Regulating Signs After Reed v. Gilbert

Fair Housing Law and Other Land Use Decisions

Kelly A. Lynch, JD, AICP
Deputy Director/General Counsel
Montana League of Cities and Towns

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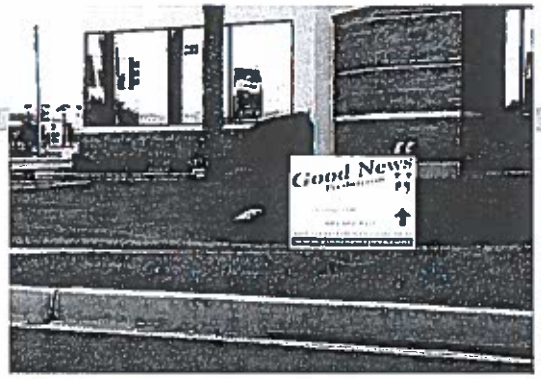
Is Your Sign Ordinance Unconstitutional?

Reed v. Town of Gilbert (June 2015)

- Sign ordinance prohibited outdoor signs without a permit, with exemptions for 23 categories of signs, including:
  - Ideological signs ("communicating message or ideas") – up to 20 sf, no placement or time restrictions
  - Political signs ("designed to influence the outcome of an election") – up to 32 sf, placed 60 days before and 15 days after election
  - Temporary directional signs ("directing the public to a qualifying event," generally a meeting of a nonprofit group, including churches) – 4 signs up to 6 sf, placed 12 hours before the event and one hour after
- Early each Saturday, the Good News Community Church would post temporary directional signs throughout the town with church name and the time and location of services. Signs were removed by midday each Sunday.



Reed, cont.

- The Town cited the Church for exceeding display time limits and failing to include an event date on the signs. Church filed suit against the Town for violation of free speech.
- District Court and 9th Circuit found for Town. "Cursory examination" of sign to determine which provisions of ordinance apply is not the same as "synthesizing the expressive content of the sign" in order to regulate it. "Content-neutral" means based either on the viewpoint or subject-matter of the speech. If you can justify the regulation without reference to the content, then content-neutral. ***SPLIT AMONG CIRCUITS ON THIS TEST:***
  - 1, 2, 8, 11 – if you have to read the text, its content-based
  - 4, 6, 9 – motive is test for content-based
  - 3 – context-sensitive test

Reed, cont.

- US Supreme Court (Thomas) reverses 9th Circuit, applying the more rigid test – application of different requirements for the different categories of signs is necessarily content-based and therefore subject to strict scrutiny.

"Strict scrutiny, like a Civil War stomach wound, is generally fatal." -NYT

  - Is regulation NECESSARY to further a COMPELLING government interest? and
  - Is regulation NARROWLY TAILORED to meet that interest?
  - Government's motive, lack of animus, or content-neutral justification **doesn't matter.**

Reed, cont.

- If content-neutral on its face, then can look to motive, animus, or lack of justification. **Intermediate scrutiny:**
  - Is regulation NARROWLY TAILORED to further a SIGNIFICANT government interest?
  - Does the regulation LEAVE OPEN AMPLE ALTERNATIVE CHANNELS for speech?

Reed, cont.

- If the Church had decided to support a political candidate, it could have put up larger signs, in more locations, and kept them up longer than signs inviting people to attend its services.
- "If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government."

Reed, cont.

- Justice Alito concurring opinion provides lists of rules that would not be considered content-based:
  - regulating the size of signs*;
  - regulating the locations in which signs may be placed (may distinguish between freestanding and attached signs)*;
  - distinguishing between lighted and unlighted signs;
  - distinguishing between signs with fixed messages and electronic changeable copy signs;
  - distinguishing between the placement of signs on private and public property, or between commercial and residential property;

Reed, cont.

- Alito concurrence, continued:
  - distinguishing between on-premises and off-premises signs;
  - restricting the total number of signs allowed per mile of road;
  - imposing time restrictions on signs advertising a one-time event**;
  - Government putting up its own directional, historic, or scenic signs

Reed, cont.

- Justice Kagan's concurring opinion: Of course "imposing time restrictions on signs advertising a one-time event" is content-based –that's exactly what the majority opinion says in *Reed*.
- This approach to content-neutrality does not (yet?) apply to:
  - commercial speech
  - speech in limited or non-public forums
  - obscenity,
  - defamation, libel, and slander.

Lone Star Security & Video v. City of Los Angeles, 827 F.3d 1192 (9th Circ. March 2016)

- Cal. Vehicle Code modified in 2010 to specifically authorize local governments to regulate non-motorized and motorized mobile advertising
- Four cities passed nearly identical regulations banning certain types of mobile advertising signs
- Plaintiffs owned and used parked trailers and parked vehicles to advertise their businesses in violation of the ordinances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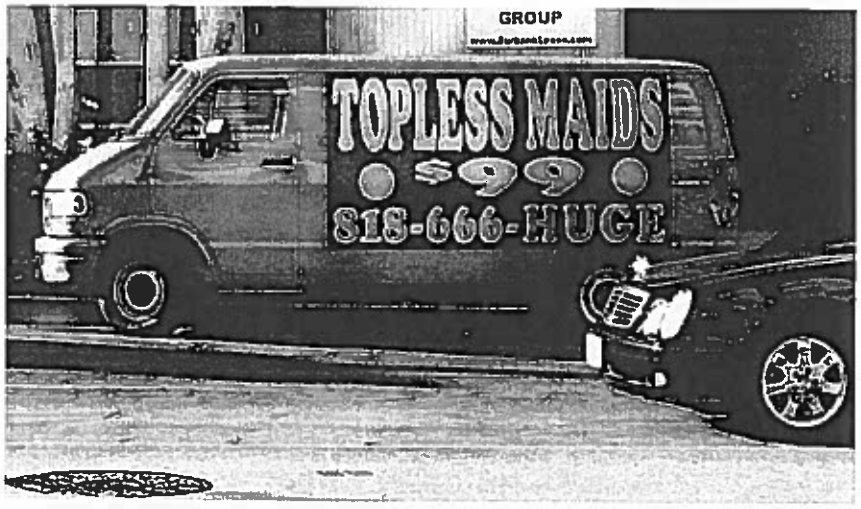
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Lone Star, cont.

- District court and 9th Circuit upheld local ordinances
  - **Content-neutral**, even using new *Reed* test: "advertising" does not distinguish between commercial and non-commercial speech and does not require enforcing officers to read the content to know whether the sign violates the ordinance
  - **Narrowly-tailored**, citing *City Council v Taxpayers for Vincent*, 466 U.S. 789 (1984): ban addresses mobile advertising only, visual clutter, traffic safety, parking control, and aesthetics are substantial government interests

Lone Star v. City of Los Angeles, cont.

Ample alternative channels for communication: advertising may still be accomplished through other types of mobile signs (decals, bumper stickers) or permanent structures (bus benches, stationary billboards)

"The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."

-Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981)

Where to go from here ...???

Where to go from here ...???

1) Purpose statement – makes sure your ordinance has a strong purpose statement regarding the significant government interests being protected by the regulations – traffic safety, parking control, aesthestics, visual clutter, etc.

2) Substitution clause: "Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs."

Where to go from here ...???

3) Review your sign ordinance for all content-references (prohibitions, exemptions, permit requirements, and differences) in a non-commercial context.
   - How do you treat political v. ideological v. special event signs?

4) Pay special attention to temporary sign regulations
   - Allow for certain amount all the time with restrictions on sign types
   - Additional amount with time-restrictions and broader options for sign types

Where to go from here ...???

5) Base regulations on sign form/site activity/zoning distinctions, not content of the sign.

   Ex: Allow for minimum amount of non-commercial signage based on zone (by size, location, lighted, electronic, total amounts, type). Then:
   - Allow an extra sign on-site when property is for sale or rent
   - Allow for an additional sign, located within certain amount of distance from street, intersections, and driveways
   - Allow one small additional sign placed on front of building, on either side of the mailbox, or on a post
   - Provide process for limited-time sign permit, with date sticker issued by government

Where to go from here ...???

- Commercial content? Metromedia says can be treated differently, Reed's attorney said the same at oral argument. Lone Star –demonstrate how the regulations are constitutional as applied in non-commercial context
- Be wary of Alito's list – some lower courts (not 9th Circ) have already found on/off premise distinction, exemption for sales or lease signs, and time limitations on political signs to be content-based and unconstitutional
- Other ideas? What have you done? In my review last week, almost every Montana city sign ordinance I looked at had at least one constitutional violations ala *Reed* variety... (!)

Fair Housing Law

FHA

- Fair Housing Act (FHA) – 42 U.S.C. §3604(a)-(f)
  - Prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin
  - Can't refuse to sell or rent, refuse to negotiate to sell or rent, make unavailable or deny (all applies to zoning or building regulations), or discriminate in terms, conditions, or privileges (local government services)
  - Disability includes *past* drug or alcohol use
- 3 Types of Violations of FHA:
  - Fail to reasonably accommodate a disability
  - Disparate treatment – naming a protected group (!)
  - Disparate impact – policies result in discrimination

AFFH

- Affirmatively Furthering Fair Housing (AFFH) – CDBG/HOME
  - Fund recipients must certify to HUD they will affirmatively further fair housing
  - New analysis required by HUD, focusing on patterns of segregation ("racially or ethnically concentrated areas of poverty") (previously entitled Analysis of Impediments to Fair Housing)
  - Closer focus on zoning tools - will look at impact of facially neutral zoning; if these regulations restrict the supply of affordable housing, can result in a disparate impact finding under the FHA as well
  - HUD will provide the data; entitlement communities will receive greater scrutiny – Missoula, Great Falls, Billings

AFFH, cont.

- Fair Housing Act authorizes HUD to investigate local government violations of the FHA and refer meritorious claims to DOJ – HUD will likely use its own AFFH standards and data to investigate, with higher scrutiny on entitlement communities. Ideas to consider:
  - Use HUD data or collect similar data sets for your community, then...
  - Promote small lot sizes and higher densities across the jurisdiction
  - Decrease minimum floor-area-ratio requirements
  - Reduce parking requirements
  - Consider density bonus, ADUs, or inclusionary housing policies
  - Use same process and be consistent in treatment of affordable housing and high-density residential projects as other residential projects

Pacific Shores Properties, et al v. Newport Beach
(730 F.3d 1142 (9th Circ. Sept 2013)

- City passed moratorium on new group homes in response to complaints about proliferation of "sober homes" in the city; struck down by courts as discriminatory.
- City passed new ordinance addressing group homes and short-term lodging facilities. "Single housekeeping units" allowed only with written lease and residents decide who lives in the household; "residential care facilities" subject to new zoning requirements strictly limiting allowable locations.
- City would have preferred to "simply ban all unlicensed group homes" – under state law, cooperative living arrangements with a commitment or requirement to be free from alcohol and other drugs do not require state agency license

"Sober Living by the Sea"

Pacific Shores Properties, cont.

- Ordinance immediately reduced group home housing opportunities by 40% and closed about 1/3 of all drug and alcohol treatment facilities in the city. Zoning permit application process was "burdensome, time-consuming, and costly"; majority of applications were denied.
- Owners of group homes sued city for violation of FHA, ADA, and equal protection. District court dismissed; 9th Circuit 3-judge panel overturned; *en banc* hearing denied.
- Persons recovering from drug and/or alcohol addiction meet definition of persons with a disability under both ADA and FHA

Pacific Shores Properties, cont.

- Discrimination can be shown by disparate treatment *or* impact
- Here, City's sole objective in enacting and enforcing the ordinance was to discriminate against people deemed to be disabled under the FHA and ADA.
- City's discriminatory purpose in adopting the ordinance supported disparate treatment claim:
  - Discriminatory statements made by city staff, elected officials, public at public hearings and in surveys
  - City changing policy and practices from the norm – survey conducted of complaining residents, ad hoc committees formed, task force to enforce ordinance
  - Prior to the ordinance, group homes were generally permitted in all residential areas

El Dorado Estates v. Fillmore
765 F.3d 1118 (9th Cir. Sept 2014)

- Plaintiff owned and operated seniors-only mobile home park. Park residents approached City about adopting a mobile home rent control ordinance. In response, Plaintiff applied to City to subdivide the park into single lots for sale.
- City twice deemed application incomplete, then imposed hundreds of conditions *for completeness*.
- Plaintiff filed suit against City under Fair Housing Act, alleging City "acted with the intent of coercing, interfering with, and preventing [plaintiff] from potentially making housing available for families."

El Dorado Estates, cont.

- District Court dismissed the suit, 9th Circuit reversed and remanded. Plaintiff adequately alleged injury under FHA – expenses directly caused by City's unreasonable delays and extralegal conditions
- The right not to have to endure housing discrimination is a constitutionally cognizable legal interest; ***land use decisions made by local governments are subject to the FHA***
- Communications by city officials showed an effort to delay and discourage the subdivision to protect park residents from family housing in the park, including offers to remove the conditions if owners would agree to sell only to seniors.

El Dorado Estates, cont.

- NOTE: Fair Housing Act contains exemption for "housing for older persons" from the prohibitions against familial discrimination
- Exemption does not apply when other types of discrimination are alleged
- Exemption apparently also does not apply when owner is trying to get OUT of the housing for older persons business!
- City settled case with park owner in 2015; family park, lots approved for sale with lease-buy back provisions required for existing residents

Texas Department of Housing and Community Affairs v. Inclusive Communities Project (135 S. Ct. 2507 (June 25, 2015))

- Texas Department of Housing and Community Affairs ranked and scored applications for federal low income housing tax credits in accordance with state statutory criteria.
- Defendant claimed Department caused segregated housing patterns by allocating disproportionate amount of tax credits to predominantly black inner-city areas rather than equally in white suburban neighborhoods.
- Fifth Circuit held that disparate-impact claims are cognizable under the FHA

Texas Department of Housing, cont.

- SCOTUS agreed with Fifth Circuit - cases have consistently construed antidiscrimination laws to encompass disparate-impact claims.
- Disparate-impact liability was designed to reverse the country's historic pattern of housing segregation by allowing "private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units."
- Remands to District Court to analyze disparate impact claim.

Avenue 6E Investments v. City of Yuma (2016 U.S. App. LEXIS 5601 (9th Cir. March 25, 2016))

- City's Consolidated Plan and Analysis of Impediments for HUD funds documented that Hispanic population and affordable housing was concentrated in northern, western and central portions of the City
- City's General Plan encouraged development of more affordable housing in areas without high concentrations of Hispanic households, and acknowledged "NIMBY" arguments used to block or delay affordable housing projects
- General Plan also acknowledged problems with large lot zoning (increased housing costs) and encouraged higher-density zoning

Avenue 6E Investments, cont.

- Developer's 42-acre property was located in white-majority area; zoned low-density residential with 8,000 sf minimum lot size; and bordered by luxury homes, senior housing development, and undeveloped municipal property
- Developers sought a rezone to low-density residential at 6,000 sf minimum lot size to build more affordable housing; staff recommended approval of rezone
- Residents objected that Developers "catered" to low-income families with *large households*, that *used single-family homes as multi-family dwellings*, allowed *unattended children to roam the streets*, owned *numerous vehicles* which they *park in the streets and their yards, lacked pride of ownership*, with a *higher rate of crime*

Avenue 6E Investments, cont.

- Zoning commission unanimously approved the rezone; City Council denied – *only one* of 76 requests in previous 3 years
- Developer filed §1983 claim against City for disparate treatment and impact under FHA; District Court dismissed treatment claim and granted summary judgment on impact claim – existence of similarly priced housing in the area foreclosed a finding of disparate impact
- 9th Circuit reversed and remanded

Avenue 6E Investments, cont.

- Treatment claim – FHA and Equal Protection Clause prohibit government from zoning land or refusing to zone land out of concern that minorities would enter a neighborhood (citing *Pacific Shores*)
- Plaintiff "must simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the [city] in some way..."
- "Racially charged code words" and a City's disregard of its staff recommendations can be sufficient to allege discriminatory intent

Avenue 6E Investments, cont.

- Impact claim – data contained in City's planning documents identified racially concentrated areas of poverty in the City, a direct relationship between housing density and costs, and the historical opposition of local residents to affordable housing projects as impediments to the production of affordable housing in the City.
- "Discriminatory zoning practices violate the FHA even if they only 'contribute to making unavailable or denying housing' to protected individuals" (citing *Pacific Shores*)
- When the developer shows by statistical data that a zoning denial will have a disparate impact on [protected groups], the city's obligation is to establish a legitimate and credible basis for its decision.

FHA cases, cont

- See also *MHANY Management v. Village of Garden City*, 819 F.3d 581 (2nd Circ. March 2016) (City rezoning to exclude multi-family housing after "racially coded" public opposition to proposed affordable housing project constituted unlawful discriminatory intent and impact)
- August 26, 2016 – North Texas U.S. District Court ruled that Inclusive Communities failed to provide any evidence that Texas Department of Housing and Community Affairs' discretionary application of the low-income tax credits had any disparate impact on low-income housing in the area.

Other Land Use Decisions

Clark Fork Coalition v. DNRC
2016 MT 229 (September 13, 2016)

- Montana Water Use Act (Title 85, Chapter 2, MCA) establishes permit system for all appropriations of water in Montana. Primary purpose of permit system is to protect senior water rights holders from encroachment by junior appropriators.
- Section 85-2-306(3)(a)(iii), MCA provides an "exempt well" water right exemption for the following *de minimis* use of groundwater:
  - outside a stream depletion zone; and
  - 35 gpm or less AND 10 AFY or less.
  - Must be put to use within 60 days prior to filing for the certificate of water right; and
  - No notice to other water right holders.
- *"... except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit."*

Clark Fork Coalition v. DNRC, cont.

DNRC adopted 1987 rule defining "combined appropriation":

An appropriation of water from the same source aquifer by means of two or more groundwater developments, the purpose of which, ***in the department's judgment,*** could have been accomplished by a single appropriation. Groundwater developments ***need not be physically connected nor have a common distribution system*** to be considered a "combined appropriation." They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs ***need not be developed simultaneously***. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."

Clark Fork Coalition v. DNRC, cont.

DNRC four-part analysis under 1987 rule:

1) Are two or more wells part of a project or development?

2) Do the well or wells withdraw water from the same source aquifer as another well in the project or development?

3) In the department's judgment, could the purpose served by the wells have been accomplished by a single appropriation?

4) As a single appropriation, would the wells withdraw more than 10 acre-feet per year?

Clark Fork Coalition v. DNRC, cont.

- In 1993, DNRC adopted new rule with opposite definition for "combined appropriation," with no public hearing held or comments received:

  "an appropriation of water from the same source aquifer by two or more groundwater developments that are ***physically manifold*** into the same system."

- Senior water users, agricultural and environmental groups sued DNRC in 2010, claiming 1993 rule violated the spirit and intent of the Water Use Act and exempt well provision – instead allows large consumptive uses of groundwater with no permit and no notice to senior water users

- 1st District Court agreed and invalidated the 1993 rule; 1987 back in effect as of November 21, 2014

Clark Fork Coalition v. DNRC, cont.

- MSC upheld District Court decision

- "Combined," as a modifier for "appropriation," refers to the combined quantity of water that an appropriator has the legal right to use

- Legislature clearly intended a narrow "de minimis" exemption to the permit process, and the 1993 ARM rule conflicts with and

- Proper for DC to reinstate previous 1987 ARM rule, and order further rule-making consistent with the court's order

Clark Fork Coalition v. DNRC, cont.

How to apply to subdivisions? Case plus HB 168:

- Other than existing tracts of record as of 10/17/14 , probably not many grandfathered exempt wells
- New applicants seeking more than one well from same groundwater source must obtain permit from DNRC with rigorous process to demonstrate availability, beneficial use, and no adverse affects on senior users; and notice and objection process. Even more difficult in closed basins.

Murr v. Wisconsin, USSC 2016

- Does the "parcel as a whole" concept as described in *Penn Central* establish a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes?