200

IV. Further assistance

Due to the complexity of regulating signs, cities should work with their city attorneys to draft and review such ordinances. City attorneys also can examine the law for possible exceptions to these general rules about sign ordinances and the First Amendment. The League of Minnesota Cities' Research Department can provide assistance and sample ordinances.