

# ATTACHMENT A

## Consultant Memo



# WEISS SEROTA HELFMAN COLE & BIERMAN

AT THE CROSSROADS OF BUSINESS, GOVERNMENT & THE LAW

## MEMORANDUM

To: Leslie Del Monte, Planning Manager  
Doug Gonzales, City Attorney

From: Susan L. Trevarthen

Date: September 28, 2018

Re: Revisions to the City of Hollywood Sign Regulations

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As outside counsel for the City on land use and zoning matters, I was asked to review the City sign code and propose changes following recent court decisions that have significantly changed the way in which local governments can regulate signage.

The following memo explains the applicable legal standards, explains why the City needs to review the legality of its sign regulations at this time, describes the currently proposed revisions.

### Legal Background

Signs are protected under the free speech guarantees of the First Amendment of the U.S. Constitution. Therefore, local government sign regulation must conform to the First Amendment. The regulations cannot vary based on the content of speech that the sign is intended to express, and cannot favor or punish points of view or topics. "Content-based" regulation is presumptively unconstitutional; strict scrutiny applies, and must be justified by a compelling governmental interest. If a sign regulation is content-based on its face, its purpose, its justification and its function does not matter. If it is content neutral, then these factors can be considered in evaluating the constitutionality of the regulation. However, the courts have been unclear about exactly how to determine whether a particular regulation is "content-based."

Sign regulations must be narrowly tailored to achieve the City's governmental purposes for regulating signs, which can be generally characterized as aesthetics and traffic safety. The regulations must not be substantially overbroad, exceeding the scope of the governmental

interests justifying regulation. But they also must not be substantially under-inclusive, so narrow or exception-ridden that the regulations fail to further the governmental interests.

The permitting criteria and timeframes must meet strict requirements as a prior restraint on speech. And the regulations of commercial signage cannot be looser than those for noncommercial signage, because noncommercial speech is more highly protected by the First Amendment.

A 2015 U.S. Supreme Court case (*Reed v. Town of Gilbert*) places greater limitations on how much the City's sign regulations can be tailored based on the functions or content of various sign types. The case arose from a temporary sign category allowing a number of small directional signs to be briefly placed in the right of way prior to and following a special event of a nonprofit entity, in order to guide drivers to the location of the event. This categorical sign type was used by a small itinerant church, led by Pastor Reed, to publicize its church services at various locations including elementary schools and nursing homes. The Town of Gilbert cited the church for placing signs that failed to comply with the regulations for this sign type, because they were too large, were posted for too long, and did not contain directional content.

Pastor Reed and the church sued because the Gilbert code treated these event directional signs differently from other noncommercial signs, and allowed temporary signs related to elections in the right of way and permanent ideological signs on private property to be larger and to be posted for a longer time. The June 2015 *Reed* opinion modifies prior Supreme Court precedent in holding that government regulation of speech is "content-based" if a law applies to particular speech because of the topic discussed or the idea or message expressed. The majority opinion of the Court was delivered in an opinion by Justice Thomas, but three of the six justices who joined his opinion also joined a more narrow concurring opinion by Justice Alito.

The two opinions differ in some aspects; read together as the holding of the case, they suggest that a regulation creating a category for a purely directional message, which merely gives "the time and location of a specific event," is one that "conveys an idea about a specific event" and may be considered content-based. Sign regulations tied to the identity of the speaker may be content-based. Event-based sign regulations may also be considered content-based. However, tying a signage opportunity to the timing of an event, without specifying that the sign content must relate to the event, may be more defensible. If regulations are content-based, then they must be justified by a compelling governmental interest, regardless of whether the governmental motive was innocent and not intended to censor speech.

Justice Thomas' opinion held that, even assuming that aesthetics and traffic safety were compelling governmental interests, the Gilbert regulation was under inclusive and was not

narrowly tailored enough to advance these governmental interests and thereby satisfy strict scrutiny. It noted that certain signs that may be essential to guide traffic or to identify hazards and ensure safety for vehicles and pedestrians might well survive strict scrutiny.

Justice Alito's opinion states that "Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives." It assures local governments that *Reed* does not affect their continued ability to regulate based on key distinctions:

- Commercial signs vs. noncommercial signs
- Off-premise signs vs. on-premises signs
- Temporary vs. permanent signs
- Regulation by zoning district and land use
- Regulation by whether the message is changeable or static
- Regulation of size, placement, spacing, illumination, fabrication and other physical criteria
- Governmental signs on governmental property, including traffic control devices, are not affected by the First Amendment, and can be controlled in the broad discretion of the City, apart from the revised sign regulations. Private signs are not required to be allowed on governmental property.

Thus, billboard/off-premise sign regulations remain valid. Also, private covenants and regulations that may address signage on private property and common areas were unaffected by *Reed*.

Court decisions in the years since *Reed* have followed the *Reed* decision and provided additional clarity but also made it clear that local governments should make changes. Most sign codes in Florida, and across the country, fail to meet all of the requirements of *Reed* and other applicable caselaw. City staff have also identified several aspects of the regulations that need clarification or revision from their perspective, and their policy driven changes are addressed in the Staff memo for this item. Thus, we have worked with City staff to develop and recommend revisions to the City's sign regulations as outlined below.

### **Revisions to City Sign Regulations**

The ordinance repeals the existing sign code Article 8 and creates a replacement, and it amends the relevant definitions in Article 3. From a policy perspective, the draft starts from

the existing standards of the Code, and supplies additional standards or revises them where recommended by staff or required by caselaw.

Changes to the legislative intent, scope and purpose of the Article are legally necessary to better articulate the compelling and substantial governmental interests that justify the regulation of signs: traffic safety and preserving aesthetics. The changes specifically reference and respond to the governing caselaw, and articulate that the requirement for local government sign regulation in Florida Statutes, the Florida Constitution's protection of scenic beauty, and the relevant goals, objectives and policies of the City's comprehensive plan—all factors that were missing from the *Reed* decision, and all presenting compelling governmental interests supporting sign regulation in Florida in the event of challenge.

Organizational changes are proposed, and strict procedures have been added to comply with constitutional prior restraint requirements applicable to sign permits. In order to address changing conditions as the City continues to develop, additional changes are outlined in the Staff's memo.