



Joseph P. Szeman, Esq.  
szeman@hsklawyers.com

PLEASE NOTE: These materials are provided for general educational and discussion purposes only. While the opinion of the author may be stated herein, any opinions made with respect to law, policy, or otherwise are made solely for academic purposes and are not intended and should not be construed by anyone as legal counsel nor utilized as a substitute for the advise of their legal counsel.

## THERE ARE DIFFERENT LEGAL STANDARDS FOR JUDICIAL REVIEW OF A CHALLENGED LAW DEPENDING UPON THE NATURE OF WHAT IS BEING REGULATED

### “RATIONAL-BASIS REVIEW”

On rational-basis review, a classification in a statute...comes to us bearing a strong presumption of validity and those attacking the rationality of the legislative classification have the burden “to negative every conceivable basis which might support it.” Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of ““legislative facts”” explaining the distinction “[o]n the record,” has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

*FCC v. Beach Communications, Inc.* (1993), 508 U.S. 307, 314-15,  
124 L.Ed 2d 211 (internal citations omitted).

## SIGN REGULATIONS IMPLICATE THE PROTECTION AFFORDED THE FREEDOM OF SPEECH BY THE FIRST AMENDMENT

Consequently, the standard of review is heightened.

It is the government's burden to show the  
lawfulness of its sign regulations.

Are you in a position to defend the law?  
Can you defend what you cannot explain?

“Everyone else does it” is not going to satisfy this legal burden.

BEING ABLE TO STATE & EXPLAIN THE  
UNDERLYING BASES FOR SIGN REGULATIONS  
SHOULD BE CONSIDERED A NECESSARY  
COMPONENT OF ANY SIGN CODE:

- ▶ Necessary for any legal challenges
  - ▶ Necessary for variance requests
- ▶ Necessary for proper administration
  - ▶ Necessary to educate the public

## STATEMENT OF LEGISLATIVE INTENT AND PURPOSE

(The language at the beginning of your sign code that looks really boilerplate is actually extremely important.)

## **Mentor Code of Ordinances**

### **1171.01 PURPOSE AND INTENT.**

(A) Sign regulations, including provisions to control the type, design, size, location, motion, illumination, enforcement and maintenance thereof, are established in order to achieve, among other objectives, the following purposes:

(1) To promote and maintain high quality districts for all land uses, and attractive public and private facilities of all types, by permitting only signs appropriate to their environs and preventing the blighting influence of excessive signage;

(2) To provide for reasonable and appropriate methods for identifying establishments in office, business and industrial districts by relating the size, type and design of signs to the size, type and design of the office, business and industrial establishments;

(3) To eliminate any conflict between traffic control signs and other signs which conflict may be hazardous to the safety of the motoring public and to pedestrians;

(4) To control the design and size of all signs so that their appearance will be aesthetically harmonious with an overall design for the area, in accordance with commonly accepted community planning and design practices;

(5) To establish equal and uniform opportunities for persons and legal entities to erect signage appurtenant to their ownership and/or tenancy of land.

(B) This chapter is not intended to infringe on the rights of free speech as protected by the First Amendment to the United States Constitution and Article I, §11 of the Ohio Constitution. All ordinances in this chapter are to be construed, whenever possible, in favor of vigorous political debate and accommodation of the rights of residents and visitors to speak freely. All provisions of this chapter shall be interpreted in a content-neutral manner excepting solely for those narrow, legally-recognized exceptions explicitly identified in this chapter. All ordinances in this chapter shall be applied in accord with 15 U.S.C. §1121(b), as amended, and such other applicable federal and Ohio laws as may now or hereafter be enacted, when in conflict with same.

# What happens if there is no stated purpose for the law?

You will likely get a decision like these:

“It is a well-established rule that where legislation restricts speech, even commercial speech, the party seeking to uphold the restriction carries the burden of justifying it.

The ordinances of Babylon and Hempstead impermissibly restrain commercial speech because they contain no statement of a substantial governmental interest and the towns offered no extrinsic evidence of such an interest.”

*National Advertising Co. v. Town of Babylon* [NY] (2nd Cir. 1990), 900 F.2d 551, 555 (court held that interests such as traffic safety and aesthetics could not be assumed) (internal citations omitted).

“Unlike the ordinances discussed in the vast majority of other sign ordinance cases reviewed by the court, the [ordinance] contains no statement at all of the legislative purpose behind it. Thus, Alsip has not even identified which significant government interests it sought to advance through passage of the [ordinance], much less shown that the size and height restrictions of sections 18(B) and 18(C) are narrowly tailored to advance these unstated interests.”

*Lockridge v. Village of Alsip* (N.D. Ill. 2005), 03 CV 6720.



The fundamental question to answer in reviewing an existing or proposed sign ordinance is precisely what is being regulated.

What is being regulated dictates the nature of judicial review.

# CONTENT

If the regulation is directed at content -- the message, viewpoint, subject matter -- then it is generally subject to “strict scrutiny” analysis. (There’s an exception to this rule for “commercial speech”).

“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, and manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”

*Hill v. Colorado* (2000), 530 U.S. 703, 719, 120 S.Ct. 2480, 147 L.Ed.2d 597, quoting *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 791.

## “STRICT SCRUTINY”

(You should be prepared to lose)

“Strict scrutiny” means the state must show that regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

*Burson v. Freeman* (1992), 504 U.S. 191, 119 L.Ed.2d 5 (upholding the constitutionality of a 100-foot campaign-free zone around polling places on election day).

It is an extremely difficult showing to make by the government.

Examples where a governmental interest has been recognized as compelling:

- incitement

- speech integral to criminal conduct

- “fighting words”

- obscenity

- defamation

- fraud

- child pornography

## ONE GENERAL RULE THAT YOU SHOULD NEVER BREAK:

Favoring commercial speech over non-commercial speech  
– subject to strict scrutiny and you will lose.

As a housekeeping item, you may want to consider making  
an explicit provision in your code as follows:

### **Mentor Code of Ordinances**

#### **1171.16 GENERAL REGULATIONS.**

(B) Any sign that can be displayed under the provisions of this chapter may  
contain non-commercial copy.

## CONTENT NEUTRALITY: Does the law regulate speech for reasons independent of content?

- 1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur;
- 2) the regulation was not adopted because of disagreement with the message the speech conveys; and
- 3) the government's interests in the regulation are unrelated to the content of the affected speech.

*Wag More Dogs, LLC v. Cozart* (4th Cir. 2012), 680 F.3d 359.

## **Review Your Code for Both Overt and “Hidden” Content-Based Regulations**

*Neighborhood Enterprises, Inc. v. City of St. Louis* (8th Cir. 2011), 644 F.3d 728, 739, cert. den., 132 S.Ct. 1543, 182 L.Ed.2d 163. A non-profit placed a mural on an exterior wall of approximately 363 or 369 ft<sup>2</sup> in area with the message “End Eminent Domain Abuse” inside a red circle and slash. The sign code was challenged on the basis that it contained content-based regulations that could not survive strict scrutiny. The court agreed, holding that the definition of “sign” was content-based because the message conveyed determined whether the speech is subject to the regulations:

**Sign.** “Sign” means any object or device or part thereof situated outdoors which is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business product, service, event, or location by any means including words, letters, figures, designs, symbols, fixtures, colors, motion illumination or projected images. *Signs do not include the following:*

- a. Flags of nations, states and cities, fraternal, religious and civic organization;
- b. Merchandise, pictures of models of products or services incorporated in a window display;
- c. Time and temperature devices;
- d. National, state, religious, fraternal, professional and civic symbols or crests, or on site ground based measure display device used to show time and subject matter of religious services;
- e. Works of art which in no way identify a product.

If for any reason it cannot be readily determined whether or not an object is a sign, the Community Development Commission shall make such determination.



The lesson is simple:

Do not try to carve out exceptions for certain content and/or speakers.

The *Neighborhood Enterprises* decision also contained some additional language worthy of note and discussion:

The City justified its outdoor sign restrictions principally on concerns for traffic safety and aesthetics. Neither the City nor the Board is aware of any reports, studies, or memoranda (1) concerning or supporting the regulation of outdoor signs in Chapter 26.68 of the zoning code, (2) regarding whether the City's restrictions on outdoor signs affect traffic safety, (3) regarding whether the City's restrictions on outdoor signs affect the aesthetics of the City or surrounding neighborhood, (4) regarding whether the City's restrictions on outdoor signs affect property values in the City, or (5) discussing the impact of SITO's sign/mural on the flow of traffic on any street or highway. The City and the Board are unaware of any traffic incidents in which any driver involved mentioned SITO's sign/mural, or any "painted wall sign," as contributing to such incident. Further, the City and the Board have no (1) internal memoranda or communications, and no communications to or from them, discussing the adoption or enforcement of the regulations of outdoor signs in Chapter 26.68 of the zoning code or (2) minutes or transcripts of any City Board of Aldermen meeting, including any committee or subcommittee of such Board, concerning or relating to the regulation of outdoor signs in Chapter 26.68 of the zoning code.

Id. at 732.

## INTERMEDIATE SCRUTINY (You might lose)

Applies to:

(i) “commercial speech”

&

(ii) content-neutral time, place and manner  
(TPM) restrictions

## COMMERCIAL SPEECH

Commercial speech is treated differently. Commercial speech is protected only if it concerns lawful activity and is not misleading. An intermediate-level of scrutiny is applied to commercial speech.

Identifying what is commercial versus non-commercial speech can be difficult. The U.S. Supreme Court has generally categorized signs which identify a business and advertise a product or service as forms of commercial speech.

*Metromedia, Inc. v. City of San Diego* (1981), 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800.

Judicial “intermediate scrutiny” review consists of a four-part test to determine whether:

- (1) the expression is protected by the First Amendment (i.e., it is truthful and not misleading),
- (2) the governmental interest is substantial,
- (3) the regulation directly advances the governmental interest, and
- (4) the regulation is not more extensive than is necessary to serve that interest.

*Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York* (1980), 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341.

The issue of commercial sign regulation usually comes up when local governments differentiate between commercial copy and allow only certain content.

Examples include regulations allowing for construction signs, “for sale” and “for rent” signs, & subdivision signs.

You also see examples where a community seeks to limit commercial content, for example, prohibiting the display of prices or phone numbers.

Always ask yourself:  
Why are you regulating the nature of the commercial copy?

Let's take a look at an Ohio case, *North Olmsted Chamber of Commerce v. City of North Olmsted* (N.D. Ohio 2000), 86 F.Supp.2d 755, wherein:

A sign ordinance classified signs by use types. In identifying use types, the ordinance specified the type of information the signs could contain.

## “Directional sign”

Per the ordinance, was one which indicated “[o]nly the direction of pedestrian and vehicular circulation routes....” with no advertising permitted on the sign.

The court held this was content-based regulation because it prohibited a sign which said “Vote Here” or “Betsy’s Party.” The court found the city’s stated justifications for the regulation -- safety and aesthetics -- to be unpersuasive.

The court found no material distinction between a permitted sign which could read “Exit Here” versus a non-permitted one that could not say “Vote Here.”



## “Identification sign”

A sign that indicates the name and address of the building and which could also include the principle type of goods or services sold, however, it could not include a telephone number nor the listing of numerous goods or services nor prices and sale items.

## “Informational sign”

A sign which presented information to the public such as temperature and time

The court even took issue with ordinance language which prohibited signs resembling traffic control signs and prohibited use of words such as “stop,” “go,” “slow,” etc. The court noted that a political sign mimicking a stop sign and stating “Stop Gun Violence” would be prohibited by the ordinance.

Compare the North Olmsted case with a state case decided that same year.

Columbus's code required that permanent on-premise signs directed toward freeways and interstate highways could only include the business logo and language identifying the use by name, street address, and principal product or service being advertised. In this case, the company wanted to include the words "weekly rates" on their sign.

The court noted that analysis of the restriction must not be individualistic, but rather based upon whether it in general directly advances the governmental interest. The court held the city's common sense approach was that limiting the text generally reduces visual clutter and the possibility of accidents and, on this basis, upheld the ordinance.

*Suburban Lodges of America, Inc. v. City of Columbus Graphics Comm.* (2000), 145 Ohio App.3d 6, appeal dismissed, 94 Ohio St.3d 1205.

After the decision announced in *Reed v. Town of Gilbert*, is anyone comfortable relying on *Suburban Lodges* as still being good legal authority?

## TIME, PLACE AND MANNER REGULATIONS (TPMs)

Laws regulating the time, place or manner of speech, which are neutral as to content, are permissible if the incidental restrictions on the speech are no greater than is essential to further a substantial governmental interest.

*City Council v. Taxpayers for Vincent* (1984), 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772.



They must further leave open ample alternate channels for communication of the information.

*Ward v. Rock Against Racism* (1989), 491 U.S. 781, 109, S.Ct. 2346, 105 L.Ed.2d 661.

An absolute prohibition of a manner of disseminating expression, even if reasonably regulated in place and time, is generally an unconstitutional and unreasonable interference with First Amendment rights.

*Brown v. Town of Cary [NC].*

In orange florescent paint, Mr. Bowden wrote this on his house:





Cary's sign code was challenged, in part, as unconstitutionally content-based because it exempted from regulation public art and holiday decorations.

The court wrote:

Here, the Town also adequately documented its aesthetic concerns. Its legislative findings, manifested in the Land Use Plan, the LDO preamble, the Sign Ordinance, policy statements, and testimony of Town officials, were that unregulated signage would depress property values, cause visual blight, deter commercial and residential growth, harm environmental resources, and diminish the wholesome character of the Town.

*Brown v. Town of Cary* [NC] (4th Cir. 2013), 706 F.3d 294, 305.

The court noted that both public art and holiday decorations were defined terms and that, while requiring some subjective judgment, nonetheless that did not invalidate the code.

The court noted that the town could find that both public art and holiday decorations enhance its aesthetics.

Is *Cary* still good law after *Reed*?

## Current Trending Legal Challenge

ARGUMENT: Communities that allow a greater area for signs in commercial districts than in residential districts unconstitutionally favor commercial speech. WHY?

When reviewing or revising your sign code it is very important to remember that what we as Planners may consider self-evident issues may not be so obvious to a reviewing court. Always remember: the government has to justify its restrictions.

Legislative findings are a mechanism for doing so, such as the following:

## Zoning District Distinctions

A fundamental question was asked at the beginning of this process: Who is the user's intended audience for their exterior signs? In a large urban business district, the answer may be that the intended audience is pedestrian traffic along a sidewalk. In a residential district, the audience is likely neighbors and local traffic. In Mentor's business districts, the vast majority of a sign's potential audience is vehicular-based. Certainly the City does have some pedestrian traffic within its business districts, but it is a small percentage compared to vehicular traffic. Persons working at or patronizing adjacent properties would be the other component of the audience the user is seeking to reach.

## Roadway Conditions

One of several significant distinctions between the zoning districts are the number of lanes of travel of the streets within those districts. Residential districts are overwhelmingly two-lane roads. The general business corridors of U.S. Rt. 20, S.R. 615 and a portion of S.R. 306 have between four and five lanes of travel (the fifth being a center turning lane). The main routes through the City's industrial corridors, same being Tyler Boulevard and Heisley Road, are of varying widths from two to five lanes depending on the particular stretch of road. In both business and industrial districts, the secondary streets are two lanes with some areas including an additional turn lane. Discussed below is the significance of the number of lanes of travel on the "cone of vision" – the viewing range of motorists.

## Built Environment

Commercial and residential districts are dramatically different. The general business corridors in the City are built-out with a significant number of signalized intersections, traffic control devices, curb cuts, and utility infrastructure.

The buildings can vary greatly in size from several thousand square feet of floor area to hundreds of thousands of square feet of floor area. Building setbacks tend to not follow any “build-to” line, even on adjacent parcels, and the resulting pattern of development is such that building setbacks vary considerably. Parking areas are in most instances in front of buildings and extend up to the required right-of-way setback of 10 feet.