



## **REPORT TO THE CITY COUNCIL**

**DATE:** Regular Meeting of May 12, 2020

**TO:** Mayor Esquivias and Members of the City Council

**SUBMITTED BY:** Patrick Tang, City Attorney  
Robert Reber, Interim Community Development Director

**SUBJECT:** Status of City of Hercules Sign Regulations following the decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

**RECOMMENDED ACTION:** Receive report, discuss, and provide direction. If the recommended changes are acceptable to the Council, direct staff to schedule required Planning Commission review and consideration of proposed changes.

### **FISCAL IMPACT OF RECOMMENDATION:**

There are no immediate fiscal impacts associated with this item.

### **BACKGROUND:**

It was previously reported to the City Council by way of a staff report dated September 10, 2019, that the United States Supreme Court's ruling in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) necessitated some updates to the city's existing sign regulations. In the *Reed* case, the court ruled that regulations categorizing signs based on the type of information they convey and then applying different standards to each category are content-based regulations of speech and are subject to strict scrutiny under the First Amendment to the United States Constitution. The *Reed* decision impacts most every local sign ordinance in the U.S. Almost all sign codes contain content-based exemptions from permit requirements for house nameplates, real estate signs, political and/or election signs, garage sale signs, etc., and then regulate them differently. The *Reed* ruling's impact is far reaching for cities across the country, because the court articulated an unforgiving standard for assessing the content neutrality of restrictions that impact speech rights under a city's sign ordinance.

After the September 10, 2019 presentation and discussion by the Council, staff was directed to return to Council with draft amendments to the City's existing Sign Ordinance for Council's consideration. Staff was directed to make the minimum changes necessary to comply with the legal requirements of the *Reed* decision. This report and update is responsive to Council's direction. A detailed case background and analysis was provided in the September 10, 2019 report to Council, which is provided as Attachment 1 to this revised report.

## **DISCUSSION:**

In light of the uncertainties and inconsistent rulings in the wake of the *Reed* decision discussed in the prior report, arguably the best course for cities is to err on the side of allowing for less restrictive, rather than more restrictive, sign regulations until the courts provide more specific guidance. Cities can still legally regulate signs, provided their regulations avoid making distinctions based on content or subject matter. Revisions to sign codes should ensure the codes are “content neutral” by:

- 1) Eliminating any separate rules for categories of signs that are defined by the content or subject matter of their message. This means avoiding rules that have different size, height, or duration requirements for “political” or “directional” or “real estate” signs, etc.
- 2) Reviewing “exceptions” to regulations to make sure they are not content based, and eliminating such exceptions even if they seem innocuous (e.g., exceptions for historical markers, for example).
- 3) Adopting content neutral, “time place and manner” (TPM) regulations. Such TPM regulations can legally distinguish between for example, lighted and unlighted signs, signs with fixed and changing electronic messages, signs on public and private property, on-premise and off-premise signs, and signs on commercial and residential property.

Council directed staff to return with proposed changes to the City’s existing Sign Ordinance that address the issues raised by the *Reed* decision. A draft Ordinance is attached for the Council’s review and consideration, with Attachment 2 being the redlined version, and Attachment 3 being the clean version. The draft makes: 1) the minimal changes necessary to conform with the *Reed* decision’s requirements, and 2) other non-substantive clarifications to eliminate inconsistencies within the existing code. The Sign Ordinance is part of the City’s zoning regulations. It should be noted that any amendments to the zoning regulations require Planning Commission review and recommendation, before final review and adoption by the City Council (Hercules Municipal Code Section 13-52.200).

Staff is offering the proposed draft updates with the caveat that there is still lingering confusion over what the *Reed* decision requires that may not be clarified until the courts rule on specific challenges to various post-*Reed* ordinances. This may necessitate additional amendments to the Sign Ordinance as the courts continue to address sign code challenges.

## **CONCLUSION:**

Defending reasonable sign regulations from First Amendment challenges has become increasingly difficult following *Reed v. Town of Gilbert* and its progeny. While the courts continue to grapple with challenges to sign regulations after *Reed*, it is recommended that in the meantime, the Council consider forwarding the proposed Sign Ordinance amendments to the Planning Commission for their initial review pursuant to HMC 13-52.200, in order to revise provisions that are not sufficiently content neutral.

## **ATTACHMENTS:**

1. September 10, 2019, Report to City Council: Sign Ordinance Update

2. Draft Ordinance with proposed changes to Sign Ordinance (Municipal Code Chapter 13-34, “Sign Regulations”) –redlined with changes shown
3. Draft Ordinance to Proposed changes to Sign Ordinance (Municipal Code Chapter 13-34, “Sign Regulations”) – clean with changes incorporated