



The First Amendment and Your Town's Sign Regulations *Addressing Reed v. Town of Gilbert Step-by-Step*

1. KNOW THE ISSUE AND WHY YOU SHOULD CARE

In *Reed v. Town of Gilbert**, the US Supreme Court established a bright-line test to determine when a sign regulation violates the First Amendment. *Please take note: this is a big deal!* Based on *Reed*, it is nearly certain that at least some aspect of your sign ordinance is unconstitutional and illegal.**

2. REVIEW YOUR SIGN REGULATIONS: are they "content-based"?

A. **Review now!** If you DO NOT HAVE STAFF, you should review your sign regulations as soon as possible to identify potential First Amendment violations. If you DO HAVE staff, you should direct them to do so. Alternatively, you could of course bring *Reed* to the attention of your legal counsel and request that he or she conduct the review.

B. **Use the test.** For purposes of conducting an initial review of your sign regulations, you can use a short-hand version of the *Reed* test. To do so, read each and every regulation related to signs in your Zoning Ordinance or Code and ask yourself this question:

✓ **Do I need to READ the sign in order to know whether or how this regulation applies?**

✓ **If the answer is YES, the regulation is most likely unconstitutional and illegal.** (Why? Because it is most likely a "content-based" restriction on free speech and, therefore, subject to "strict scrutiny" review which means a court will very likely consider it an unconstitutional restriction on free speech).

If you need to read the sign in order to determine whether your regulation applies, the regulation is most likely unconstitutional and illegal.

C. **Consult your legal counsel.** Your town's attorney will apply a more nuanced application of the test and may be able to identify regulations that may pass constitutional muster.

3. AMEND YOUR SIGN REGULATIONS: make them "content-neutral". Before starting:

First: Review "Sign Ordinance Drafting Tips" on page 3.

Second: Determine your level of comfort.

- A conservative approach would eliminate any and all *content-based* restrictions.
- A riskier approach could maintain some commercial/non-commercial content-based restrictions, including for example on-site/off-site regulations.

Third: Clarify your goal.

- Do you want to address only the specific concerns you identified in Step 2?
IF SO, PROCEED TO OPTION #1
--OR--
- Do you want to take this an opportunity to revise your sign regulations entirely?
IF SO, PROCEED TO OPTION #2

OPTION #1: MAKE TARGETED REVISIONS to help your ordinance survive a First Amendment challenge.

A. Simple changes you can make:

- Include a purpose statement that identifies:
 - traffic safety and aesthetics as purposes of your sign regulations;
 - goals of your master plan that will be furthered by the sign regulations; and, if possible,
 - studies that draw the connection between sign clutter and vehicle accidents.
- Include a “message substitution clause” that allows the copy on any sign to be substituted with noncommercial copy.
- Include a severability clause to increase the likelihood that your ordinance will be upheld in litigation, even if certain provisions are not upheld.

B. Additional strategies/changes. Provide that:

The key is to tie the additional sign allowance to the use of the property, rather than the content of the sign.

- Every property has a designated amount of square feet of signage that they can use for any temporary signs on their property, year round. For example:
 - [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and perhaps with spacing of signs from one another.
- All properties get additional noncommercial signs at certain times (for example, before an election) or in connection with activities taking place on the property (for example, a home for sale or a special event).
- Additional sign area is allowed for particular uses, such as a property with a drive-through service window.

OPTION #2: MAKE COMPREHENSIVE REVISIONS.

If you decide to use the review necessitated by *Reed* as an opportunity to revise and update all of your sign regulations (and why not? it’s the perfect time to do so), there are at least two model ordinances that you can use as a starting point:

- ❖ APA Model Ordinance. The “Street Graphics Model Ordinance” can be found in Street Graphics and the Law, Fourth Edition (2015), PAS Report 580, published by the American Planning Association, available for purchase on-line here: <https://planning.org/publications>. *Recommended!*
- ❖ IMLA Model Ordinance. The International Municipal Lawyers Association is preparing its own model ordinance. Consult your legal counsel for more information.
- ❖ The Town of Warner, NH, adopted revised sign regulations in March, 2016. The revisions were crafted as a response to *Reed* and could be used as a *New Hampshire-specific* model for use as a starting point. See Article XII of the Town’s Zoning Ordinance, available on-line here: <http://www.warner.nh.us/index.php?page=pubs>

*The full citation is *Clyde Reed, et al, v. Town of Gilbert, Arizona, 135 S.Ct. 2218, __ U.S. __ (2015)*.

**For a detailed discussion of *Reed v. Gilbert* and *pre-Reed* case law regarding First Amendment challenges to municipal signs ordinances, see Free Speech Law for On Premise Signs, 2016 Revised Edition, Daniel R. Mandelker, published by the United States Sign Council, available on-line at www.ussc.org. See also Chapter 11 (“Street Graphics and Free Speech Issues”) of Street Graphics and the Law, referenced in Step 5 above.

SIGN ORDINANCE DRAFTING TIPS

The goal: make your sign regulations *as content neutral as possible!*

1. Include purpose statement, or revise if existing.
 - Specifically tie purpose of sign regulations to Town's interests in aesthetics and traffic safety. Reference Master Plan goals.
2. Regulate signs by *zoning* and *land use*, not content.
3. Remember that non-commercial speech has the most constitutional protection. So:
 - Treat all forms of non-commercial speech equally (do not bother creating categories for different types of non-commercial speech!)
 - NEVER treat commercial speech more favorably than non-commercial speech.
 - Include a clause in your ordinance to allow any commercial sign to be substituted with a non-commercial message.
4. Keep in mind the unknowns:
 - It's not clear whether the *Reed* test applies to **commercial signs**, which have historically been subject to the lower intermediate scrutiny standard.
 - A "*Reed*-proof" ordinance would eliminate **all** regulations that control the **content** of **any** sign.
 - The Supreme Court specifically ruled in *Metromedia v. San Diego* (US, 1981) that ordinances banning **signs advertising off-site uses** are subject to intermediate scrutiny. It is not clear whether off-site advertising bans are now subject to strict scrutiny.
 - A "*Reed*-proof" ordinance would eliminate any distinction between on-site and off-site advertising.
5. Most importantly - ***don't be the Town of Gilbert!***
 - Make sure all of your regulations are fully supportable.
 - At a minimum, be prepared to demonstrate or explain how the regulation actually furthers the Town's alleged interest in enacting the regulation.