

# New York Law Journal

## Real Estate Trends

WWW.NYLJ.COM

VOLUME 254—NO. 101

An ALM Publication

WEDNESDAY, NOVEMBER 25, 2015

### ZONING AND LAND USE PLANNING

# Ruling Against Sign Code Has Implications for New York

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**N**ear the end of its term in June, the U.S. Supreme Court issued a decision in *Reed v. Town of Gilbert*<sup>1</sup> that is likely to require a great deal of attention by local governments throughout New York.

In *Reed*, the court reversed a decision by the U.S. Court of Appeals for the Ninth Circuit and ruled that an Arizona town's comprehensive code (the "sign code") governing the manner in which people could display outdoor signs was unconstitutional.

At least one New York court, in a case filed before the court's decision, already has cited *Reed* to strike down a town's sign ordinance.<sup>2</sup> It seems clear, therefore, that *Reed* should be used as a guide by any municipal official in New York intent on developing a sign ordinance as well as by local authorities here who will need to review and possibly modify their existing laws.

#### Background

The sign code adopted by the town of Gilbert, Arizona, prohibited the display of outdoor signs anywhere within the town without a permit, except for various categories of signs specifically exempted from that requirement.

One exempt category of signs was "ideological sign[s]," including any "sign communicating a message or ideas for noncommercial purposes that is not a construction sign, directional sign, temporary directional sign relating to a qualifying event, political sign, garage sale sign, or a sign owned or required by a governmental agency." The sign code allowed these so-called ideological signs to be up to 20 square feet in area and to be placed in all zoning districts without time limits.

A second exempt category was "political sign[s]," including any "temporary sign designed to influence the outcome of an election called by a public body." The sign code treated these signs less favorably than ideo-



**A roadside sign** for worship services of Good News Presbyterian Church in Gilbert, Arizona.

logical signs; it allowed the placement of political signs up to 16 square feet on residential property and up to 32 square feet on non-

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residential property, undeveloped municipal property, and rights-of-way. These signs could be displayed up to 60 days before a primary election and up to 15 days following a general election.

A third exempt category was "temporary directional signs relating to a qualifying event," including any "temporary sign intended to direct pedestrians, motorists, and other passers-by to a 'qualifying event'" (emphasis deleted). A "qualifying event" was defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational,

or other similar non-profit organization." The sign code treated temporary directional signs even less favorably than political signs: Temporary directional signs could be no larger than six square feet; they could be placed on private property or on a public right-of-way but no more than four signs could be placed on a single property at any time; and they could be displayed no more than 12 hours before the "qualifying event" and no more than one hour afterward.

The sign code was at the heart of the *Reed* case, which arose after Good News Community Church placed signs around the town of Gilbert to advertise the time and location of its Sunday church services. The town's sign code compliance manager cited the church for violating the sign code and the church sued, arguing that the sign code abridged its freedom of speech in violation of the First and Fourteenth Amendments.

The U.S. District Court for the District of Arizona granted summary judgment in favor of the town and the Ninth Circuit affirmed, holding that the sign code's sign categories were content neutral. The circuit court concluded that "the distinctions between temporary directional signs, ideological signs, and political signs... are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign." In light of that determination, it applied a lower level of scrutiny to the sign code and concluded that the law did not violate the First Amendment.

The Supreme Court granted certiorari, and reversed.

#### Supreme Court's Decision

In the majority decision,<sup>3</sup> the court explained 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. As the court observed, content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and can be

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justified only if the government can prove that they are narrowly tailored to serve compelling state interests.

The court then easily found that the sign code was content-based on its face given that the church's signs inviting people to attend its worship services were treated differently from signs conveying other types of ideas. The crucial aspect of the majority's decision with respect to its content-based analysis may be its consideration—and its rejection—of several theories that had been offered by the Ninth Circuit in support of its conclusion that the sign code was content neutral.

First, the Ninth Circuit had determined that the sign code was content neutral because the town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." The court explained that this analysis skipped the "crucial first step" in the content-neutrality analysis: determining whether the law is content-neutral on its face. According to the court, "[i]nnocent motives" did not eliminate the danger of censorship presented by a facially content-based statute, as "future government officials may one day wield such statutes to suppress disfavored speech." Discriminatory treatment, according to the court, was not suspect under the First Amendment only when the Legislature intended to suppress certain ideas.

Second, the Ninth Circuit had decided that the sign code was content neutral because it did "not mention any idea or viewpoint, let alone single one out for differential treatment," and that it made "no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted."

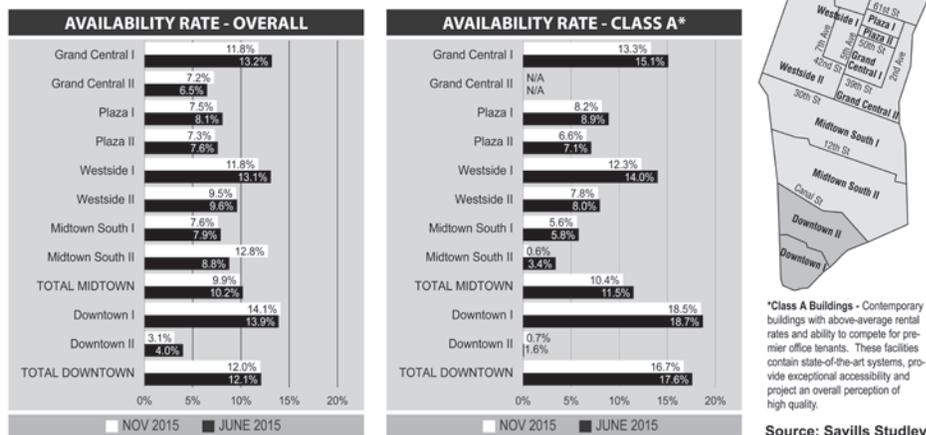
However, according to the court, a speech regulation targeted at specific subject matter was content-based even if it did not discriminate among viewpoints within that subject matter. The sign code gave ideological messages more favorable treatment than messages concerning a political candidate, which were given more favorable treatment than messages announcing an assembly of like-minded individuals, the court said. That was "a paradigmatic example of content-based discrimination," the court ruled.

Finally, the Ninth Circuit had characterized the sign code's distinctions as turning on "the content-neutral elements of who is speaking through the sign and whether and when an event is occurring." The court found that analysis "mistaken on both factual and legal grounds."

The court pointed out that the sign code's restrictions for political, ideological, and temporary event signs applied equally no matter who sponsored them—and that the sign code's distinctions did not hinge on "whether and when an event is occurring." As the court noted, the sign code did not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example.

Instead, it required town officials to determine whether a sign was "designed to influence the outcome of an election" (and thus was "political") or merely was "communicat-

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ing a message or ideas for noncommercial purposes" (and thus was "ideological"). That "obvious content-based inquiry" did not evade "strict scrutiny" simply because an event such as an election was involved, according to the court.

Having concluded that the sign code imposed content-based restrictions on speech, the court applied strict scrutiny, and easily determined that the sign code had to be struck down. The court was not persuaded by the town's arguments that preserving the town's aesthetic appeal and traffic safety were two compelling governmental interests that allowed the sign code to withstand review.

### Options

*Reed* contained a number of suggestions for local governments interested in enacting effective sign laws.

For example, the majority opinion observed that there are "ample content-neutral options available to resolve problems with safety and aesthetics." As the majority opinion pointed out, a sign law may regulate many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. The majority also said that, on public property, a town "may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner."

Moreover, according to the majority, a sign ordinance "narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers," such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses, "well might survive strict scrutiny."

In his concurrence, in which Justices Anthony Kennedy and Sonia Sotomayor joined, Justice Samuel Alito, Jr., cited the following rules that, at least in the opinion of these three justices, "would not be" content-based:

- rules regulating the size of signs;
- rules regulating the locations in which signs may be placed;
- rules distinguishing between lighted and unlighted signs;

- rules distinguishing between signs with fixed messages and electronic signs with messages that change;

- rules that distinguish between the placement of signs on private and public property;
- rules distinguishing between the placement of signs on commercial and residential property;

- rules distinguishing between on-premises and off-premises signs;

- rules restricting the total number of signs allowed per mile of roadway; and

- rules imposing time restrictions on signs advertising a one-time event.

### Conclusion

As political candidates and their supporters, individuals and businesses, and non-profit institutions including houses of worship become familiar with the decision in *Reed*, they are likely to seek to rely on the ruling to challenge local sign rules that, they believe, infringe on their First Amendment rights. In advance of the constitutional challenges that they are likely to face, it may be prudent for local governments to review their sign regulations and, where necessary, to adopt appropriate amendments.

1. *Reed v. Town of Gilbert*, 575 U.S. \_\_\_, 135 S. Ct. 2218 (2015).

2. See, *Marin v. Town of Southeast*, No. 14-CV-2094 (S.D.N.Y. Oct. 14, 2015).

3. Justice Clarence Thomas wrote the majority opinion, in which Chief Justice John Roberts, Jr., and Justices Antonin Scalia, Anthony Kennedy, Samuel Alito, Jr., and Sonia Sotomayor joined. Alito wrote a concurring opinion, in which Kennedy and Sotomayor joined. Justice Stephen Breyer filed an opinion concurring in the judgment. Justice Elena Kagan filed an opinion concurring in the judgment, in which Justices Ruth Bader Ginsburg and Breyer joined.