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PRACTICE **TEMPORARY SIGNS**



Temporary Sign Regulations in a Post-Reed America

By Wendy E. Moeller, AICP, and Alan Weinstein

Any community planner who has had the responsibility of administering and enforcing a zoning code has likely had to deal with the often complex issue of temporary signs—those signs that seemingly pop up overnight and proliferate if unchecked.

These same planners may understand the need for the signage to advertise local events, business activities, elections, and the like, but they are also charged with regulating the temporary signs to prevent their excessive use, often to preserve community character.

According to a recent survey of local governments, more than 80 percent of respondents stated that staff enforcement of their temporary sign regulations was one of their community's biggest issues, and almost a third responded that content neutrality—the regulation of signs without consideration of the content of the sign message—was an ongoing issue (Moeller 2015). A more in-depth review of the responses showed that even those communities that did not feel content neutrality was an issue had some level of content regulation in their existing sign regulations, most often the regulation of real estate or election signs. This is particularly noteworthy, given that the

regulation of a sign's content was the subject of the U.S. Supreme Court's June 2015 ruling in *Reed v. Town of Gilbert, Arizona*, a case with a number of ramifications for sign regulations across the country.

This article summarizes the ruling in *Reed* and introduces how it impacts a core aspect of temporary sign regulations, which is how we define signs. This is followed by the best practices communities can utilize to help regulate temporary signs in a post-*Reed* America.

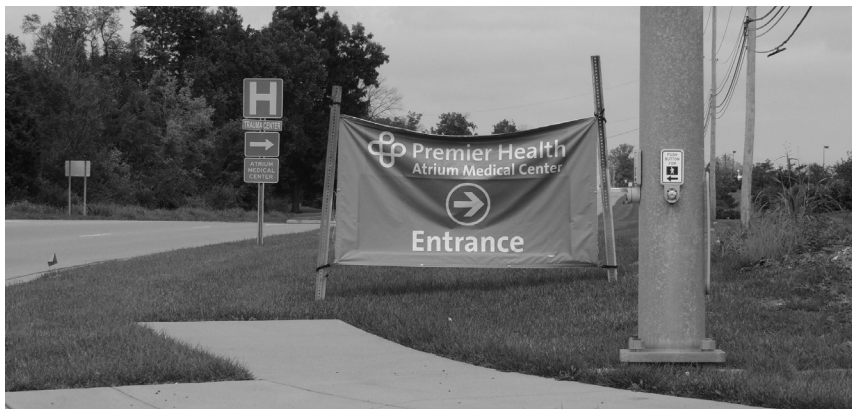
REED V. TOWN OF GILBERT, ARIZONA

The U.S. Supreme Court's decision in *Reed v. Town of Gilbert* on June 18, 2015, is, undoubtedly, the most definitive and far-reaching statement that the Court has ever made regarding the day-to-day regulation of signs. While the sign code provisions challenged in *Reed* involved only the regulation of temporary noncommercial signs, the Court's 6–3 majority

decision, written by Justice Clarence Thomas, likely applies to the regulation of permanent signs as well as temporary signs, business signs as well as residential signs, and possibly, on-site versus off-site signs.

The rules that Justice Thomas announced in *Reed* could not be more straightforward. A sign regulation that “on its face” considers the message on a sign to determine how it will be regulated is content-based. Justice Thomas emphasized that if a sign regulation is content based “on its face” it does not matter that the government did not intend to restrict speech or to favor some category of speech for benign reasons. He wrote: “In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral.” Further, a sign regulation that is facially content neutral is also a content-based regulation if it is justified by—or that has a purpose related to—the message on a sign. For example, a code provision that allows more lawn signs between mid-August and mid-November would be facially content neutral but might be challenged as being justified by or have a purpose related to allowing “election campaign” messages.

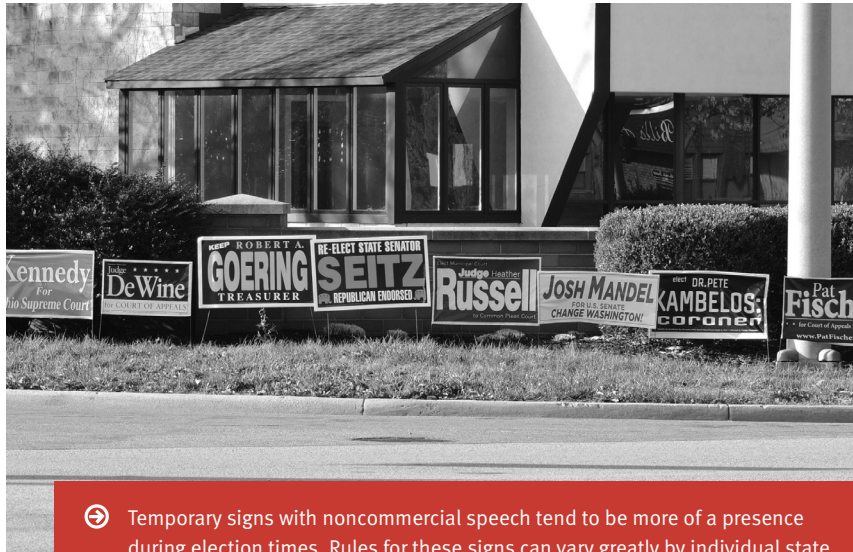
Whether content-based “on its face” or content neutral but justified in relation to content, Justice Thomas specified that the regulation is presumed to be unconstitutional and will be invalidated unless the government can prove that the regulation is narrowly tailored to serve a compelling governmental interest. This is known as the “strict scrutiny” test and few, if any, regulations survive strict scrutiny. This may be particularly true in regard to sign regulations, given that a number of federal courts have previously ruled that aesthetics and traffic safety, the “normal” governmental



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Temporary signs are an important tool for businesses and residential uses alike, so it is important to have reasonable rules for temporary signs in your land-use regulations.



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interests supporting sign regulations, are not “compelling interests.”

Justice Thomas’s opinion calls into question almost every sign code in this country: Few, if any, codes have no content-based provisions under the rules announced in *Reed*. For example, almost all codes contain content-based exemptions from permit requirements for house nameplates, real estate signs, political or election signs, garage sale signs, “holiday displays,” etc. Almost all codes also categorize temporary signs by content, and then regulate them differently. For example, a real estate sign can be bigger and remain longer than a garage sale sign. Or the code allows the display of more election signs than “ideological” or “personal” signs, but the election signs must be removed by a certain number of days after the election, while the personal or ideological signs can remain indefinitely.

Many sign codes also have content-based provisions for permanent signs. Because the *Reed* rules consider “speaker-based” provisions to be content based, differing treatment of signs for “educational uses” versus “institutional uses” versus “religious institutions” could be subject to strict scrutiny. The strict scrutiny test could also apply for differing treatment of signs for “gas stations” versus “banks” versus “movie theaters.”

Reed does not, however, cast doubt on the content-neutral “time, place, or manner” regulations that are the mainstay of almost all sign codes, provided they are not justified by—and do not have a purpose related to—the

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message on the sign. Justice Thomas acknowledged that point, noting that the code at issue in *Reed* “regulates many aspects of signs that have nothing to do with a sign’s message: size, building materials, lighting, moving parts and portability.” Justice Alito’s concurring opinion, joined by Justices Kennedy and Sotomayor, went further.

While disclaiming he was providing “anything like a comprehensive list,” Justice Alito noted “some rules that would not be content based.” These included rules regulating the size and location of signs, including distinguishing between building and freestanding signs; “distinguishing between lighted and unlighted signs”; “distinguishing between signs



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with fixed messages and electronic signs with messages that change”; distinguishing “between the placement of signs on private and public property” and “between the placement of signs on commercial and residential property”; and rules “restricting the total number of signs allowed per mile of roadway.”

But Justice Alito also approved of two rules that seem at odds with Justice Thomas’s “on its face” language. Alito claimed that rules “distinguishing between on-premises and off-premises signs” and rules “imposing time restrictions on signs advertising a one-time event” would be content neutral. But rules regarding “signs advertising a one-time event” clearly are facially content based, as Justice Kagan noted in her opinion concurring in the judgment, and the same claim could be made regarding the on-site/off-site distinction. Further, neither Justice Thomas nor Justice Alito discussed how courts should treat codes that distinguish between commercial and noncommercial signs, a point raised by Justice Breyer in his concurring opinion.

In fact, the lower federal courts are already dealing with claims that codes that differentiate between commercial and noncommercial signs or that regulate on-site and off-site signs differently are content based and

subject to strict scrutiny. To date, only one federal district court has accepted the claim that the on-site/off-site distinction is content based under *Reed*, with several other courts rejecting that claim. No decision to date has extended the *Reed* decision to include the regulatory distinction between signs bearing commercial versus noncommercial messages.

Keep in mind, however, that even content-neutral “time, place, or manner” sign regulations are subject to intermediate judicial scrutiny rather than the deferential “rational basis” scrutiny applied to regulations that do not implicate constitutional rights such as freedom of expression or religion. Intermediate scrutiny requires that a government demonstrate that a sign regulation is narrowly tailored to serve a substantial government interest and leaves “ample alternative avenues of communication.” Because intermediate scrutiny requires only a “substantial,” rather than a “compelling,” government interest, courts are more likely to find that aesthetics and traffic safety meet that standard. That said, courts have struck down a number of content-neutral sign code provisions because the regulations were not “narrowly tailored” to achieve their claimed aesthetic or safety goals.

REGULATORY BEST PRACTICES

There are a number of comprehensive sign regulations that have been crafted over the years that can serve as a good starting point when considering an update to your own sign regulations. In this post-*Reed* time, many communities are rethinking their approach to signs, and over the course of the next year, we are likely to see new models that better respond to the direction of the Supreme Court. The problem with temporary signs is they are a small, but integral, part of overall sign regulations. This, along with the fact that there are variable state rules related to certain temporary signs (e.g., election signs), makes it difficult to create a model temporary sign code that can stand on its own and be seamlessly added to a community’s sign regulation. However, there are a number of general best practices for the regulation of temporary signs in light of *Reed*.

Distinguish Between Temporary Sign and Temporary Message

Few sign regulations make a clear distinction between a temporary message and a temporary sign. A temporary sign is where the entire sign structure is either fully portable or



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➡ Communities can still regulate the types of signs allowed (e.g., A-frame signs or blade signs), setbacks, size, and other structure type requirements.

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is not intended to be permanently installed. A temporary message is where the sign structure itself is permanent but the message may be temporary. The most common types of temporary messages we see in communities are electronic message centers and manual reader boards. In such cases, the sign should be regulated as a permanent structure but the

community might control how often the message may change. While these examples seem straightforward, the line between the two can be a bit blurred. An example of this situation is when business owners or communities hang banners or other signs on light poles or similar structures. To address this issue, the community should consider the supporting structure and whether it is designed in a manner to accommodate the message, even though it may be changed out through the year. A community’s banner signs attached to light poles are an excellent example where the light poles are designed with permanent fixtures on which the banners are hung. In these instances, the community should regulate the light pole, and any related fixtures that support the message, as a permanent structure with allowable temporary messages, rather than regulating it as temporary sign.

Think of the Bigger Picture

Reed may have related to an issue with a temporary sign, but the ruling has implications for all sign regulations. Generally speaking, it is impractical to completely separate out all the rules that apply to temporary signs as a distinct set of regulations. Consequently, when you consider overhauling how you regulate temporary signs, it is important to step back and take a comprehensive look at the overall sign code. First, given the implications of *Reed*, communities should take a look at all of their sign regulations to see where they may be regulating content, and consider if they are making a large number of exemptions to accommodate various types of signs. Second, one of the major driving forces of your sign regulations should be the purpose statement that sets clear direction for how and why a community regulates signs. This purpose statement needs to apply to all the different sign types, not just to temporary signs. Furthermore, your community might consider that if one of the purposes of the sign regulations is to promote businesses but limit temporary signs, then perhaps a better approach is to consider allowing more temporary messages on a permanent sign. Finally, evaluating your sign regulations as a whole will help you identify where you might have conflicts, such as allowing for larger temporary signs over permanent signs or making various exceptions based on content or permanency.

Consider the Sign’s Location

There is a long list of temporary sign types,

GLOSSARY

The following is a sampling of some of the most common content-neutral temporary sign types.

A-Frame Signs (aka Sandwich Board Signs or Sidewalk Signs)

A freestanding sign ordinarily in the shape of an “A” or some variation thereof, which is readily moveable and not permanently attached to the ground or any structure. See also the definition of *T-frame signs*.

Air-Activated Graphics

A sign, all or any part of, which is designed to be moved by action of forced air so as to make the sign appear to be animated or otherwise have motion.

Balloon Signs (aka Inflatable Devices)

A sign that is an air-inflated object, which may be of various shapes, made of flexible fabric, resting on the ground or a structure and equipped with a portable blower motor that provides a constant flow of air into the device. Balloon signs are restrained, attached, or held in place by a cord, rope, cable, or similar method. See also the definition for air-activated graphics.

Banner Signs

A temporary sign composed of cloth, canvas, plastic, fabric, or similar lightweight, nonrigid material that can be mounted to a structure with cord, rope, cable, or a similar method or that may be supported by stakes in the ground.

Blade Sign (aka Feather Signs, Teardrop Signs, and Flag Signs)

A temporary sign constructed of cloth, canvas, plastic fabric, or similar lightweight, nonrigid material and supported by a single vertical pole mounted into the ground or on a portable structure.

Freestanding/Yard Signs

Any permanent or temporary sign placed on the ground or attached to a supporting structure, posts, or poles, that is not attached to any building.

Pennants

A triangular or irregular piece of fabric or other material, whether or not containing a message of any kind, commonly attached by strings or strands, or supported on small poles, intended to flap in the wind.

People Signs (aka Human Mascots, Sign Spinners, and Human Signs)

A person, live or simulated, in the public right-of-way who is attired or decorated with insignia, images, costumes, masks, or other symbols that display commercial messages with the purpose of drawing attention to or advertising for an on-premise activity. Such person may or may not be holding a sign. [Note: There is significant debate about whether a people sign is really a sign or whether

they can be regulated by zoning, especially in light of *Reed*. Many communities still regulate these signs, but this requires special consideration.]

Portable Message Center Signs

A sign not permanently affixed to the ground, building, or other structure, which may be moved from place to place, including, but not limited to, signs designed to be transported by means of wheels. Such signs may include changeable copy.

Snipe Signs (aka Bandit Signs)

A temporary sign illegally tacked, nailed, posted, pasted, glued, or otherwise attached to trees, poles, stakes, fences, or other objects.

T-Frame Signs

A freestanding sign ordinarily in the shape of an upside down “T” or some variation thereof, which is readily moveable and not permanently attached to the ground or any structure. See also the definition for A-frame signs.

Vehicle Signs

Any sign permanently or temporarily attached to or placed on a vehicle or trailer in any manner so that the sign is used primarily as a stationary sign.

and each community has its own preferences for what types of signs it wants to allow. When determining what sign types to allow in your community, be sure to consider the character of the area or zoning district where you are allowing the signs. In downtown and pedestrian-focused areas, banners and sidewalk signs are far more prevalent; larger temporary signs, such as yard signs, blade signs, and banners, are more common along high-traffic areas and in more suburban or rural areas. When it comes to historic districts or other unique areas, it is not that uncommon to see a complete prohibi-

tion of temporary signs other than those that might be posted in a window or a banner attached to a building. With an increasing focus on regulating the character of land use, such as in form-based codes, there is more opportunity to write sign regulations specific to the form of development.

Specify Temporary Sign Allowances

It is not realistic or advisable to recommend that a community simply allow “X” amount of sign area and let a property owner determine how much of that area should be utilized for

permanent or temporary signs. It may look like the easiest of solutions, but it ends up being an administrative nightmare for staff. Every time the owner increases or decreases the amount of temporary signs, there is a possibility of creating nonconforming sign issues or, more likely, eliminates all possibility of temporary signs if the owner spends the allowance completely on permanent signs. The latter issue becomes a problem when there is a legitimate need for a temporary sign in a situation where, for example, the property is for sale. Most communities do not want to take an ex-

treme approach of even appearing to prohibit all temporary signs, which they would have to do in the case of a business owner using their full sign allocation for permanent signs. A more reasonable solution is to establish a certain sign area allowance for permanent signs and a separate allowance for temporary signs. The community can then specify what types and numbers of signs are allowed, based on structure type and not content, along with any specific regulations for the individual sign types.

As far as an allowance for temporary signs goes, this is going to vary based on the individual vision and goals of the community. Some communities may want to be very permissive in the amount of signs but hold strict to the types of signs allowed, while others might restrict the amount of sign area permitted but allow for the signs to be posted for longer periods of time. One approach to consider is allowing a limited amount of temporary commercial signage that could be allowed year round but strictly control the permissible types of signs (e.g., banners and yard signs). This allowance will accommodate signs used for real estate, garage sales, and other commercial activities that may be necessary for longer stretches of time or that are often exempted because of their prevalence. Keep in mind, the allowances and types of signs may vary based on the zoning district or neighborhood. This provision could then be supplemented by allowing for some additional temporary signage for a specified number of

days and a set number of occurrences per year. This supplemental signage might provide for other types of temporary signage (e.g., balloon signs, portable signs, additional yard signs, etc.), but the time limits will keep them from becoming permanent signs. In all instances, the community should provide basic requirements for each type of sign, including setbacks, maximum heights, maximum numbers, and separation distances.

Consider Allowing Off-Premise Temporary Signs

Many localities prohibit all off-premise signs. These prohibitions are typically related to a desire to prohibit or at least limit billboard signs. The problem with such prohibitions is that temporary signs often contain off-premise content, such as the advertisement of community events or even certain directional signs. It should be clear at this point that regulating a sign by its content (e.g., real estate signs, directional signs, etc.) is problematic because of *Reed*, but, as noted in the discussion above, there is still a question of whether the ruling also prevents communities from making the distinction between on-premise and off-premise signs.

Consequently, communities are starting to consider whether it is worth the risk to make such a distinction. In order to be as content neutral as possible, some localities are focusing more on the type and size of sign to control

where and how a billboard-style sign might be allowed. Ultimately, a community should consider how people are using temporary signs and determine whether it is appropriate or not to make an on- versus off-premise distinction, especially related to temporary signs. As with any regulation, there is a balancing act of the risk of being challenged versus the benefit of the requirement.

Leave Room for Interpretation

If someone proposes a new type of sign that your regulations may not clearly address, incorporate some language that allows staff to determine if the new sign type is similar in nature to a sign you do regulate, and treat the new sign in the same manner. An example of this is treating a temporary adhesive wall sign in the same manner as a banner that can be attached to a facade. If that doesn't address the sign, the community might have to consider a text amendment to incorporate the new sign type specifically.

ADMINISTRATIVE BEST PRACTICES

The administration of sign regulations is quite often the bane of a planner's existence. A lot of the frustration is often focused on temporary signs and whether to require a permit, establish deadlines, and then enforce those deadlines and any sign-specific regulations. As mentioned earlier, administration and enforcement continues to be a major issue for the vast majority of communities surveyed as part of the research into these best practices. To combat these issues, communities are beginning to take a multipronged approach that focuses on the use of technology, ease of enforcement, and public outreach.

Take Advantage of Technology

Communities can use readily available software to help aid permitting and enforcement of temporary sign regulations, especially deadlines for sign removal. For smaller communities, this might mean using online or free calendar applications that will alert staff to when they need to inspect to determine if a sign has been removed. For larger communities, there are numerous permitting software packages that accommodate online permitting applications that require little to no administrative time. These same packages can also alert staff to specific issues, such as deadlines or application requests that exceed signage allowances for a particular site.



While it is necessary to avoid regulating the content of a sign, it is still possible to control temporary signs by the type of structure, such as this portable message center.



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Seasonal businesses rely heavily on temporary signage that may be in place for extended periods of time.

Enforce Fairly and Consistently

Given that few localities have staff focused exclusively on proactively identifying code violations, most zoning enforcement is complaint driven. To counter this issue, communities should always consider what their enforcement capabilities are when writing any zoning requirement, especially as it relates to signs. Consider whether there are other staff members, outside the planning and zoning department, who could be trained and authorized to assist in enforcement, if necessary. Finally, make sure that your regulations can be fairly and consistently enforced. This can reduce the potential for conflict associated with selective enforcement, and it also tends to lead to better compliance because temporary sign users become increasingly aware of the implications of overstepping the requirements.

Educate Residents and Business Owners

Communities are finding success with administration and enforcement by proactively reaching out to businesses and residents with educational brochures or workshops related to sign regulations to ensure a clear understand-

ing of expectations and requirements. Not all business owners are aware that communities have temporary sign regulations and can risk losing money by investing in the wrong type of sign. Proactive outreach activities allow the communities to educate those owners and possibly save them time.

CONCLUSIONS

Temporary signs have long been a difficult aspect of zoning regulations. Communities want to reasonably control them, but the administrative and enforcement aspects of these ever-changing structures can pose problems, especially when the content comes into play. The *Reed* case provided a response to one element of sign regulations but still leaves some questions. At the same time, the case has also provided communities a very good reason for reevaluating how and why they regulate signs and what changes need to be made to focus on the structure rather than the content.

This article is based in part on the Signage Foundation, Inc. report Best Practices in Regulating Temporary Signs.

Resources

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ARE YOUR SIGN REGULATIONS
CONTENT NEUTRAL?

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