WHITE PAPER

The Impact of *Reed v. City of Gilbert* on Municipal Codes Impacting Real Estate Signs

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June 2016

INTRODUCTION / EXECUTIVE SUMMARY

Municipalities generally impose sign regulations for two purposes. The first relates to time, place and manner restrictions which arise from non-communicative concerns, such as protecting public safety by controlling the use of public streets. These are generally allowed under the First Amendment[1] as long as they meet certain criteria.[2] The second common type of sign regulation arises out of communicative concerns because they differentiate based upon the type of message conveyed. These regulations divide regulations into categories or types for practical reasons (i.e., political, real estate, temporary). They were acceptable under the First Amendment as long as they were not based upon government disagreement with the viewpoint of the message, or some other impermissible government motive. Then, in 2015, the United States Supreme Court changed the rules of the game for municipal sign regulation and First Amendment jurisprudence in *Reed v. Town of* Gilbert.[3] The Court found that sign regulations based on the message, or subject matter, are content-based under the First Amendment. A regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed."[4] In plain English this means that a sign regulation is "content-based" if you have to read its message to determine which regulation applies. If that regulation is challenged under the First Amendment it must pass "strict scrutiny" the toughest legal standard, which few regulations can meet.[5]

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[1] The First Amendment prohibits the enactment of laws "abridging the freedom of speech." U.S. Const., Amdt. 1. It is applicable to state action through the Fourteenth Amendment. They mean that no state authorized entity "has the power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

[2] "The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[3] 135 S.Ct. 2218 (2015).

[4] 135 S.Ct. at 2227.

[5] Judicial evaluations of First Amendment claims depend upon the standard of review for each type of speech. The Supreme Court has developed an array of tests applicable to different circumstances, with "strict scrutiny" as the most stringent test. As discussed in throughout this paper, commercial speech gets less protection so rules regulating it get less stringent review.

Prior to *Reed*, courts had looked for impermissible viewpoint disagreement to find content discrimination in a sign ordinance.[6] Now content discrimination is possible simply because a sign code distinguishes based upon subject matter of the message or speech, irrespective of government motive.

Many municipalities' sign ordinance do distinguish, or categorize, based upon the subject matter of the signs. For instance, many municipalities have specific ordinances for real estate signs including temporary A-Boards announcing "open houses" and "for sale" signs on property listed for sale. Theoretically, under *Reed,* such ordinances might be unconstitutional content-based regulation. Municipalities are exploring necessary sign ordinance revisions to satisfy *Reed*, which could have serious implications for the sign tools so vital for realtors, sellers and Federal Fair Housing in Washington.

Washington REALTORS® requested the law firm of Garvey Schubert Barer to prepare a white paper with multiple purposes:

1. Provide an analysis of *Reed v. Gilbert* and subsequent case law developments and pertinent Washington state law;

2. Identify issues impacting real estate signs flowing from *Reed v. Gilbert*;

3. Identify solutions to identified real estate sign issues.

    a. Analyze post-*Reed* options for municipal ordinances to retain content-based regulations for temporary real estate "open house" and "for sale" signs.

    b. Identify industry data and talking points that (together with the analysis of *Reed v. Gilbert* and subsequent case law developments and pertinent Washington state law) cities might reference with approval to assist in supporting the retention of content-based regulations for temporary real estate "open house" and "for sale" signs.

The goal of this paper is to provide local governments with a working knowledge of sign law in light of *Reed v. Gilbert,* and to understand the unique nature of real estate signage and the importance of signage to real estate transactions and homeowners that warrant special considerations when sign ordinance revisions are considered.

[6] *See, e.g., Davenport v. Washington Ed. Assn.*, 551 U.S. 177, 189 (2007).

LEGAL BACKGROUND

I. *REED v. GILBERT:* SIGN RULES BASED ON SIGN CONTENT ARE SUBJECT TO STRICT SCRUTINY AND PROBABLY UNCONSTITUTIONAL

Pastor Reed sued the Town of Gilbert, Arizona, for repeated citations for violation of Gilbert's sign code, which required permits for outdoor signs with 23 exceptions. The exceptions categorized signs by type. The three at issue in *Reed* were "Ideological Signs," "Political Signs," and "Temporary Directional Signs," with less favorable treatment for each category in descending order.[7]

Reed posted "temporary directional signs" each Saturday to tell the public about the time and location for his church's Sunday services, because his church had no permanent location. "Temporary directional signs" could be displayed for no more than twelve hours before the "qualifying event" – the church service – and up to one hour afterwards.

The other two categories of exempt regulations faced far fewer restrictions as to size, location, and duration.

When Gilbert cited Reed for sign code violations for his "temporary directional signs" because they remained displayed beyond the allowable time period, he sued for violating his First and Fourteenth Amendment rights.

Justice Clarence Thomas wrote the majority opinion invalidating the Gilbert sign code. He wrote that Gilbert's sign code was content-based on its face because each category contains a different message with different restrictions. Justice Thomas emphasized that the first step of the content neutrality analysis is to test the regulation for facial content neutrality--the government's justification or purpose in enacting a sign regulation is irrelevant. If a regulation does not expressly draw distinctions based on a sign's communicative content then courts go to Step Two. This analyzes whether the regulation "cannot be 'justified without reference to the content of the

[7] A "Temporary Directional Sign" was a sign that directs the public to a "qualifying event." "Political Signs" were temporary signs "designed to influence the outcome of an election called by a public body." "Ideological Signs" communicate "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." 135 S. Ct. at 2221.

regulated speech,' or … [was] adopted by the government 'because of disagreement with the message [the speech] conveys.'"[8] Thus, the sign ordinance must be *facially* content neutral and content neutral *in purpose* to avoid strict scrutiny. If it fails either criteria the ordinance is subject to strict scrutiny under the First Amendment. This means that the government must justify the regulation by proving that it "further[ed] a compelling interest and [wa]s narrowly tailored to achieve that interest."[9] The Gilbert ordinance failed this test because it was not sufficiently tailored to the town's regulatory interests of traffic safety and aesthetics because the code placed different limits on sign types capable of having the same effect on traffic safety and community aesthetics.

Three concurring opinions were filed. Justice Alito (and Kennedy and Sotomayor) agreed with the majority. However, in an attempt to assure municipalities that they were not powerless to regulate signs, Justice Alito listed examples of content – neutral regulations that could pass constitutional muster, in his view:

- Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.
- Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.
- 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.[10]

[8] 135 S.Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).
[9] 135 S.Ct. at 2231.
[10] While Justice Alito views on-premise and off-premise rules to be content-neutral because they are based on location, one federal judge disagreed in *Thomas v. Schroer*, ___ F.Supp.3d ___, 2015 WL 5231911 (W.D. Tenn. 2015). In this post-*Reed* case the court rejected Justice Alito's views because an on-premise/off-premise distinction

- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event.[11] Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.

Justice Kagan in her concurrence (joined by Breyer and Ginsberg) noted, however, that rules distinguishing between on-premise and off-premise signs or those that advertise a one-time event are facially content-based and would face strict scrutiny under the majority's strict analysis. Justice Breyer's separate concurrence shared Justice Kagan's view – that strict scrutiny may not always be appropriate for all content-based regulations. Justice Kagan said there was really no need to apply strict scrutiny to the Gilbert ordinances because they couldn't pass "immediate scrutiny, or even the laugh test."[12] Both Justices Kagan and Breyer said the proper focus of analysis for content-based regulation should be its impact on well-defined First Amendment interests. Only in the case of a substantial impact should strict scrutiny apply.

In sum, in *Reed* six justices would not have gone as far as Justice Thomas in the majority opinion in requiring strict scrutiny for <u>every</u> content-based sign regulation, even though all agreed that the Gilbert ordinances violated the First Amendment. Justice Thomas posited that his mechanical two-step content discrimination analysis need not prevent local sign regulation because "Not 'all distinctions' are subject to strict scrutiny, only content-based ones are."[13] He noted that governments may even entirely forbid the posting of signs "so long as it does so in an evenhanded, content-neutral manner."[14] He concluded by speculating that even content-based regulations that are narrowly tailored to a government need might well survive strict scrutiny, such as traffic warning signs. Nonetheless, the majority opinion provides cold comfort for municipalities who reasonably, and legitimately, have regulated by type of sign in the past.

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rests upon reviewing the sign's content to see if it is sufficiently related to the activities conducted on the property where it is located to qualify as an on-premise site. *Id.* at *4.

[11] The majority opinion in footnote 4 rejects Justice Alito's inclusion of a one-time event as an example of a content-neutral regulation. According to Justice Thomas, it is not, and one-time event sign rules are subject to "strict scrutiny."

[12] *Id.* at 2239.

[13] *Id.* at 2232.

[14] *Id.* *Reed* did not overrule *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding content-neutral ban against posting signs on public property).

Reed's bright line test for content discrimination may not remain the controlling law forever, given the opinions of six justices who might limit *Reed* in future sign cases if the sign ordinances have the right attributes, such as a negligible impact on core First Amendment values. These include protection of a free and open marketplace of ideas and protecting against official suppression of ideas.[15]

Reed also left many questions unanswered, which impact municipal sign regulations. Of most concern to realtors is *Reed*'s impact on ordinances that govern placement of temporary real estate signs.

Municipal ordinances also could be challenged under the Washington State Constitution. The Washington State Constitution, Article 1 § 5, provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." The Washington State Supreme Court has held that strict scrutiny applies to all time, manner and place restrictions on speech under the Washington Constitution. *Collier v. City of Tacoma*, 121 Wash.2d 737, 747, 854 P.2d 1046. Rather than showing that a restriction advanced a *significant* government interest as under the federal constitution, Washington courts require that the restriction advance a *compelling* government interest. The government interest in aesthetics and safety does not rise to a compelling state interest. *Id.* at 754-56, 854 P.2d 1046.

In *Collier*, the plaintiff challenged a Tacoma ordinance that barred political signs from placement in yards and parking strips more than 60 days prior to an election. The Washington Supreme Court held that this ordinance, while viewpoint neutral, was based upon subject matter.

> We hold that time, place, and manner restrictions on speech that are *viewpoint-neutral*, but *subject-matter based*, are valid so long as they are narrowly tailored to serve a *compelling* state interest and leave open ample alternative channels of communication. This formulation of the standard of review comports with free speech jurisprudence under both article 1, section 5, of the Washington Constitution and the First Amendment.

[15] *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537-38 (1980); *Davenport v. Washington Ed. Assn.*, 551 U.S. 177, 189 (2007).

Id. at 753. *Collier*'s holding seems consistent with *Reed*. Thus, any sign code related to noncommercial speech that distinguishes by subject matter will face the same strict test under both the federal and state constitutions.

II. POST-*REED* ISSUES AND POST-*REED* CASE ANALYSIS

A. Outstanding Issues Realtors and Property Owners Care About.

REALTORS® and property owners care about being able to post "open house" signs along streets and in public rights-of-way. REALTORS® and their clients care about being able to post "For Sale" or "For Lease" signs on the properties to be sold or leased. After *Reed,* municipalities could revise or even repeal sign codes that apply to real estate signs because *Reed* leaves open the following questions:

- Does *Reed* apply to commercial sign regulation, including real estate signs?
- Can municipalities distinguish between on-premises and off-premises signage without facing strict scrutiny?
- Can municipalities ban all signage, including real estate signage?
- Can temporary sign codes that cover real estate signage be enacted that could survive strict scrutiny?
- Would separate ordinances for real estate signage need to pass a strict scrutiny review?

Clearly, the bottom line is to provide a path for municipalities to allow real estate signage, even if they impose different regulations for other categories of signage.

The following analyzes these issues, but there is no question that absolute answers may only be determined by subsequent case law and, ultimately, the Supreme Court.

B. Does *Reed v. Gilbert* Apply to Commercial Sign Regulation?

The sign code invalidated in *Reed* covered noncommercial speech regarding a "Temporary Directional Sign" for church services. The majority opinion did not discuss its holding's applicability to commercial speech, which is subject to a less strict standard of review under *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*[16] Real estate signs

[16] 447 U.S. 557 (1980).

by their very nature reflect commercial activity, so whether *Reed* applies to commercial speech may govern the type of regulations municipalities may adopt. Commercial speech is afforded "somewhat less extensive" protection than is afforded noncommercial speech and municipalities have an easier time justifying commercial regulations.[17]

As of this writing, four federal cases[18] have held that *Reed* applies only to noncommercial speech and does not apply to commercial sign regulations. To be constitutional, any government restriction on commercial speech must satisfy the four-part test announced in *Central Hudson*: To be protected, (1) the speech (a) must concern lawful activity and (b) must not be false or misleading. If the speech is protected, 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.[19] The governmental interest need only be "substantial" – not "compelling" – as required by the "strict scrutiny" test. Several post-*Reed* cases have upheld regulations on the basis that they served a substantial governmental interest.

In *Citizens for Free Speech v. County of Alameda*,[20] the court upheld an ordinance banning all offsite commercial billboards. The purpose of the ban is to "advance the County's interests in community aesthetics by the control of visual clutter, pedestrian and driver safety, and the protection of property values."[21] The court found that the ordinance advanced those interests and goes no further than necessary to do so. The court explained "[w]hat is required is a reasonable fit between the ends and the means, a fit that employs not necessarily the least restrictive means, but … a means narrowly[22] tailored to achieve the desired objective."

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[17] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).
[18] *California Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346 at *10 (C.D. Cal. July 9, 2015); *Citizens for Free Speech, LLC v. County of Alameda*, 114 F.Supp.3d 952, 969 (N.D. Cal. 2015); *Contest Promotions LLC v. City and County of San Francisco*, 2015 WL 4571564 at *4 (N.D. Cal. July 28, 2015); *Peterson v. Village of Downers Grove*, ___ F.Supp.3d ___ ,2015 WL 8780560 (N.D. Del. 2015) at *10.
[19] *Id.*, 447 U.S. at 566.
[20] 114 F.Supp.3d 952 (N.D. Cal. 2015).
[21] *Id*. at 969.
[22] *Id*. at 971. (citations omitted)

In *Timilsina v. West Valley City*,[23] the court applied the *Central Hudson* intermediate scrutiny test to uphold an ordinance prohibiting temporary commercial A-frame signs in certain areas. The ordinance advanced the government's goals of traffic safety and aesthetics. It prohibited no more speech than necessary to advance those purposes because the ordinance banned only a specific type of advertising – A-frame – when other means of advertising exist.

Note, however, that the United States Court of Appeals for the Ninth Circuit struck down a somewhat similar ordinance banning a commercial sandwich board sign in *Ballen v. City of Redmond*.[24] Because the ordinance allowed other portable signs, including real estate signs, which posed the same threats to "vehicular and pedestrian safety and community aesthetics," the ordinance failed the third and fourth elements of the *Central Hudson* test. The ordinance could have used more consistent, less restrictive means to advance its goals. The key reason for invalidation appeared to be the inconsistent application of a ban for one type of sign, while allowing another type that could be equally as disruptive to the City's goals.

Because *Reed* has not yet been applied in a commercial speech case commercial ordinances should still be reviewed under the intermediate *Central Hudson* test.[25] The majority opinion in *Reed* never mentioned *Central Hudson* and therefore did not overrule it because of the doctrine that prior Supreme Court decisions should not be overruled by implication.[26] One federal court in a post-*Reed* decision, *Peterson v. Village of Downers Grove*, noted,[27]

> But the majority never specifically addressed commercial speech in *Reed*, which is not surprising, because the Supreme Court did not need to address that issue: all of the restrictions at issue in *Reed* applied only to *non*-commercial speech. What is important for this case is that, absent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny–which are

[23] 121 F.Supp.3d 1205 (D. Utah 2015).
[24] 466 F.3d 736 (9th Cir. 2006). This case is known as the "Blazing Bagels" case because the plaintiff Ballen owned a bagel store – Blazing Bagels and he hired an employee to wear a sandwich board sign that read "Fresh Bagels – Now Open."
[25] *See* Weinstein, "Sign Regulation after *Reed*: Suggestions for Coping with Legal Uncertainty" (2015) at page 34, available at http://ssrn.com/abstract=2660404.
[26] *Agostini v. Felton*, 521 U.S. 203, 237 (1997) quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).
[27] ___ F.Supp.3d ___, 2015 WL 8780560 (N.D. Ill. 2015) at *10.

> directly applicable to the commercial-based distinctions at issue in this case–binding.

Applying the *Central Hudson* test in *Peterson* the court upheld an ordinance that restricted painted wall signs, signs that do not face a roadway or drivable right-of-way, the total sign area and number of wall signs permitted. The ordinance's limitations were narrowly tailored to enhance the town's aesthetics, the court found.

In *Peterson*, the court upheld the town's complete ban on all painted wall signs. Because it banned all such signs[28] the court found the restriction to be content-neutral and a reasonable time, place and manner restriction. These restrictions are permitted under the First Amendment if they are (1) content neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels of communication.[29]

The complete ban furthered the significant governmental interest in promoting aesthetics and left open alternative methods of communication. The ordinance only banned painted wall signs. Other types of wall signs were permissible.[30]

C. Post-*Reed* Rulings on Rules Restricting Noncommercial Speech.

Since *Reed*, not even a year old, lower courts reviewing commercial sign ordinances have sustained them under *Central Hudson*. However, with respect to ordinances involving noncommercial speech, *Reed* has been strictly applied. In *Central Radio Co. Inc. v. City of Norfolk*[31] the court held a former sign code violated the First Amendment under *Reed*. The code

[28] These banned both commercial and noncommercial wall signs.
[29] *Ward v. Rock Against Racism*, 419 U.S. 781, 791 (1989).
[30] In another post-*Reed* case, *Vosse v. City of New York*, ___ F.Supp.3d ___, 2015 WL 7280226 (S.D.N.Y. 2015), the court ruled that an ordinance's prohibition on illuminated signs extending more than 40 feet above curb level was a reasonable time, place and manner restriction. The plaintiff had affixed an illuminated peace symbol in the window of her 17th floor condominium. The court had ruled previously that she lacked standing to bring a content-based discrimination challenge so she claimed it was not a reasonable time, place or manner restriction.
[31] 811 F.3d 625 (4th Cir. 2016).

exempted governmental or religious flags or emblems from restrictions but applied then to private secular flags.

In *Marin v. Town of Southeast*,[32] the court invalidated a local law that restricted "temporary signs" without reference to subject matter. The plaintiff posted temporary signs on her property in support of political candidates. She claimed the law violated the First Amendment. The court agreed, applying *Reed*, because the law exempted certain types of signs from the restrictions even though the statute, in isolation, could be considered "content neutral." These exemptions were the basis for finding the restriction to be content-based and it did not survive strict scrutiny. The justification for the law – aesthetics, public health, safety, welfare and property values – are not compelling governmental interests, to justify the restrictions, the court found.

In *Thomas v. Schroer*,[33] the court found the Tennessee Billboard Act could violate the First Amendment when used as a basis to remove some of Thomas' billboards and signs displaying noncommercial content. The court issued a preliminary injunction against the removal. This case addresses the unresolved issue of whether rules that distinguish between on-premises and off-premises are content neutral. The difference between the two can only be determined by considering "the content of the sign and determin[ing] whether that content is sufficiently related to the 'activities conducted on the property on which they are located."[34] The court rejected arguments that the distinction is content neutral because it is based on location or placement of the sign. He disagreed with Justice Alito's concurrence and said that *Reed* required him to find the law to be content-based, unlikely to withstand strict scrutiny.

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[32] ___ F.Supp.3d ____, 2015 WL 5732061 (S.D. N. Y. 2015). This paper focuses on *Reed*'s impact on signage ordinances. Its impact has been felt in other types of First Amendment cases. *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015) (anti-panhandling ordinance struck down); *Rideout v. Gardner*, 123 F.Supp.3d 218 (D.N.H. 2015) (law banning digital photo of ballot invalidated); *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015) (anti-robocall statute invalidated).

[33] ___ F.Supp.3d ___, 2015 WL 5231911 (W.D. Tenn. 2015).

[34] *Id.*

The court in *Contact Promotions, LLC v. City and County in San Francisco*,[35] reached a different result because the on-site/off-site regulations applied to commercial signs. The court said *Reed* had no bearing on the case and that "laws which distinguish between on-site and off-site commercial speech survive intermediate scrutiny.[36]

Indeed, in *Metromedia Inc. v. City of San Diego*[37] the Supreme Court conclusively determined that on-and-off-site sign distinctions were permissible under *Central Hudson* but the ordinance was found to be unconstitutional because it favored commercial speech over noncommercial speech. Onsite commercial advertisements were allowed but not advertisements carrying noncommercial messages. *Reed* did not address *Metromedia*, which must not be presumed to be overruled by implication. However, whether an on-site/off-site distinction discriminates on the basis of content, or is a content-neutral regulation of a sign's location appears to remain an open question.

D. Post-*Reed* Options for Sign Codes.

Reed will take a while to shake out. Subsequent cases have not followed it if the regulation involves commercial signage. Theoretically, a distinction drawn on the basis of the commercial versus noncommercial message in a sign could make a sign code content-based under *Reed*. However, courts do not appear willing to jettison *Central Hudson* and its progeny without clarity from the Supreme Court. All that we can be certain of is that sign codes cannot treat noncommercial messages less favorably than commercial messages.

Reed creates a circular dilemma for municipalities. They need less compelling justifications to regulate commercial speech, but if regulators need to read the message of a sign to determine which type of regulation to apply, the content-based analysis of *Reed* would seem to control and they might need more substantial justifications than traffic safety and aesthetics.

[35] 2015 WL 4571564.
[36] *Id.* at *4.
[37] 453 U.S. 490 (1981).

Municipalities will need to determine the level of risk that is acceptable to them and balance that risk against the community needs for sign control. Several options seem possible:

- Ban all signs completely (or conversely allow all signs without any regulation);
- Adopt a content-neutral sign code structure with separate codes for temporary and permanent sign structures based upon reasonable non-content-based criteria;
- Minimize content-based exceptions to a defensible content-neutral code structure. Those exceptions would require a compelling or substantial government justification. Create a real estate signage exception.

The ban in the first option would violate the First Amendment. Allowing all signs with no sign regulation would create immense practical problems for municipalities (i.e., allow billboards in residential areas?) Because that is such a remote possibility, this option will not be addressed here. The second option may prove to be un-workable because drawing a distinction on the basis of permanent versus temporary may result in too much signage that cannot be controlled by a municipality. The third option may be the best compromise for realtors and municipalities. A code could be based upon the commercial versus non-commercial distinction. This would allow municipalities to control commercial signage, which requires less of a justification for restrictions but it would allow for real estate signs, which can be justified as serving unique, substantial or compelling governmental interests. *Reed* sidesteps the issue of commercial signage and the many the Supreme Court cases discussed herein that must be assumed to remain the law. This makes developing a bullet-proof constitutional sign code a complex and difficult task, with no silver bullet solution.

1. Could a Municipality Completely Ban All Signs?

a. Private versus public property distinctions

Some municipalities might think, simplistically, that a complete ban on all signs would avoid constitutional problems because such a ban would be content-neutral under *Reed*.[38] Not

[38] A complete ban would raise numerous non-constitutional issues beyond the scope of this paper, such as impact on economic development and general community reaction.

so. Such a regulation would still have to satisfy the time, place and manner restriction test of *Ward v. Rock Against Racism*.[39] Even if a total restriction is content neutral it must still be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.

The usual "government interest" justifications for banning signs are promotion of aesthetics and traffic safety. If a community allowed certain types of signs *before imposing a* ban it would have a hard time justifying a ban *now* on aesthetic and traffic safety grounds. What has changed is *Reed*, which may make governments want to take the path of least resistance to avoid litigation because a complete ban is "content neutral." However, "avoidance of litigation" seems a very speculative interest and probably does not create a new and independent "significant," or "compelling," interest. A complete ban would deprive citizens of a critical medium of speech, with no ample alternative channels of communication. A complete ban on signs conveying non-commercial speech would violate the First Amendment because it would suppress political speech which is "at the core of what the First Amendment is designed to protect." *Morse v. Frederick.*[40]

In *City of Ladue v. Gilleo*[41] the Supreme Court struck down an ordinance that banned most types of signs on residential property. The plaintiff posted a sign on her property protesting an imminent government decision to go to war, in violation of the ordinance. The Court said this ban violated the First Amendment. "By eliminating a common means of speaking, such measures can suppress too much speech." The ban foreclosed signs which provide a "venerable means of communicating that is both unique and important."[42] A complete ban on all signs that includes noncommercial signs could not be justified as serving a significant public interest because it would not leave open an ample channel of communications and would violate the First Amendment.

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[39] 491 U.S. 781, 791 (1989). See also Ft. 2.
[40] 551 U.S. 393, 403 (2007).
[41] 512 U.S. 43 (1994).
[42] *Id.* at 55.

A complete ban of all commercial signs on private property could face similar problems but should be tested under the *Central Hudson* criteria. Real estate sign bans on private property have already been stricken by the Supreme Court. In the landmark case of *Linmark Associates, Inc. v. Township of Willingboro*[43] the Supreme Court struck down a ban on the posting of commercial "For Sale" or "Sold" signs on residential property under a *Central Hudson* commercial speech analysis. The Court held that a municipality cannot prohibit the posting of "For Sale" or "Sold" signs under the First Amendment. The municipality justified the ban by claiming that it was necessary to prevent "white flight" from a racially integrated community. The court acknowledged the importance of that objective but said the ban prevented residents from obtaining information of vital interest to them "since it may bear on one of the most important decisions they have a right to make: where to live and raise their families."[44]

Some municipalities might try to impose signage bans on public property but allow them on private property. Such a ban would most likely fail the time, place and manner restriction test of *Ward v. Rock Against Racism*[45] even though bans of signs on public property may face less scrutiny than bans on private property in some circumstances.[46] In *Members of City Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*,[47] the Supreme Court upheld a ban forbidding the posting of signs, including political signs on public utility poles. But it noted that such a ban probably would not pass constitutional muster if it applied to private property. "The private citizen's interest in the use of his own property justifies the disparate treatment."[48] *Vincent* turned on the character of the property at issue – public utility poles – not typically considered a public forum. The ban passed the "time, place and manner" test because there were alternate forums for the posting of political signs. Despite *Vincent*, a complete ban on

[43] 431 U.S. 85 (1977).
[44] *Id.* at 96.
[45] 491 U.S. 781, 791 (1989). See also Ft. 2.
[46] *Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 174 P.3d 84 (2008) (ban on signs on doors of tenants by housing authority violated the First Amendment); *Marin v. Town of Southeast*, 2015 WL 5732061 (S.D.N.Y. 2015) (exacting scrutiny applies to political speech on private, residential property and ban does not pass such scrutiny).
[47] 466 U.S. 789 (1984). *accord, City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 96 P. 3d 979 (2004).
[48] *Id.* at 811.

signs on public property that has historically been considered a "public forum" would be very ill-advised.[49] Such a ban does not seem narrowly tailored to promote the governmental interests of aesthetics and traffic safety, particularly if noncommercial signs (i.e. political) would have to be allowed because a ban on signs on public property would not leave open ample alternative means of communication, as the Washington Supreme Court found in *Collier.*

The bottom line is that municipalities probably cannot totally ban signs from private property or traditional public forums, and they should not do so for real estate signs as discussed in the next sub-section.

Ladue and *Linmark* (not overruled by *Reed*) mean that bans of signs posted on private or residential property (whether commercial or noncommercial) would face significant constitutional challenges, but under different tests (*Central Hudson* or strict scrutiny).

b. Commercial versus non-commercial distinctions

Bans of certain types of commercial signs have been upheld.[50] Total bans on off-premises commercial billboards have been upheld in *Metromedia, Inc. v. City of San Diego*[51] and *Citizens for Free Speech v. County of Alameda*,[52] which followed *Metromedia*. These cases were analyzed under *Central Hudson* and found justified as furthering substantial government interests in traffic safety and visual aesthetics. Because the bans allowed for signage at other locations the advertisers had alternate means of communication so they satisfied the time, place and manner criteria.

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[49] *See Collier v. City of Tacoma*, 121 Wn.2d 737 (1993) (parking strips between the "streets and sidewalks" are part of the "traditional public forum," occupy a special position in terms of First Amendment protection and the government's ability to restrict expressive activity is very limited, citing *Boos v. Barry*, 485 U.S. 312, 318 (1988); *Hague v. C.I.O.*, 307 U.S. 496, 517 (1939) (right to communicate views to others on a street in an orderly and peaceable manner); *U.S. v. Grace*, 461 U.S. 171, 177 (1982) ('public places' such as streets, sidewalks and parks, are considered, without more, to be 'public forums'); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1982) (streets are "...quintessential public forums, the government may not prohibit all communicative activity.") See also: *Burson v. Freeman*, 504 U.S. 191 (1992).

[50] *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).
[51] 453 U.S. 490 (1981).
[52] 114 F.Supp.3d 952 (N.D. Cal. 2015).

Even if commercial billboards or other types of commercial signs might be banned, a municipality should not consider banning real estate signs. Under *Linmark* a municipality cannot ban real estate signs on *private* property, and for the reasons stated in that case, as well as others, should not ban them on *public* property (i.e. rights of way or parking strips) because real estate signs serve different interests than other types of commercial signs that promote only the sale of commercial products (i.e. bananas or Budweiser). Under *Central Hudson* a ban of real estate signs in public forums would seem more extensive than necessary to serve the governmental interests of promoting aesthetics and public safety because these interests could be impacted to the same degree by noncommercial signs that cannot be banned from public forums without a compelling state interest. A ban would thwart the societal interest in the "free flow of commercial information," *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*.[53]

Further, leaving aside the practical business implications of a ban on real estate signs, such a ban would leave few, if any effective alternatives for realtors and their clients to communicate to the public because of the unique nature of real estate signs. They need to be placed in locations near the property at issue where interested buyers will most likely notice them, such as in rights of way or parking strips. For reasons discussed below, typical real estate "A-board" signs serve substantial and compelling governmental interests that are not served by other temporary commercial signs. However, local government should develop a strong record reflecting the unique nature of real estate signage and the governmental interests in real estate transactions to support justifying different treatment for different types of temporary commercial signs. While difficult to do under the Ninth Circuit's "Blazing Bagels" case,[54] a thoughtful local process can support such a result. This legal analysis, as well other information provided by REALTORS® associations that reflect local conditions can be included in the jurisdiction's record to support the importance of real estate-related signage.

[53] 425 U.S. 748, 764 (1976).
[54] See fn. 24.

2. Can a Municipality Justify Special Regulations for Real Estate Signs?

If a municipality adopted regulations that allowed temporary real estate signs but banned other commercial signs, what reasons would support allowing temporary real estate signs but prohibiting other types of temporary commercial signs?

Such a regulation would be tested under *Central Hudson.* As discussed, regulations for commercial speech must: (1) serve a substantial governmental interest; (2) directly advance the asserted governmental interest; and (3) be no more extensive than necessary to serve that interest. The governmental interest need only be "substantial" – not "compelling," as required by the "strict scrutiny" test. Allowing real estate signage, while prohibiting other temporary commercial signage, could meet that test because temporary real estate signs describe a unique service or product – the sale of a home. A municipality could justify different treatment for real estate signs under the less stringent *Central Hudson* test, which does not require a perfect fit between the governmental interest and the means of satisfying it.[55]

The government has a "substantial" if not "compelling" interest in allowing temporary A-Board real estate signs to provide information to buyers about one of the most important purchases of their life, and to eliminate housing discrimination. In contrast, other types of temporary commercial signage often relates to the purchase of ordinary consumer goods.

- Under *Linmark*, real estate signs, including A-frame Open House signs, provide a "flow of truthful and legitimate commercial information" to consumers to enable them to make "one of the most important decisions they have a right to make: where to live and how to raise their families."[56]
- Real estate signs further the critical public goal of guaranteeing equal access to housing. The government has a compelling interest in eradicating housing discrimination.[57] The U.S. Department of Housing and Urban Development has issued regulations that explain:

[55] Only a "reasonable fit between the ends and the means" is required. *Citizens for Free Speech v. County of Alameda*, 114 F.Supp.3d 952, 969 (N.D. Cal. 2015).
[56] 431 U.S. at 96, 98.
[57] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P. 2d 274, 282-83 (Alaska *per curiam, cert denied* 115 S. Ct. 460 (1994)).

> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. The provisions of the Fair Housing Act (42 U.S.C. 3600, *et seq.*) make it unlawful to discriminate in the sale, rental, and financing of housing, and in the provision of brokerage and appraisal services, because of race, color, religion, sex, handicap, familial status, or national origin.[58]

These regulations recognize the important role that advertising plays in promoting fair housing opportunities. Placement of temporary real estate signs promotes the elimination of housing discrimination. Any person can come to any Open House regardless of race, creed, color, sex or national origin. Open House signs invite inclusion and openness in communities. While other sources of Open House information exist (i.e., the internet) real estate signs are the most immediate means of providing information to potential buyers, some of whom may lack the means to access the Internet.

- Real estate signs are vital in many communities facing housing shortages. They provide on-the-street valuable information to potential home owners and renters to quickly learn of possible housing in areas with housing shortages. A seeker does not need access to a computer and the Internet to find housing possibilities.
- Real estate signage helps promote real estate sales, enabling sellers to more quickly sell and move to another residence, which in turn increases further economic activity. The state and communities derive revenues from these sales and an expanded tax base.

Clearly, temporary real estate signs serve substantial governmental interests other than traffic safety and aesthetics, which are the usual justifications for sign codes. Because of this, different treatment between temporary real estate signs and other temporary commercial signs may be justified. A "city may distinguish between the relative value of different categories of commercial speech." *Metromedia, Inc. v. City of San Diego*.[59]

The interests served by a temporary real estate sign code should pass the "substantial government" interest test of *Central Hudson*. Such a code would be narrowly tailored to serve

[58] 24 C.F.R. § 109.5.
[59] 453 U.S. at 514.

the different interests promoted by real estate signs that other commercial signs do not serve. Whether parties wanting to display other commercial signs have effective alternatives can only be determined on a fact-specific basis.

Many of the existing temporary real estate sign ordinances on the Realtors Tri-County Sign Code matrix could satisfy a *Central Hudson* analysis, as long as real estate signs are not given any preference over noncommercial signs regulated by other sections of a municipal code. Therefore, no "model" real estate ordinance for the post-*Reed* world is included herein because it might not be needed and existing ordinances in any given community should be examined first.

3. Content-Neutral Allowance For All Temporary Signs.

Municipalities may choose to allow, but regulate, all temporary signs, including real estate signs. This approach may protect the important public interests in housing and real estate, as well as the interests of property owners, as long as the non-content based rules are fair, not too burdensome and facilitate a truly efficient and non-discriminatory real estate market place. However, because of the difficulty in implementing such an approach, it may be more productive to use available materials and industry data to document in the city's record the substantial and compelling government interests in having a content-based regulation for real estate "open house," "for sale" and "for rent" signs.

As a general rule, under *Reed*, certain non-communicative aspects of signs are usually considered non-content based time, place or manner restrictions and would not face rigid strict scrutiny. These include the following for real estate "open house" signs, which REALTORS® generally support:

- They may not be placed on (or attached to) trees
- They may not be placed on (or attached to) foliage
- They may not be placed on (or attached to) utility poles
- They may not be placed on (or attached to) regulatory signs
- They may not be placed on (or attached to) directional signs
- They may not be placed on (or attached to) informational signs
- They may not interfere with vehicular, bicycle, wheelchair or pedestrian travel
- They must be outside of vehicular lanes

- They must be outside of bicycle lanes
- They may not block driveways
- They may not block curb cuts
- They may only be in place between the published times for dawn and dusk, and must be picked up at the end of each day
- They may not exceed six square feet per side in area, and 36 inches in height
- They may not be used unless the property owner (or owner's agent) is physically present at the property that is for sale or rent.

The non-content characteristics of a temporary sign may differ significantly from those of a permanent sign in the following ways. The following are example of criteria REALTORS® generally support:

- material used (sturdy and weatherproof)
- size (4 sq. ft. per side, plus "status" rider strips once the property is under contract)
- duration (while the property is for sale)
- locations allowed (one per street frontage)
- removal obligations (within 7 days following closing of the purchase and sale transaction)
- time allowed (24/7)

As long as a sign code does not favor commercial speech over noncommercial speech, content-neutral sign code restrictions governing the medium of the communication should be constitutional.[60]

CONCLUSION

Reed precludes municipalities from regulating a sign based on its message, at least a non-commercial message, unless the regulation is narrowly tailored to meet a compelling government interest. While *Reed* suggests total sign bans may be possible, total bans on a form of speech

[60] In *Metromedia*, *supra*, the court found that a sign code banning all offsite advertising in San Diego could be constitutional. However, because the code allowed for onsite commercial advertising but not onsite noncommercial advertising the ordinance was unconstitutional.

usually violate the First Amendment, according to other Supreme Court decisions that were not overruled by *Reed*.

The prevailing view in post-*Reed* cases is that *Reed* does not apply to the regulation of commercial messages/signs like real estate signs. Thus, regulations aimed at commercial speech would only have to pass the *Central Hudson* test.

Municipalities cannot bar placement of real estate signs on residential property under *Linmark*. They should not do so for public property that is a traditional public forum (i.e. rights of way; parking strips).

However, municipalities can impose reasonable time, place, and manner restrictions on signs. A slightly different test is used by courts to evaluate time, place and manner restrictions. However, for the purposes of commercial real estate signs, municipalities could craft reasonable time, place, or manner restrictions that allow real estate signs but may prohibit other types of commercial signs because of the different governmental interests served by real estate signs.

Many existing temporary sign ordinances could be amended easily to produce a result consistent with *Reed*, and which would allow real estate professionals to continue to use critical "For Sale" and "Open House" signs.