



REPORT TO THE CITY COUNCIL

DATE: Regular Meeting of September 10, 2019

TO: Mayor Romero and Members of the City Council

SUBMITTED BY: Patrick Tang, City Attorney
Holly Smyth, Planning 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.

FISCAL IMPACT OF RECOMMENDATION:

There are no immediate fiscal impacts associated with this item.

DISCUSSION:

The dust is still settling from the United States Supreme Court's 2015 ruling in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). 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 not allowed under the First Amendment to the United States Constitution. The *Reed* decision impacts most every 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.

Case Background. The Town of Gilbert, Arizona, enacted a sign ordinance that included definitions for temporary directional signs, ideological signs, and political signs. Based on the type of sign, it then limited how long the sign could be posted; temporary directional signs could be posted no sooner than 12 hours before an event and for one hour after the event, but ideological or political signs could be posted for much longer.

Each week, a church in town used temporary directional signs to guide parishioners to the church. The signs were in place longer than allowed by the town's ordinance, and the town issued citations for the violations. The church sued the town, arguing that the shortened time frame for temporary directional signs versus the longer time frame for ideological and other

signs was a “content-based” restriction on speech that is prohibited by the First Amendment to the U.S. Constitution. The town countered that the shorter time frame for temporary directional signs was not content-based because any person or entity utilizing temporary directional signs had to follow the same restrictions, not just churches, so the regulation did not discriminate based on viewpoint.

The Court held that the ordinance’s varying durations for posting based on the type of sign was content-based because a city employee had to read the sign to determine if it was a political or ideological sign or a temporary directional sign, in order to enforce the ordinance. When a restriction on speech is content-based (as opposed to a reasonable time, place, or manner restriction) it will be upheld only if a city can show that the restriction meets “strict scrutiny”. For a regulation to be found valid under the strict scrutiny test, the burden is on the City to demonstrate both 1) that the regulation is designed to achieve a compelling governmental interest, and 2) that the regulation is narrowly tailored to achieve that interest. Few, if any, regulations survive application of the strict scrutiny test.¹

The *Reed* Court invalidated the town’s ordinance because it did not meet the strict scrutiny test; the town did not prove that the content-based distinctions in the ordinance were narrowly tailored to achieve the town’s interests of aesthetics and traffic safety.

It is clear that after *Reed* sign regulations must strive for as much content neutrality as possible and that signs should not be regulated based on the content of the message or the speaker. Practically, this means that any ordinance provision that requires a city employee to read the content of a sign before taking action will be subjected to strict scrutiny by a court.

Reed leaves Unanswered Questions. As discussed in the section below, treatment of the onsite/offsite and commercial/noncommercial distinctions remains uncertain post-*Reed*. *Reed* also failed to provide answers to a number of practical considerations, such as how to provide for the public’s desire for more signage during election campaigns in a wholly content-neutral manner.

Inconsistency in Decisions Since *Reed*. There has been inconsistency in court rulings post-*Reed*. The United States Ninth Circuit has held that regulations on the height and size of signs were content-neutral. See *Herson v. City of Richmond*, 631 Fed. Appx. 472, 473 (9th Cir. 2016). The Ninth Circuit has also upheld a city’s right to prohibit billboards based on an off-site vs. onsite distinction. (See *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 17-15909.13, 14 (9th Cir. Aug. 16, 2017). Two rulings involving the regulation of noncommercial speech for on- and off-premise signs appear to be inconsistent, as one court held that the distinction for on- and off-premise signs is not a content-based regulation, but rather a location-based regulation (*Reagan National Advertising of Austin, Inc. v. City of Austin*, 2019 WL 1375574 at *8), while another court held that the distinction of noncommercial speech for on- and off-premise signs is indeed a content-based regulation subject to strict scrutiny because a sign could be regulated differently due to its contents being on- or off-premise. *Reagan National Advertising of Austin, Inc. v. City*

¹ “Strict scrutiny, like a Civil War stomach wound, is generally fatal.” *The New York Times*, “Court’s Free-Speech Expansion Has Far-Reaching Consequences” (Aug. 17, 2015).

of *Cedar Park*, 2019 WL 1375574 at *8. An Illinois 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. 2015), yet a Louisiana district court has held that a design review process for a mural permit is a content-based regulation of speech because the design contents needed to be approved by city officials. *Morris v. City of New Orleans*, 350 F.Supp.3d 554, 556-557 (E.D. La. 2018). Finally, a district court in California has held that language allowing additional signs (regardless of content) during election season was unconstitutional. *RICARDOPACHECO.COM et al. v. City of Baldwin Park*, No. 2:16-cv- 09167-CAS(GJSx), 2017 WL 2962772 (C.D. Cal. July 10, 2017).

In light of the uncertainties and inconsistent rulings in the wake of the *Reed* decision, 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 guidance on the above questions. Cities can still legally regulate signs, provided their regulations do not make any 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, address signs, etc.)
- 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.

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, staff with assistance from the city attorney review the City's current sign ordinance provisions for content neutrality, and draft amendments to the City's current sign ordinance only to the extent necessary to remove or revise provisions that are not sufficiently content neutral.