

Give Me a Sign: ReReeding our Sign Codes



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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**

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 law can be *content based* in two ways:

- by distinguishing speech by the *topic discussed*
- if the law’s purpose or justification depends on the underlying *idea or message expressed*—i.e., law 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”

Reeding the Rules: Alito's Concurrence

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**



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*

Austin Court of Appeals

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.

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).

Signs: The Ninth Circuit upheld a city’s right to prohibit billboards based on an onsite vs. offsite distinction. *See Contest Promotions, LLC v. City & Cty. of S.F.*, No. 17-15909, 2017 U.S. App. LEXIS 15375 ,at *14 (9th Cir. Aug. 16, 2017). *See also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 606 (1980).

Loc. Gov. Code. 216.903

- In the same vein, Loc. Gov. Code. 216.903, which provides that “a municipal charter provision or ordinance that regulates signs may not, for a sign that contains primarily a political message and that is located on private real property with the consent of the property owner: (1) prohibit the sign from being placed ...[etc.],” is unconstitutional under *Reed*. TEX. LOC. GOV’T CODE § 216.903.

Content-based

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.

Bonus: More room on which to place network nodes?

Highlighting Another Example

Can a City allow holiday lights during a certain time of year, but not other types of lights?

- Here, an argument could be made to the underlying First Amendment reasons in restricting the content of “holidays.”
- This regulation could avoid *Reed* by simply focusing instead on categories of lights (i.e. size, luminosity, etc.) rather than their content-based function.



City Goals



- 1. Keep ordinances content neutral on their face.*
- 2. Look at peddler, lights, or any other ordinance that has exceptions or definitions that inherently speak of content or message.*
- 3. Be wary of enforcement of current ordinances that may not be content neutral.*

“Model” Sign Ordinance

- Separated by Zoning District
- Commercial signs are treated differently than Non-Commercial
- On-Premise versus Off-Premise are different
- Stricter than what most cities adopt
- Please email me with questions . . .

Questions?

