



**CITY OF COVINGTON
SPECIAL MEETING AGENDA
CITY COUNCIL STUDY SESSION**

Council Chambers – 16720 SE 271st Street, Suite 100, Covington
www.covingtonwa.gov

Tuesday, October 13, 2015 – 6:00 p.m.

GENERAL INFORMATION:

The study session is an informal meeting involving discussion between and among the City Council, Commissioners, and city staff regarding policy issues. Study sessions may involve presentations, feedback, brainstorming, etc., regarding further work to be done by the staff on key policy matters.

CALL CITY COUNCIL STUDY SESSION TO ORDER

ROLL CALL

APPROVAL OF AGENDA

ITEM(S) FOR DISCUSSION

1. Sign Code Revisions (Hart)

PUBLIC COMMENT Speakers will state their name, address, and organization. Comments are directed to the City Council, not the audience or staff. Comments are not intended for conversation or debate and are limited to no more than four minutes per speaker. Speakers may request additional time on a future agenda as time allows.*

ADJOURN

Americans with Disabilities Act – reasonable accommodations provided upon request a minimum of 24 hours in advance (253-480-2400).

****Note* A Regular Council meeting will follow at approximately 7:00 p.m.***

Agenda Item 1

Covington City Council Study Session

Date: October 13, 2015

SUBJECT: POLICY DISCUSSION REGARDING OBJECTIVES OF NEW SIGN CODE

RECOMMENDED BY: Richard Hart, Community Development Director

ATTACHMENT(S): None

PREPARED BY: Sara Springer, City Attorney
Richard Hart, Community Development Director
Salina Lyons, Principal Planner
Brian Bykonen, Associate Planner/Code Enforcement Officer

EXPLANATION:

1. BACKGROUND

In 2013, the city council directed staff to study potential sign code amendments for temporary civic/non-profit banner signs for events. Staff spent the first part of 2014 examining the city's sign code, discussing with other city staff their needs as they related to temporary signs for city-sponsored events and programs, and reviewing current case law and best practices regarding sign regulations. The city council held a study session regarding temporary sign policies in June of 2014.

During this same time, staff noted that the prevailing case in the Ninth Circuit Court of Appeals regarding the regulation of signs, *Reed v. Town of Gilbert*, was on petition for review before the United States Supreme Court ("USSC" or "the Court"). Accordingly, staff recommended tabling any discussion or consideration of changes to the city's sign code until the *Reed* case was resolved by the USSC. The Court ultimately granted review of the case and issued their decision on June 18, 2015. As anticipated, the Court's decision in *Reed* has dramatically changed the landscape for drafting constitutionally defensible sign regulations.

The following sections include a brief overview of the Court's ruling in *Reed*; followed by staff's analysis regarding how to best apply the *Reed* decision; and a final section guiding general policy considerations and direction needed from the council to inform the next steps staff will take in drafting revisions to the city's sign code.

2. OVERVIEW OF REED v. TOWN OF GILBERT

Good News Community Church is a small church located in Gilbert, Arizona. The church rented space in temporary locations for its weekly service. It used small, temporary signs to invite and direct the community to its services. The Town of Gilbert's sign code imposed strict limits on the size, location, number, and duration of the church's signs, but did not impose the same restrictions on political, ideological, and homeowners' association signs. The church filed suit against the town in 2007, arguing that the town's sign code—both as written and as applied—regulated signs based on what they say and therefore violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The district court found that the town's sign code was constitutional because they found it to be content-neutral and reasonable in light of the government's interests. The U.S. Court of Appeals for the Ninth Circuit affirmed and held that, even though an official would have to read a sign to determine what provisions of the sign code applied, the restrictions were not based on the content of the signs, and the sign code left open other channels of communication. The town petitioned the USSC for a writ of review and the Court granted the town's writ and heard oral arguments on the case last spring.

On June 18, 2015, in a 9-0 majority opinion, the USSC overturned the Ninth Circuit and held that the town's sign restrictions were subject to strict scrutiny because they were content-based restrictions—restrictions that were applied differently depending on the message of the sign. Because these restrictions were content-based on their face, the Court need not examine justifications or the town's motives in determining whether the restrictions are subject to strict scrutiny. Despite the town's argument that the restrictions do not single out a specific nonprofit or church but rather restrict all such signs for events, the Court stated that the First Amendment prohibits censorship of all speech on a whole topic. The Court also held that the restrictions cannot survive strict scrutiny because they had no compelling interest in adopting restrictions to only a certain type of sign.

In his concurring opinion, Justice Alito wrote that the Court's decision does not preclude cities from continuing to regulate signs, but it does stop them from restricting signs in an unconstitutional manner. Justice Kennedy and Justice Sotomayor joined in the concurrence.

Justice Breyer wrote a separate concurring opinion in the judgment in which he argued that content discrimination should have been the consideration and legal analysis, and that this case did not trigger strict scrutiny. He further argued that the presumption against constitutionality is too strong to use automatically and was unnecessary in this case as there was another, more appropriate method of analysis available.

In her separate opinion concurring in the judgment, Justice Kagan wrote that constantly using strict scrutiny to judge government-regulated communication is too restrictive and would water down the meaning of strict scrutiny. She reasoned that the risk that the government will limit the public's ability to debate ideas with these regulations is very low and does not warrant strict scrutiny. In this case, the restrictions were not brought on by any reason or need, therefore all the Justices concurred that they did not pass any level of scrutiny (according to Kagan, they didn't even pass a "laugh test"). Justices Ginsburg and Breyer joined in Kagan's concurring opinion.

3. APPLYING AND IMPLEMENTING *REED*

The legal, planning, and development communities all agree that the Court's decision in *Reed* affects every local government in the country that regulates signs and has made many current sign codes, either in full or in part, unconstitutional. Pursuant to the Court's majority decision, sign regulations that are content-based on their face—by category, subject matter, speaker, viewpoint, or the like—face strict scrutiny by the court. To survive strict scrutiny a regulation must be narrowly tailored to advance a *compelling* government interest. As the Court has frequently opined, regulations seldom survive a strict scrutiny analysis.

Even though a regulation may be content-neutral on its face (*i.e.* as written), the Court’s analysis does not end there. The regulation will then be subject to intermediate scrutiny by the Court. To survive an intermediate scrutiny analysis a regulation must be narrowly tailored to advance a *substantial* government interest. The Court will indeed look at the government’s justification and intent for the regulation and if the underlying motive is ultimately content-based the regulation will be found unconstitutional (*e.g.* if a city prohibits a certain type of structural sign, and there is only one type of business or organization or person that uses that type of structural sign, the city would bear the burden of demonstrating how the regulation is not intended to target only that category and/or speaker).

What is clear from the Court’s ruling in *Reed* (not only in the majority opinion, but also in the commentary included in the concurring opinions) is that cities *must* develop regulations and a record that robustly support the objectives of a sign regulation and how the regulation specifically supports and/or advances that objective. The Town of Gilbert had no discernable reason for the sign regulations it had enacted other than standard objectives of traffic safety and aesthetics, and had no record to speak of to demonstrate how the subject regulations advanced those generalized objectives—again, as the Court stated, the regulations at issue didn’t even pass a laugh test.

Accordingly, the standard objectives of traffic safety and aesthetics will no longer pass muster with the Court on their own. A city must develop specific purposes for *why* they are seeking to adopt certain regulations, and then the city must also create a record to demonstrate *how* those regulations actually specifically address the city’s stated objectives and purposes (to either survive strict or intermediate scrutiny from the Court). Sign regulations that do not support a compelling or substantial government interest will not pass the court’s scrutiny, nor will regulations that are over-broad, under-inclusive, or are not narrowly tailored to support and advance the objectives of the regulation. In short, local governments must draft a sign code and create a record that “shows their work”.

The Court’s decision in *Reed* presents a marked change and restriction on how cities may regulate signs. However, the regulation of signs should be viewed not as a land use regulation, but rather a regulation of speech, and under that framing the Court’s decision in *Reed* arguably becomes exponentially more palatable to implement and enforce.

4. INITIAL CODE REVIEW

To assess the city’s current sign code given the Court’s decisions in *Reed*, city staff first reviewed the city’s entire sign code to determine what provisions, as currently drafted, would pass strict or intermediate scrutiny by the Court under *Reed* and which would be found unconstitutional. Upon completion of this review, though much of the city’s current code is enforceable, it is staff’s recommendation and intent to redraft the entire sign code, in part for administrative ease and efficiency.

5. POLICY CONSIDERATIONS AND INITIAL DIRECTION FROM COUNCIL

As noted above, given the Court’s ruling in *Reed*, the foundation of a constitutional sign code must include specific objectives and a substantial purpose. The purpose and objectives then guide the development of the sign standards and specifications and the administration and enforcement of the code.

The purposes subsection of the city's current sign code is actually much more specific and robust than most sign codes. However, those purposes were adopted in 2002 and much development and maturity of the city's character and vision has occurred since then. Therefore, at this study session, staff would like to take the opportunity to lead the council through a series of brainstorming exercises to extract from councilmembers general core objectives and values for the city that will then be used by staff to update the purpose provision for the city's new sign code.

****This session will be interactive and on the surface will not directly relate to signs**—staff encourages councilmembers to come to this session with a blank slate and an understanding that this is a first step of many in the development of the city's new sign code.

6. NEXT STEPS

Staff will take the comments and feedback gathered from the council at this initial study session and combine it with the city's vision and planning goals to develop a detailed purpose provision to serve as the foundation of the new sign code. Staff will then schedule a second council study session to review the revised purposes and objectives and to present a general outline of recommended sign standards and specifications that support the revised purposes and objectives. Upon the council's approval of the general outline for the new sign standards and specifications, staff may consider with council a public engagement process and a timeline for drafting, review, and adoption of the new sign code.

ALTERNATIVES: NA

FISCAL IMPACT: NA

CITY COUNCIL ACTION: ___ Ordinance ___ Resolution ___ Motion X Other

**PARTICIPATE IN INTERACTIVE EXERCISES LED BY STAFF AND CONTINUE
DISCUSSION AT SUBSEQUENT STUDY SESSION**

REVIEWED BY: Community Development Director, City Attorney, City Manager