Legal

# On-, off-premise sign distinction questions remain

As we discussed in our October 2018 article in Property Management Quarterly, the 2015 U.S. Supreme Court ruling in Reed v. Town of Gilbert held that local sign codes must be content neutral. This means that an enforcement officer should not have to read the sign to determine the type and which sign code provisions apply. Because the facts of Reed concerned temporary directional signs put up by a church – i.e., with a noncommercial focus – Reed does not expressly mandate that content neutrality apply to commercial signs.

Most sign codes contain a distinction between on- and off-premise signs and treat those differently. Whereas an on-premise sign identifies or advertises the business, activity, goods or services that are located and available on the same premises as the sign, an off-premise sign identifies or advertises a business, activity, goods or services not principally located or available on the same premises as the sign. Billboards are the most recognizable type of off-premise signs.

Because the only way to determine whether a sign relates to the premises on which it is located is to read it, Reed's requirement for content neutrality is problematic for the on- versus off-premise sign distinction. The question, then, is whether Reed applies to commercial signs at all. The underlying basis for the court's decision in Reed was the strict scrutiny standard that protects noncommercial free speech. Commercial speech, however, is subject to a weaker

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standard called intermediate scrutiny.

Under intermediate scrutiny, a government law or rule may stand so long as the law or rule furthers an important government interest by means that are substantially related to that interest. By contrast, strict scrutiny requires that a law or rule be narrowly tailored and use the least restrictive means to further a compelling government interest.

Complicating the question, Justice Samuel Alito wrote a short, two-page concurring opinion in Reed that was joined by Justice Anthony Kennedy and Justice Sonia Sotomayor, calling out "some rules that would not be content-based" and expressly including "rules distinguishing between on-premises and off-premise signs." Local jurisdictions would not be prevented from enacting and enforcing such rules, Justice Alito reasoned, as a means of "regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."

A concurring opinion does not carry the same weight as a majority opinion, but it does carry some weight, particularly here where Justice Clarence Thomas' majority opinion is silent on the question of whether sign codes must be made content neutral only as to noncommercial signs or as to both noncommercial and commercial signs alike.

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In the wake of Reed, there were several cases filed in the lower courts challenging the content neutrality of local sign codes. Those cases are now working their way back up to the U.S. Supreme Court. In Contest Promotions v. San Francisco, for example, a raffle prize company filed suit against San Francisco challenging the city's prohibition of off-premise advertising on grounds that after Reed, the city could no longer distinguish between on- and off-premise signs. The company, Contest Promotions, promoted its games on signs throughout the city and received citations from the city, which had deemed the signs to be unlawful off-premise signs. The district court dismissed the case, holding that Reed did not involve commercial speech. The 9th Circuit Court of Appeals upheld the dismissal and, in May of this year, the U.S. Supreme Court declined to accept Contest Promotion's request for appeal, meaning the lower courts' decisions stand – at least in the 9th Circuit.

Conversely, the judge in a lower court case in Tennessee, captioned Thomas v. Schroer, struck down the state's Billboard Regulation and Control Act as unconstitutional and in violation of the content neutrality required by Reed. The plaintiff, a billboard owner named William Thomas, argued that Tennessee's controls over billboards – e.g., zoning, spacing, sizing and lighting rules – violate the First Amendment and Reed because those controls are based solely on the fact that those signs are off-premise signs, defined by their content.

The lower court in Thomas rejected the state's argument that its interest in maintaining traffic safety and aesthetic beauty justify the regulations. Instead, the lower court concluded the state could abolish the distinction between on- and off-premise signs and still maintain regulations that serve the state interest by requiring all signs, regardless of content, to be a particular size, to face a particular direction and to stand at a particular height, among other requirements. Tennessee has appealed the ruling to the 6th Circuit Court of Appeals.

Where does this leave us with respect to Reed's application?

For now, local jurisdictions are faced with one of two choices when it comes to on- and off-premise signs: maintain the distinction, even though it is not content neutral; or treat such signs the same, thereby allowing on- and off-premise advertising on all signs. In addition, lower courts will continue to be asked to clarify the issue and, perhaps, one day the U.S. Supreme Court will again take up a case that will provide a definitive answer one way or another.▲