Reed vs. Town of Gilbert Case Comments

CodeWright:

This section is proposed to replace Section 36-165 of the current code. As mentioned in the Code Assessment, federal laws with respect to the regulation of signs have changed dramatically based on the US Supreme Court's ruling in the Reed vs. Town of Gilbert case. Essentially, the holding from this case is that sign standards that require the regulator to read the sign's message to determine which kind of sign standards to apply are not content-neutral. Court precedent has indicated that sign standards must be content neutral (to pass muster under the 1st Amendment to the Constitution), or must withstand the strict scrutiny doctrine. To withstand strict scrutiny, standards must be developed with a compelling governmental interest and must be narrowly tailored to achieve that specific interest. In practice, most sign standards are focused on aesthetics, and thus will NOT pass the test of strict scrutiny.

As a result, local governments across the country are now revising their sign standards in two or three key ways: First, sign standards may not be structured in ways that require the sign to be read to determine which set of standards to apply (in other words, no longer may a community apply differential sign standards based on sign type – you may not have special standards for "for rent" signs versus "directional signs"). Second, sign standards may not distinguish between "commercial" signs versus "noncommercial" signs (since doing so requires reading the sign's message). Third, the Court has ruled that speaker-based standards (sign standards that relate to a particular kind of use, like signs for a restaurant or a signs for a vacation rental) are not content neutral, and must also pass strict scrutiny.

One of the best ways to address this new court precedent is to maintain the time, place, and manner provisions for signs that most communities (including Southern Shores) already have, and revise any specific sign-type standards into a set of generic time, place, and manner sign standards that differ by type of zoning district. Fortunately, the Town's current sign standards are already organized in this fashion, and will only require some moderate adjustment to avoid the strict scrutiny doctrine.

Town Attorney:

Prior to the 2015 Supreme Court case of Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), there was a substantial body of law, much from the USSCT, which allowed for a distinction between commercial and non-commercial signage and allowed for a lowered standard of review for commercial speech. The Reed case itself did not address this line of cases, but on its face seemed to say that if you have to look at the content to regulate then strict scrutiny applied. Federal appellate courts interpreting the Reed case have come to differing conclusions whether or not a distinction can still be made between commercial signage and other signage. A significant body of conflicting case law has developed since Reed was decided in 2015 (As of September 4, 2020 Westlaw shows that 669 cases have cited Reed since it's publication in 2015), and I am unaware of the USSCT revisiting the issue directly.

However, a handful of opinions have mentioned these distinctions without giving definitive analysis. See Barr v. Am. Ass'n of Political Consultants, Inc, 140 S. Ct. 2335, 2347 (2020) (Noting without a clear majority that the "decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity…" but also limiting that to "traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech."); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2374, 201 L. Ed. 2d 835 (2018) (finding no exception to content neutral analysis for professional services, while also referencing noncommercial speech). Where the courts have allowed the distinction, a lower standard of review has been applied to commercial speech. Generally, it is probably best practice to avoid the issue all together by having content neutral sign regulations.

Also, while it is possible that the author is correct that determining the signage regulation based on use is considered to be content based, I am not aware of any courts holding that and would have to research the issue more thoroughly to determine the answer. See Barr v. Am. Ass'n of Political Consultants, Inc, 140 S. Ct. 2335, 2347 (2020) (confirming that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference") (citing Reed). However, again, it's easy enough to avoid the issue entirely by having regulations which do not address the use of the property and instead rely on the zoning district designation of the property as the new ordinance provisions seem to do.