

“Content Neutral” Land Use Regulation After Reed: Recent Developments in Signs, Adult Businesses, and Religious Uses

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The authors will be presenting on the topics discussed in this article at the APA National Conference in the session titled “Planning and Zoning for First Amendment-Protected Land Uses” on Monday, May 8, 2017 at 4:15 p.m.

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Introduction

Regulating land uses in a content neutral manner satisfying First Amendment limitations became more difficult for local governments following the 2015 U.S. Supreme Court decision in *Reed v. Town of Gilbert*. In *Reed*, all nine Supreme Court justices agreed that the Town of Gilbert, Arizona’s sign code failed the First Amendment’s content neutrality

requirement, although the justices came to that conclusion in different ways. Although signs were the focus of the Court’s decision in *Reed*, the case’s mandate regarding content neutrality has prompted local governments to reconsider zoning and land use regulation in other First Amendment-protected areas, such as adult businesses and religious uses.

At issue in *Reed*, Gilbert’s zoning code distinguished among a variety of categories of signs. The Gilbert code provided different regulations for “political signs,” “ideological signs,” “qualifying event signs,” “real estate signs,” and others. Pastor Clyde Reed and Good News Community Church placed temporary signs in street right-of-ways advertising religious services, but Gilbert enforced its sign code against the church’s temporary signs. The church filed a challenge to the Gilbert sign code. The Town’s sign code was upheld on summary judgment by the federal district court, and the Ninth Circuit Court of Appeals affirmed.

In *Reed*, six justices agreed that the Town’s sign code was facially content

based; that is, the code improperly distinguished between types of noncommercial speech based on the particular subject matter of the speech. A majority of the Court found that distinctions between political, ideological, and event-based speech impermissibly regulated on the basis of the signs’ content, which is prohibited under the Court’s First Amendment doctrine. The Court subjected the code to the “strict scrutiny” standard of review, which required the Town to demonstrate a compelling governmental interest and narrow tailoring of the regulations to the governmental purpose. According to the majority, the Town failed to meet that standard, and thus the sign code was held invalid.

The result in *Reed* clarified several decades of constitutional law regarding content neutrality in speech regulations, and has put a much greater obligation on local governments to ensure that sign regulations and other regulations of speech are content neutral both on the face of the regulations and in the government’s underlying purpose for the regulations.

As local governments go about updating their sign codes in response to *Reed*, they should remember to consider other areas of land use that receive First Amendment protection, including adult uses and religious uses. This article provides a brief overview of recent case law developments relating to signs, adult businesses, and religious land uses that local governments should study during any code update.

Sign Regulation

With nearly two years of experience post-*Reed*, many local governments throughout the country are rewriting



Egor’s Dungeon, an adult business store in Chicago, Ill. Courtesy of APA Image Library Photographer: Carolyn Torma (2010)

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sign codes to ensure that they meet the rigorous standard set by *Reed*. Additionally, several cases from the lower courts have clarified some of the unanswered questions following *Reed*. Uniformly, the lower courts have invalidated content-based regulations of noncommercial speech, particularly those relating to political signs (*Marin v. Town of Southeast*; *Wagner v. City of Garfield Heights*; *Sweet Sage Café v. Town of North Redington Beach*). Conversely, the lower courts have upheld several examples of content-neutral time, place, and manner regulations, including restrictions on painted wall signs (*Peterson v. Village of Downers Grove*) and a New York City prohibition on illuminated signage extending more than 40 feet above curb level (*Vosse v. City of New York*). One of the federal courts of appeals, in a decision that may conflict with some of *Reed's* holding, found that event-based sign regulations are permissible (*A.N.S.W.E.R. Coalition v. District of Columbia*). At least one lower court has looked unfavorably at specific exemptions for artwork (*Central Radio, Inc. v. City of Norfolk*), which at least suggests that artwork must be subject to the same regulations as all other noncommercial signs.

Additionally, most courts that have reviewed special billboard regulations have continued to apply the *Central Hudson* test for commercial speech regulations, which appears to be unaffected by *Reed*. However, two courts, in the cases of *Thomas v. Schroer* and *Auspro Enterprises v. Texas Department of Transportation*, have found that *Reed* prohibits the distinction between on- and off-premises signage, and the New Jersey Supreme Court recently found that a local prohibition on billboards violated the First Amendment (*E&J*

Equities, LLC v. Board of Adjustment), although these cases are considered outliers. In addition, the California Court of Appeals, in a much-watched decision in *Lamar Central Outdoor, LLC v. City of Los Angeles*, ruled that the California Constitution allows local governments to distinguish between commercial and noncommercial speech in their regulations, and to maintain the off-premises/on-premises sign distinction that permits special regulation of billboards.

Adult Entertainment Uses and the Secondary Effects Doctrine

Adult entertainment is subject to First Amendment protection like the different forms of expression discussed above. Unlike those forms of expression, regulation of sexually

oriented businesses in the zoning context appears largely unaffected by *Reed* and remains subject to the “secondary effects” doctrine established by the United State Supreme Court in two cases – *City of Renton v. Playtime Theatres, Inc.* (1986) and *City of Los Angeles v Alameda Books, Inc.* (2002). There is a presumption that local governments regulating this category of uses are not attempting to censor speech but are attempting instead to prevent the harmful effects that can result from such uses: crime, prostitution, spread of disease, drug use and trafficking, blight, and negative impacts to nearby properties and neighborhood. For this reason, regulations governing adult entertainment uses are almost always reviewed under intermediate (not strict) scrutiny and deemed content neutral. But the content neutral label is misleading, as these regulations are aimed specifically at sexually oriented businesses and apply to certain types of speech but not others. While this is the type of facial distinction one might expect to be subject to strict scrutiny judicial review, especially in *Reed's* aftermath, adult entertainment is a beast unto its own.

Courts have continued to apply the secondary effects doctrine when considering challenges to zoning ordinances concerning sexually oriented businesses. The Fourth Circuit, in *Cricket Store 17, LLC v. City of Columbia* (2017), reviewed a First Amendment challenge to a Columbia, South Carolina zoning ordinance imposing restraints on adult entertainment uses (including a 700-foot dispersal requirement from “sensitive” uses such as religious institutions, schools, parks, and residences). Shortly after a sexually oriented retail store called Taboo opened, the City amended its zoning code, making Taboo’s use illegal at its current location and requiring it to move within two years. The court upheld the ordinance and did not once reference *Reed*. The

ordinance was found to satisfy the elements of the secondary effects doctrine, as legislative findings showed that it was content neutral since it targeted secondary effects rather than speech; the ordinance was supported by sufficient evidence to show that it was designed to eliminate secondary effects; and the zoning code left available alternative sites within Columbia where adult businesses could operate.

Cricket Store is notable for a couple reasons. First, because it states that a locality can rely on “whatever evidence” it “reasonably believe[s] to be relevant to the problem” confronting it. Expanding on this concept, the court explained that a locality need not perform its own studies to show the secondary effects that would result, but could rely on studies conducted by other communities. The legislative record surrounding Columbia’s enactment of the ordinance included 2,200 pages

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with 46 judicial decisions, 27 studies on the impacts of sexually oriented businesses, and 19 summaries of reports about negative secondary effects. And, second, *Cricket Store* rejected Taboo's argument that the timing of the ordinance (less than a month after the store opened) could be used to show that the ordinance was content-based, even though the ordinance was prompted by and enacted in response to Taboo's opening.

The Seventh Circuit considered a zoning ordinance with similar timing issues, in *BBL, Inc. v. City of Angola* (2015). There, the ordinance was enacted just days after a restaurant had been purchased by a company that sought to convert it into a nude dancing establishment in Angola, Indiana. The court upheld the ordinance at a very preliminary stage and observed: "We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection." Similar to *Cricket Store*, Angola's ordinance required that adult entertainment uses be located 750 feet from every residence and served to bar the nude dancing establishment.

Recently, the Third Circuit refused to apply the secondary effects doctrine in a case contesting the legality of federal statutes imposing certain requirements on producers of sexually explicit materials in an effort to combat child pornography. *Free Speech Coalition, Inc. v. United States* (3d Cir. 2016). Although the court specifically declined to address "the issue of whether the secondary effects doctrine survives *Reed*," it observed "that it is doubtful that *Reed* has overturned the *Renton* secondary effects doctrine." The federal statutes were subject to strict scrutiny and not intermediate scrutiny under the secondary effects doctrine, because,

UNIFORMLY, THE LOWER COURTS HAVE INVALIDATED CONTENT-BASED REGULATIONS OF NONCOMMERCIAL SPEECH, PARTICULARLY THOSE RELATING TO POLITICAL SIGNS

according to the court, the doctrine has been applied only to "brick-and-mortar purveyor[s] of adult sexually explicit conduct and a local government's attempt to regulate such business."

It appears that it is more of the same when regulating adult entertainment uses. They are an "exception" to zoning codes' facial distinctions among First Amendment uses and remain subject to the secondary effects analysis, which is not a difficult threshold for local governments to meet. Most, if not nearly all, zoning ordinances regulating these uses will pass constitutional muster, because "[l]ocal governments are usually smart enough to invoke 'secondary effects' in their regulation of adult businesses." *BBL, Inc. v. City of Angola*. And local governments may even regulate such uses after they put shovel to dirt and are operational by using "whatever evidence" they can, even if the evidence shows secondary effects in other communities.

"Content Neutral" Zoning of Assembly Uses

Across the country many local governments still retain zoning codes, plans, and maps that reflect a bygone era when "churches" were the primary, if not only, religious assembly use in town. In bygone times churches were given the prime space in the heart of the community. Zoning maps that were drawn to correlate with existing uses often reflect this era, as "church" or institutional zones spot the downtown areas. Some codes still expressly regulate "churches" and, in application, lump all other religious assemblies, no matter how different they are, into the category of "churches." While such treatment has posed little to no problem for established churches, new and different religious groups have had

significant problems with and raised serious objections to this one-size-fits-all approach. For example, why should a Maum meditation center for eight people have to comply with a local government's minimum acreage requirement for churches, often times requiring several acres? Why are there even minimum acreage requirements for all churches when some churches are only fifteen people strong?

Many localities have ditched the Christian nomenclature and opted to use the more generic "religious assemblies" or "places of worship." But as increased federal religious land use litigation shows, far too many of these codes still treat religious assemblies on less than equal terms

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with non-religious assemblies in violation of federal law. The Religious Land Use & Institutionalized Persons Act, 42 U.S.C. 2000cc et seq., (“RLUIPA”) was enacted in 2000 after nine hearings before both houses of Congress revealed that many communities were using individualized and discretionary zoning processes to exclude “new, small or unfamiliar” religious groups and were treating religious assemblies on less than equal terms with non-religious assembly uses like community centers, fraternal lodges, and theaters. Increasingly, local governments that have failed to heed this “super statute” have been made to pay the price, with reported damage and attorney fee awards to religious land use plaintiffs rising into the six and seven figure range.

Prudent governmental entities, however, are scrapping the “religious” qualifier altogether when it comes to regulating assembly uses. These jurisdictions are finding that the easiest way to avoid being sued for discriminating on the basis of religion is to stop discriminating on the basis of religion. In other words, they are regulating assembly uses without respect to the religious motivation behind, or religious content of, the assemblies. Instead, they regulate assemblies only according to more objective and legitimate zoning criteria, e.g. the size of the assembly or frequency of the assemblies. In doing so, they avoid what the Supreme Court described in the landmark case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) as regulating a practice or activity differently because of its religious motivation. Such discriminatory regulation triggers the strict scrutiny of the court—a legal test which is very difficult for local governments to pass.

Further, the Supreme Court has long held that religious worship services are a form of speech and association protected by the First Amendment.

Widmar v. Vincent (1981). So too, it has considered the right of assembly equally important to and connected with the freedoms of speech. See *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass’n* (1967). As such, local governments should pay close attention to the Supreme Court’s analysis of content based speech restrictions in *Reed* when they consider how they are regulating assembly uses.

In *Reed*, the Supreme Court clarified that a government regulation of speech is content based and subject to strict scrutiny if it “applies to particular speech because of the topic discussed or the idea or message expressed.” This is true, the Court held, even if the government has an innocent or innocuous justification for the law. Though the Supreme Court has not yet taken a religious land use case, it is not a stretch to imagine that the unanimous Supreme Court that decided *Reed* would subject a zoning regulation that applies to particular assemblies because of the religious content or motivation behind the assemblies to the same strict scrutiny.

In order to significantly lessen the risk of religious land use litigation and liability under the Constitution or RLUIPA, local governments are strongly encouraged to do the following: (1) avoid and remove the use of “Christian” nomenclature and (2) regulate all assembly uses (religious and secular) the same and without reference to religious qualifiers – allow them in the same zones and subject to the same requirements, or prohibit them all from the same zones, with the caveat that a jurisdiction must provide some zones wherein religious assemblies are permitted as of right.

Conclusion and Additional Resources

First Amendment litigation is common, expensive, and risky. Local governments should contact an attorney experienced in First Amendment land use issues when considering changes to zoning

amendments or individual applications relative to signs, adult businesses, or assembly uses.

Readers are encouraged to follow the Rocky Mountain Sign Law blog (rockymountainlaw.com) and the RLUIPA Defense blog (www.rluipa-defense.com) for regular updates on sign regulation, adult businesses, religious land uses, and other First Amendment issues relating to zoning, planning, and other areas of local government regulation. ♦

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