



Municipal Sign & Billboard Regulations

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Introduction

What is this presentation?

- A general overview of the constitutional implications of sign and billboard regulations. This is not legal advice and questions about your own regulations should be directed to Town Counsel.

What are signs and billboards?

- Definitions vary by ordinance / bylaw.
- Merriam Webster – “a display (as a lettered board or a configuration of neon tubing) used to identify or advertise a place of business or a product: a posted command, warning, or direction.”
- Black’s Law Dictionary- Billboard – “1. an announcement that identifies the sponsors of the advertising. It is shown at the end or the beginning of a program on TV or radio. 2. A large outdoor sign that is rented.”
- For our purposes - Signs are structures or structural elements that have both physical (size, shape, lighting, etc.) and constitutional dimensions (content – political, religious, business, etc.).

Can signs be regulated?

- Yes. As structures, the physical characteristics of signs, including size, type, number, duration and location, may be regulated by the local government of the community in which they will be sited.

Where does this regulating authority come from?

- The 10th Amendment to the Constitution (“Police power”) – *“The powers not delegated to the United States, nor prohibited by it to the states, are reserved to the States respectively, or to the people.”*
- Granted by Massachusetts to municipalities via the Zoning Act, MGL c. 40A.
- State oversight maintained via Attorney General review required by MGL c. 40 s. 32.



Sign Regulations & Police Power

- Sign regulations historically objected to from the 1940s to 1980s on the basis that they are an unconstitutional exercise of the police power because aesthetic judgments are subjective.
- Most state courts reject this argument, holding that “aesthetics alone” is a proper basis for land use regulation and apply a presumption of constitutionality to sign regulation, as is generally given to all municipal regulation of economic interests.
- Supported and affirmed by U.S. Supreme Court in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, (1984), holding it is “well-settled” that government may exercise its police powers to regulate aesthetic values.
- As such, as a proper exercise of the government’s police powers, sign regulations would generally be presumed constitutional if the government has a reasonable basis for enacting them, similar to the presumption of constitutionality given to other governmental regulation.



The Problem

- Although sign regulations are a proper exercise of a municipality's police powers, they often run afoul of the free speech protections provided by the U.S. and Massachusetts Constitutions.

The First Amendment to the U.S. Constitution

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The Massachusetts Constitution – Article XXI

“The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever. ”

- Sign litigation is common, expensive, and risky for municipalities.
 - Most sign ordinances contain at least a few provisions of questionable constitutionality.
 - Constitutionality of regulations is determined not only by wording but also by impacts on protected rights.
 - Facially neutral regulations can be unconstitutional if they have disparate impacts on protected classes or rights.



Common Regulatory Problems

- **Prohibitions** – often distinguish by content and have been struck down. Runyon v. Fasi, 762 F.Supp. 280 (D. Hawaii 1991).
- **Political messages** - ordinances that discriminated among different political messages are unconstitutional. Lakewood v. Colfax, 634 P.2d 52 (Colo. 1981).
- **Quantity** - Ordinances that place unreasonable limits on the number of signs that may be displayed have also been struck down. Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993).
- **Prior Restraints** – ordinances that prohibit the posting of a sign w/o government consent are often struck down due to selective application. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).
- **On v. Off premises signs** - sign regulations that distinguish between on-premise and off-premise signs often lead to serious legal problems because the regulations have the unintended and unconstitutional effect of placing greater restrictions on noncommercial signs than on commercial signs. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
- **Real Estate signs** – local government may not prohibit the use of temporary real estate signs in residential areas because such a prohibition unduly restricts the flow of information. Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977). Restrictions on the size, number, and location of real estate signs have been invalidated. Citizens United v. Long Beach, 802 F.Supp. 1 223 (D.N.J. 1992).
- **Public Property** – prohibiting only certain signs from being posted in public rights-of-way have also been struck down.
- **Vehicles** - ordinance prohibiting the placement of temporary noncommercial signs on vehicles while permitting vehicles to display temporary commercial signs has been struck down. Temporary signs containing both noncommercial and commercial on-premise messages must be allowed in residential and nonresidential areas. Gonzales v. Superior Court, 226 Cal. Rptr. 164 (Cal.App. 1986).
- **Alcohol, Tobacco, and Sexually Oriented Signs** – often struck down for being content related. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484.
- **Not stating the purpose of the regulation** – some courts have struck down regulations because they fail to provide adequate evidence demonstrating they further a particular, substantial government interest, and that they are sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression. Bell v. Stafford Township, 541 A.2d 692 (N.J. 1988).



Constitutional Limitations

- The Supreme Court Recognizes that this area of regulation is difficult.

“While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities’ police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs -- just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.”

City of Ladue v. Gilleo, 512 U.S. 43 (1994).

- Unfortunately this doesn’t mean that the Supreme Court it willing to simplify / clarify the rules surrounding what is and is not constitutional.



Free Speech Application

- The constraints presented by the First Amendment are complex because the Supreme Court has not developed a single standard of scrutiny or analytical “test” for determining when government regulation of “speech” violates the Constitution.
- Rather, the Courts review regulation of speech using several different “tests” that apply standards ranging from intermediate to strict scrutiny.
- Thus, the Courts will, for example, apply different tests to the specific circumstances surrounding a regulation to determine its constitutionality. The following would all be analyzed differently:
 1. A ban on all on-premise commercial signs;
 2. A ban on only on-premise noncommercial signs;
 3. A rule limiting on-premise commercial signs to one per building;
 4. A rule imposing no specific limits in regard to on-premise commercial signs but requiring the property owner to submit a “signage site plan” for approval by a planning or design review committee; and
 5. A rule obliging the property owner to submit the proposed sign “copy” for approval by a planning or design review committee.
- * Note - Some speech (i.e. obscenity, defamation, and fighting words) is not protected by the First Amendment.



Content Neutrality

The fundamental question the Courts consider in determining whether a regulation is constitutional is whether a sign regulation is “content neutral” because that determines what level of scrutiny the Courts will apply in their review.

- Truly content neutral regulations: are subject to “intermediate scrutiny” are presumed to be constitutional so long as there is a substantial governmental interest in doing so.

Example: Ward v. Rock Against Racism, 491 U.S. 781 (1989), where the Supreme Court determined that a NYC ordinance could require the city’s Department of Recreation to provide sound equipment and technicians for all concerts performed at a publically leased venue in order to control sound quality and prevent excessive noise.

- Content based regulations: are presumed to be unconstitutional and are subject to “strict scrutiny”. These regulations *may* be deemed constitutional if they serve a compelling governmental interest and use “the least restrictive means” to achieve their purpose.

Example: Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), where the Supreme Court agreed that San Diego could prohibit “commercial” billboards but not “noncommercial” billboards.



Content Neutral Regulations

Content-neutral regulations are regulations that apply to a particular form of expression (e.g., signs) regardless of the content of the message displayed or conveyed.

- The most common form of content-neutral regulations are so-called “time, place, or manner” regulation, which place limits on when, where, and how a message may be displayed or conveyed.
- “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” Ward v. Rock Against Racism, 491 U.S. 781 (1989).
- This means that the Courts examine *the purpose* of the governmental regulation, not just its wording, in determining whether an ordinance really is content-neutral.

To be constitutional, content neutral regulation must pass a three-point test - (1) be justified by a *substantial* governmental interest, (2) be “narrowly tailored” (although not “least restrictive”) to achieve that interest, and (3) leave open “ample alternative avenues of communication.”

- “Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government’s legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.” Ward v. Rock Against Racism at 798.



Intermediate Scrutiny

1. Content neutral sign regulations must be justified by a *substantial* governmental interest
 - The rationale for the enactment of the regulations must be specifically stated, whether the sign regulations are part of a comprehensive zoning law or ordinance or separate sign law (i.e. traffic safety and aesthetics).
 - In National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2nd Cir. 1990), the Second Circuit invalidated the sign laws of the Towns of Babylon and Hempstead “because they contain no statement of a substantial governmental interest and the towns offered no extrinsic evidence of such an interest.”

2. Content neutral sign regulations must be “narrowly tailored” (although not “least restrictive”) to achieve that interest.
 - Sign regulations must be sufficiently precise so that individuals know exactly what forms of expression are restricted, and laws which legitimately regulate certain forms of expression must not also include within their scope other types of expression that may not be permissibly regulated.

3. Content neutral sign regulations must leave open “ample alternative avenues of communication.”
 - Sign regulations must also leave open alternative channels of communication, **in terms of location**, for display of signs. While sign regulations may limit the manner in which a sign can be displayed, **the speaker must be allowed to express views somewhere in the community.**
 - “Bans”: strict scrutiny standard is applied when a content-neutral regulation imposes a total ban on speech. In City of Ladue v. Gilleo, 512 U.S. 43 (1994), the Supreme Court ruled that an ordinance banning all residential signs, except certain categories exemptions, violated the 1st Amendment rights of homeowners because it totally foreclosed their opportunity to display political, religious, or personal messages on their own property.
 - “Prior restraint”: any attempt to condition the right to freedom of expression upon receiving the prior approval of a governmental official (i.e. permits, licenses, conditional approvals, etc.) is subject to strict scrutiny. In order to be constitutional, the government must show that the licensing or permitting scheme: (1) is subject to clearly defined standards that strictly limit the government’s discretion, and (2) guarantees that a decision to grant or deny the license is rendered within a determined and short period of time, with provision for an automatic and swift judicial review of any denial.



Content Based Regulations

- Content based sign regulations are regulations that affect the content or messaging on a sign and the level of scrutiny applied depends on whether the content is commercial or noncommercial.
 - Commercial speech - includes messages on signs that promote commercial products or services and is subject to a test similar to “intermediate scrutiny”, although the Courts have increasingly treating commercial speech similar to noncommercial speech. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).
 - (1) If the speech concerns lawful activity and is not false or misleading, then the regulation must (2) serve a substantial governmental interest, (3) directly advance the asserted governmental interest, and (4) be no more extensive than necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).
 - Noncommercial speech - includes **all** other messages, including ideological and political content and regulation is subject to strict scrutiny such that it (1) must serve a compelling governmental interest (2) be narrowly tailored, and (3) use “the least restrictive means” to achieve its purpose.
 - Reed v. Town of Gilbert, 575 U.S. ____ (2015) - a regulation is content-based if the rule “applies to a particular [sign] because of the topics discussed or the idea or message expressed”
 - Viewpoint Regulation - content based regulations that purport to regulate a point of view (i.e. whether something is good or bad, etc.) are never constitutional.
 - Example: sign ordinance that prohibits signs containing messages that opposes abortion ruled not viewpoint-neutral and thus unconstitutional. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).
- Note: the normal presumption that a local government regulation is constitutional is reversed for content based regulations, so that government, rather than the party challenging the ordinance, bears the “burden of proof” and must affirmatively justify the regulation to the court’s satisfaction.



What is Content Neutral?

- Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972).
 - Chicago ordinance prohibited picketing of schools, but excepted “peaceful picketing of any school involved in a labor dispute”
 - **Court Ruling:** found unconstitutional as not content neutral.
 - Mosley has guided content neutrality doctrine since 1972, but is not a sign case.

- Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
 - Ban on all off-premise advertising signs.
 - Exceptions to the ban: on-premises signs and 10 other types of signs (political signs, real estate signs, religious signs, etc.).
 - Substantial city interests cited: traffic safety and city aesthetics.
 - **Court ruling:** Commercial off-site billboards can be banned, but government cannot favor commercial over noncommercial speech.
 - **Court Ruling:** Regulations of noncommercial speech must be content neutral: “With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: ‘To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.’”



Content Neutrality Cases Cont.

- Hill v. Colorado, 530 U.S. 703 (2000).
 - State law prohibited a person from “knowingly approach[ing]” health care facility “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling.”
 - **Court Ruling:** Constitutional – content neutral and government’s purpose was to allow unobstructed passage along sidewalks and access to health care facilities.
- McCullen v. Coakley, 537 U.S. ____, 134 S. Ct. 2518 (2014).
 - Mass. law imposed 35 ft. buffer zone around entrances to reproductive health care facilities.
 - **Court Ruling:** Unanimous unconstitutional – held that the law was content neutral, but not narrowly tailored as regular enforcement of traffic control, crowd control, criminal laws, and individual injunctions and prosecutions could serve the government’s interest with less burden on leafleting and personal counseling activities protected by the 1st amendment.
 - **Why Content Neutral?** Violation depends not on **what** they say, but on **where** they say it, even though law only applied to abortion clinics.
 - Dissent - 4 justices found the law content and viewpoint based and subject to strict scrutiny.
 - Content neutrality discussion focused on application to abortion clinics only and calls for overruling Hill.
 - Narrow tailoring discussion and dissent questioned legislative record focusing on issues at only one clinic in one city, and failing to show issues statewide.



Reed v. Gilbert

- Reed v. Town of Gilbert, 575 U.S. ____ (2015).
 - City code required all signs to be permitted with 23 exceptions (political, temporary directional, ideological, etc.). Under the code:
 - Political Signs “designed to influence the outcome of an election” could be up to 32 square feet and displayed during political season.
 - Temporary Directional Signs “that direct the public to a church or other qualifying event” could be up to six square feet and could be displayed 12 hours before and 1 hour after the qualifying event.
 - Ideological signs “that communicate a noncommercial message that didn’t fit into some other category” could be up to 20 square feet.
 - Reed is pastor of Good News Presbyterian Church, which posts temporary signs on members’ lawns to direct people to services rather than on the property it rents.
 - Gilbert code enforcement issue notice of violation in 2005 after signs posted outside of display time for “temporary religious events” category.
 - **Court Ruling:** Distinctions between sign type were content-based and subject to strict scrutiny.
 - The distinctions “depende[ed] entirely on the communicative content of the sign” (*Id.* at 7).
 - “Regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints with that subject matter” (12).
 - “an innocuous justification cannot transform a facially content-based law into one that is content neutral” (9).
 - Although the Court was unanimous in ruling the Gilbert code unconstitutional, the Court was fractured, with 3 justices joining the majority opinion only; 3 joining the majority, but also joined an explanatory concurrence; and 3 disagreeing with the majority’s legal reasoning.



Where does this leave us?

1. Sign regulations are either content neutral or content based.
2. Content neutral regulations are subject to intermediate scrutiny and must (1) be justified by a *substantial* governmental interest, (2) be “narrowly tailored” (although not “least restrictive”) to achieve that interest, and (3) leave open “ample alternative avenues of communication.”
3. Content based regulations are subject to strict scrutiny and must (1) serve a compelling governmental interest (2) be narrowly tailored, and (3) use “the least restrictive means” to achieve its purpose.
4. Commercial speech regulations: (1) If the speech concerns lawful activity and is not false or misleading, then the Commercial speech regulations must (2) serve a substantial governmental interest, (3) directly advance the asserted governmental interest, and (4) be no more extensive than necessary to serve that interest.



Regulations that are Still OK

- Under Reed “time, place and manner” regulations are still presumptively constitutional if they are justified without reference to the content of the signs subject to the law (i.e., content neutral); are narrowly tailored to serve a significant governmental interest; and leave open ample alternative channels for communication of the information.
 - Time Examples: when signs can be illuminated, etc.
 - Place Examples: setback, location, and spacing requirements, type of property, etc.
 - Manner Examples: size / dimension, lighting, flashing/animation/movement, materials/colors*, neon, maximum # regulations, temporary v. permanent, portable, signs on public property vs. signs on private property, and signs on commercial property vs. signs on residential property etc.
- Under Reed **some** content-based regulations that may survive strict scrutiny if they are narrowly tailored to address public safety, including: (1) warning signs for hazards on private property, (2) signs directing traffic, and(3) street numbers associated with private houses.
- Under Reed the government **may** entirely forbid the posting of signs on public property, so long as it does so in an evenhanded, content-neutral manner
 - Regulations may prohibit signs in public rights-of-way, but, if signs are allowed, the regulations must not distinguish based on the content of the message. Regulations that allow some, but not all, noncommercial signs run afoul of Reed.

* Note: Regulating color may be a problem when applied to federally-registered trademarks



Unresolved Questions?

- Majority opinion in Reed would essentially create the following test: If a enforcement officer has to read message on sign to enforce the code, the code is not content neutral. (i.e. regulations that distinguish among noncommercial sign types - political v. ideological - are now unconstitutional and must be changed). But concurrence references two additional regulations it would deem constitutional:
- **Time restrictions on signs advertising a one-time events?** These are the type of restrictions the Supreme Court stuck down in Reed. It is unclear whether Alito believes these regulations would have to be neutral with regards to the content of the message itself (i.e. political v. ideological v. religious) or if he instead envisions blanket regulations with regards to all “temporary” signs (i.e. limiting temporary signs to 90 days – upheld in City of Waterloo v. Markham, 600 N.E.2d 1320 (Ill. App. 1992)).
- **Distinguishing between on-premises and off-premises signs?** On-premise signs advertise goods or services offered on the site where the sign is located, while off-premise signs advertise products or services not offered on the same premises as the sign. The enforcement officer must read the sign in order to determine if a sign is off-premises or on-premises. As such, these would seem to be facially content-based and subject to strict scrutiny. But, prior Supreme Court caselaw has upheld the on-premise/off-premise distinction and that precedent is not overruled by the majority opinion.
 - Under this caselaw on-premise signs are generally treated as accessory uses and have been permitted to be regulated while off-premise signs have concurrently been banned. National Advertising Co. v. City of Denver, 912 F.2d 405 (10th Cir. 1990).
 - On-premise signs must be allowed for both commercial and non-commercial purposes. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
 - Time, place, or manner regulations of off-premise signs, whether limited to commercial signs or including both commercial and noncommercial signs also permitted. National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991).
 - Unequal treatment of noncommercial off-premise messages **not permitted**. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
 - Regulations that exempt all noncommercial speech from a general ban on off-premise signs, have been upheld. Major Media of the Southeast v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986).
- **Commercial and Noncommercial Speech?** In past decisions the Supreme Court has treated commercial speech to slightly less protection than noncommercial speech, subjecting it to intermediate scrutiny, rather than the strict scrutiny applied to regulation of non-commercial speech.
 - Reed may open the door to challenge a sign ordinance that distinguishes between commercial and noncommercial speech.
 - However, the majority in Reed did not overrule its prior decisions. The Reed decision was focused on the Town code’s distinctions among types of noncommercial speech. Presumably the long-held standards for regulation of commercial speech still apply.



Recommendations

- Commercial signs are a form of constitutionally protected speech, the regulation of which will trigger heightened scrutiny by courts.
- Commercial signs should never be treated more favorably than noncommercial signs.
- Government may ban commercial off-premises signs, while allowing noncommercial off-premise signs and both commercial and noncommercial on-premise signs.
- Government must normally maintain content-neutrality in regulating noncommercial signs, with any exemptions or exceptions subject to strict scrutiny.
- Government should normally maintain content-neutrality in regulating commercial signs, with any exemptions or exceptions subject to intermediate + scrutiny.
- Government may not ban residential signs that carry political, religious, and personal messages.
- Government may not prohibit real estate signs.
- Government may prohibit the posting of all signs on public property but will be subject to heightened scrutiny for any exceptions or exemptions.
- Government may not impose time limits solely on political signs.



Additional Considerations

1. Signs and billboards can benefit from nonconforming protections granted pursuant to Chapter 40A, Section 6.
 - Eliminating nonconformities may invoke additional constitutional review pursuant to the Takings Clause of the 5th Amendment.

2. The Federal Highway Beautification Act of 1965 requires that the State control of billboards and off-premises signs visible from areas adjacent to primary highways, highways on the National Highway System, and Interstate Highways.
 - Massachusetts does so through MGL c. 93D, sections 1-7 and 700 CMR 3.00 administered by the Massachusetts Office of Outdoor Advertising.



Questions / Comments?