

MUNICIPAL SIGN REGULATION

AFTER REED AND REAGAN NAT'L



MUNICIPAL ZONING REGULATION

Texas Local Government Code 211.005

(a) The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land.

If reasonable minds may differ as to whether a particular zoning ordinance has a substantial relationship to the public health, safety, morals, or general welfare, the ordinance must stand as a valid exercise of the city's police power. *Hunt v. City of San Antonio*, 462 S.W.2d at 539 (Tex. 1971).

A city ordinance is presumed to be valid, and an "extraordinary burden" rests on one attacking a city ordinance. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d at 805 (Tex. 1984); *Hunt*, 462 S.W.2d at 539.

The regulation must be reasonable; it cannot be arbitrary. *Turtle Rock Corp.*, 680 S.W.2d at 805; *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972)

"Zoning decisions are vested in the discretion of municipal authorities; courts should not assume the role of a super zoning board." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933, 41 Tex. Sup. Ct. J. 517 (Tex. 1998). "However, despite the discretion afforded to municipal authorities, zoning decisions must comply with constitutional limitations." *Id.*

MUNICIPAL SIGN REGULATION

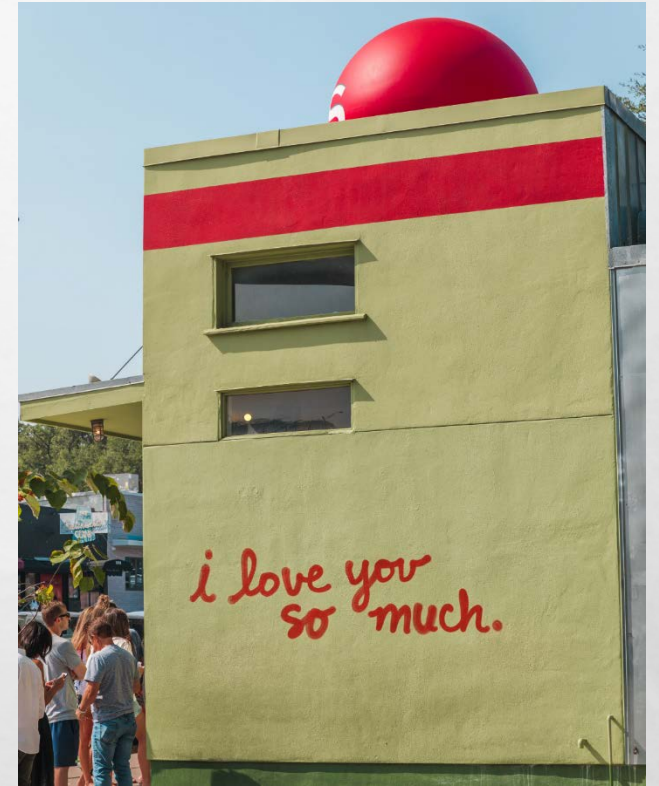
Texas Local Government Code 216.003

(a) Subject to the requirements of this subchapter, a municipality may require the relocation, reconstruction, or removal of any sign within its corporate limits or extraterritorial jurisdiction.

WHAT IS A SIGN?

Texas Local Government Code 216.002

(1) "Sign" means an outdoor structure, sign, display, light device, figure, painting, drawing, message, plaque, poster, billboard, or other thing that is designed, intended, or used to advertise or inform.



REED V. TOWN OF GILBERT

LOCAL SIGN REGULATIONS V. FIRST AMENDMENT FREEDOM OF SPEECH

- Temporary signs of various categories
- Regulation for the signs based on the sign content:
 - Political
 - Directional
 - Ideological

CONTENT EVALUATION (REGULATION ON IT'S FACE)

NEUTRAL REGULATION

- Intermediate scrutiny applies:
 - Must advance an important governmental interest by means substantially related to that interest

CONTENT-BASED REGULATION

- Strict scrutiny applies:
 - Law furthers a compelling governmental interest and is narrowly tailored to achieve that interest
- Regardless of “governments benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in regulated speech”

TOWN OF GILBERT'S RATIONALE

- NO REGULATION OF IDEAS/VIEWPOINTS WITHIN EACH CATEGORY – only subject matter
 - “...regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 576 U.S. 155, at 171 (2015).
- PRESERVATION OF TOWN AESTHETIC APPEAL AND TRAFFIC SAFETY
 - “...hopelessly underinclusive”, the Town not providing any evidence to support its claims that treating the categories of signs differently furthers the stated objective. *Id. at 172.*

HOLDING

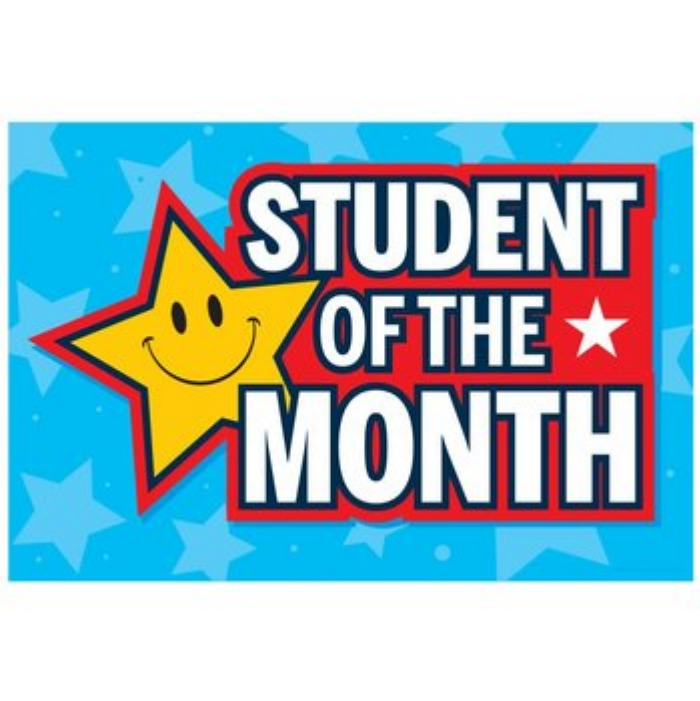
If the challenged regulations are different based on the message being conveyed, those regulations are content-based and must pass strict scrutiny to be upheld.

JUSTICE ALITO'S CONCURRENCE

DON'T WORRY CITIES – YOU STILL MIGHT BE ABLE TO REGULATE SIGNS IN THE FOLLOWING WAYS:

- Size
- Location
- Lighting
- Fixed or electronic messages
- Private v. public property
- On-premise and off-premise
- Number allowed

POST-REED IMPLICATIONS



REAGAN NAT'L ADVERTISING OF AUSTIN, INC. V. CITY OF AUSTIN

- 2 sign companies (Reagan Nat'l and Lamar) had nonconforming, off-premises billboards in the City of Austin and wanted to digitize the messages on them.
- Austin's code prohibited digitization of off-premises signs (which billboards are required to be).
- Sued claiming on-premises/off-premises distinction was content based and therefore strict scrutiny applied

5TH CIRCUIT COURT OF APPEALS

- Applied *Reed* and found:
- “To determine whether a sign is on-premises or off-premises, one must read the sign and ask: does it advertise ‘a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on site.’”
Reagan Nat’l Adver. Of Austin v. City of Austin, 972 F.3d 696, at 704
- “Some facial distinctions based on a message are obvious, ... and others are more subtle, defining regulated speech by its function or purpose.” *Reed*, 576 U.S. 155, at 163.
- So, because you have to read the sign to know if the message is off-premises or not and the function of on/off-premises discriminates between messages, the law is content-based and must pass strict scrutiny.

WHAT'S THE RESULT?



- Could only regulate by size, number, type, material, etc.
- Businesses could promote anything and everything – not just goods and services provided on-site (political views, ideological outlooks, products and services ads, etc.)

SCOTUS STEPS IN

CITY OF AUSTIN V. REAGAN NAT'L ADVER. OF AUSTIN, INC. 596 U.S. ____ (2022)

- Delivered a 5-4 opinion written by Sotomayor, 1 concurring, 1 concurring in part and dissenting in part, and 3 joining in dissent
- There is a long-standing precedent in the nation upholding on/off-premises distinction as content neutral.
- City of Austin regulation is for the sake of protecting aesthetic value of the city and public safety (exact same rationale in *Reed* that was found grossly underinclusive).
- Off-premises sign definition substantially the same as the Highway Beautification Act and other state and local codes so must be legit
- COA application of *Reed* was too extreme – the rule isn't about different treatment based on who is the speaker and what are they saying...

MAJORITY OPINION CONTINUED

- “Unlike the regulation in *Reed*, the City’s off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It’s agnostic to content.” – so no need for strict scrutiny analysis.
- *Reed* issue was related to singling out “specific subject matter”, here no subject matter at issue, rather location-based regulation and therefore is similar to a time, place, and manner restriction, not subject to strict scrutiny.
- Many prior cases upheld these types of regulations and *Reed* did not “purport to cast doubt” on them.
- The “function and purpose” statement in *Reed* didn’t mean all such regulations are content-based and the COA “stretched *Reed*’s function or purpose language too far”.

BREYER CONCURRENCE

- Agreed with result of the on/off-premises analysis based on precedent established in *Reed*, but still thinks *Reed's* reasoning is wrong
 - There should be an initial evaluation of the regulation to determine if there's a valid reason for the regulation and whether or not the regulation really “works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives”.
 - No need to jump straight to strict scrutiny just because the First Amendment is involved.

ALITO – CONCURRING AND DISSENTING IN PART

- CONCURRENCE:
 - Agrees with outcome, because the issue here is only about digitizing nonconforming, off-premise sign, not the on/off-premise categories of the Austin code which came after the creation of the signs at issue
- DISSENT:
 - Does not agree on/off-premises distinction is content neutral, and strict scrutiny should be applied (or intermediate for commercial speech)
 - Evaluates case analysis as to on-premises signs (not discussed in majority opinion) and how on-premises regulations completely are content-based, because off-premise messages are disallowed, and therefore on/off-premises distinction discriminates based on content

THOMAS DISSENT (JOINED BY GORSUCH AND BARRETT)

- Under *Reed* on/off-premises distinction is content based, because it discriminates between messages and is therefore unconstitutional unless can pass strict scrutiny test
- The majority erred finding the code was “location-based” and unrelated to content.
- As Alito did, discussed case rationale as applied to on-premises signs, and it clearly demonstrates content discrimination
- “...the majority today excises, without a word of explanation, a subset of supposedly non-substantive or unspecific messages from the First Amendment’s protection against content-based restrictions.”
- Re-states *Reed*’s standard, “a law ‘targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter’”
- Alito’s concurrence of *Reed* was just wrong (re: on/off-premises regulation).
- Majority opinion mischaracterizes case history re: on/off-premises, because those cases dealt specifically with commercial speech, which has a lower standard of scrutiny – so not the same issue – here many other types of speech being discriminated against.

NOW WHAT?

- *Post-Reed*:
 - If you're going to allow signs of a certain type, everyone can have a sign the same size, use, etc.
 - All sign regulations (except on/off-premises) must be content neutral
 - Assume non-commercial sign regulations will fail if different messages are treated differently, and if they are not afforded the same opportunity as commercial signs (except on/off-premises)
 - If you're going to argue police powers-type of arguments, make sure it's supported with demonstrable facts, not just "aesthetics and safety" (except on/off-premises).
- *Post-Reagan Nat'l* – on/off-premises sign regulations are content-neutral and legal...for now