



Date: April 4, 2018

To: Members of the Joint City-County Planning Committee

Through: Patrick O. Young, AICP, Planning Director

From: Michael Stock, AICP, Senior Planner

Subject: Information Item: *Unified Development Ordinance* Text Amendment, Signs (TC1700002)

Executive Summary

Text amendment TC1700002 is initiated by the Planning Department to revise the current signage regulations within Article 11, Sign Standards, primarily to conform to the United States Supreme Court ruling in *Reed v. Town of Gilbert*, along with any other updates necessary to conform to other applicable state or federal law. Based upon an assessment performed by CodeWright Planners, LLC, along with the Brough Law Firm, the Planning Department has developed preliminary revisions to Article 11 and other relevant sections of the UDO. Subsequent to this update, staff intends to preform stakeholder outreach and further interdepartmental review, with additional revisions to the draft anticipated.

Recommendation

Staff recommends that the Joint City-County Planning Committee (JCCPC) provide comment. No additional action is required.

Background

In June, 2015, the United States Supreme Court issued its opinion regarding *Reed v. Town of Gilbert*, where it considered the constitutionality of provisions of the town's sign ordinance, primarily the regulation of non-commercial signs. The decision struck down the town's regulations because it treated non-commercial speech differently based upon content (content neutrality), and thus clarified when content-based restrictions on signage can be imposed.

The JCCPC, City Council, and Board of Commissioners received presentations by CodeWright Planners (Attachment A) during the summer of 2017, introducing the topic for discussion. CodeWright Planners is no longer contracted to work on the project due to a general lack of responsiveness to staff inquiries, and a failure to provide the required work product in the time and manner specified in the contract. Staff has continued the work and is developing draft revisions for more extensive departmental and stakeholder review subsequent to this update.

Issues and Analysis

Prior to *Reed*, ordinances could regulate content as long as the regulation was viewpoint neutral. In the *Reed* case, the majority opinion by Justice Thomas further clarified and emphasized content-neutral protections stating regulations could regulate aspects of a sign

that are not related to the message (size, materials, lighting, portability, etc.); even-handed limitations on sign posting on public property; and that other signs specific to traffic or safety may meet strict scrutiny.¹ “At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety.”²

Justice Alito, in a concurring opinion, offered a “sample” list of additional rules for municipalities that he, and other concurring justices, did not believe to be content-based:

- “Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.
- Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.
- In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech... They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today’s decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.”³

Thus the over-riding rule is to focus on ***time, place, and manner*** for the sign regulation, with limited exceptions for content-based sign standards that further a compelling governmental interest and are narrowly constructed to do so. Based upon guidance from these two opinions, and review of other legal interpretations of this opinion, staff has begun drafting revisions to the sign regulations within Article 11, Signs, with the summary of revisions as follows. As discussed in the presentation from the June 2017 JCCPC meeting and subsequent City Council and Board of Commissioners meetings, the focus will be to:

- Maintain existing and legally defensible regulations;
- Reduce, and when possible, eliminate content-based regulations; and
- Incorporate other State statutory requirements.

¹ “Strict scrutiny” refers to the standard of judicial review where a law must be demonstrated to further a “compelling governmental interest” and is narrowly tailored to achieve that interest. *Wex, Cornell Law School Legal Information Institute.*

² *Reed v. Gilbert* (2015) Opinion of the Court, p.17

³ *Reed v. Gilbert* (2015) Justice Alito, concurring

The following is a summary of preliminary revisions to the sign regulations in Article 11 and other relevant sections in the UDO:

1. **Purpose section.** This section will remain but staff will update to, at a minimum, demonstrate the necessity of certain signs to further a governmental interest such as safety, way-finding, community enhancement, and historical and cultural recognition.
2. **New “Exempt Sign” category.** This will list specific signs that primarily relate to furthering a governmental interest and thus will not be regulated to the extent of other signs in general. This section will also include signs allowed or required by other ordinances or statutes, or signs not visible off-site (which are not considered signs under the current definition of “sign”).
3. **List of “Prohibited Signs” will be maintained.** Most of these have not been identified as content-based and thus can remain. Some may warrant re-wording, clarifying, or condensing so as to remove redundant aspects. Those that are content-based will be deleted or re-worded to meet time, place, and manner limitations.
4. **Most general sign standards will be maintained.** General signage regulations regarding sign area calculation and measurement, height, illumination, construction and maintenance, limitations on changeable copy, and the “substitution of noncommercial signage” clause will be maintained with limited substantial changes. The substantial changes to note consist of:
 - a. The deletion of aggregate sign area requirements, since they conflict with individual sign area requirements especially for large development sites with numerous freestanding and wall signage. Past determinations when conflicts have arisen resulted in sing the individual sign type allowances, thus the proposed changes reflect these determinations.
 - b. Revisions to the changeable copy allowances are proposed.
 - The 80% sign area allowance specifically just for theaters will be removed due to it being a speaker-based regulation.
 - The “time and temperature” exemption from restrictions will be removed due to it being a content-based regulation with no discernable compelling governmental interest.
 - A parking structure changeable copy exemption is proposed limited to real-time notification of parking space availability. The purpose for this focuses on safety related to queuing within the street and way-finding.
 - The limitations on the number of times a message can change is re-worded for clarity, with a proposal of once per 180 minutes. Currently the regulation limits changes to eight times per day. The regulation proposed provides more clarity and is easier to regulate without creating a visual nuisance.
 - The exceptions for the Downtown Design District are relocated to this section.
5. **New “Temporary Sign” and “Permanent Sign” sections.** The UDO currently classifies signs into three categories: signs not requiring permits, signs allowed in the right-of-way, and signs requiring permits. These sections are re-organized to be in two primary categories: “Temporary Signs” and “Permanent Signs.” Rules for right-of-way placement will be embedded within each section and most of the regulations pertaining to sign types, found within signs requiring permits, will be maintained within the “Permanent sign” category. Most of the sign types found within the “signs allowed without a permit”

will be re-worked within the “Temporary Signs” category and promote more allowances for signs placed on residential property than those placed on non-residential.

In most instances, staff plans to incorporate the current size allowances for these, thus few additional limitations are anticipated. Most sign types within the “Permanent sign” category already meet time, place, and manner standards and thus few revisions are anticipated. However, for temporary signs will need to be re-worded. For example, signs currently listed and regulated as “Real Estate Signs” would be re-worded to read “an additional sign allowed when a property is for sale, lease, or rent.”

Temporary signs: For single-family and two-family properties, staff proposes an unlimited allowance of noncommercial temporary signs, with each sign having a maximum size and height. An additional temporary commercial-type sign of limited size and height are allowed when certain activities will happen on-site such as construction, yard sales, or when the property is for sale or rent. For non-residential, multi-family, and subdivisions property, the existing standards are proposed to be maintained but re-worded as discussed above to meet time, place, and manner standards.

Permanent signs: Most of the current “sign types” located within 11.6, Signs Requiring Permits, are maintained with some re-organization or proposed re-wording for clarity. The existing regulations focus on time, place, and manner thus changes are limited. Proposed changes that are more substantial are as follows:

- a. Sign types currently listed as not requiring a sign permit such as vending machine and ATM signs, window signs, and banners are relocated to this section. These still may remain exempt from sign permits.
 - b. Medical facility sign regulations are reworded to reference “hospital” facilities, which is a defined term in the ordinance. Safety and expedient way-finding is critical for hospital facilities and the community it serves, thus the limited speaker-based additional allowances are maintained.
 - c. Revisions to how monument and pylon freestanding signs are defined are proposed to more accurately reflect the visual differences. Additional standards for pylon signs may be proposed to avoid pylon signs with very short pylons or supports, thus in actuality functioning as very tall monument signs.
 - d. Addressing standards are relocated to this section.
 - e. Way-finding sign standards are proposed for removal. These are primarily content-based regulations and most wayfinding signage without commercial messaging will be allowed as “exempt” signs. Additionally, the standards for way-finding signage plans will also be deleted.
 - f. Off-premise non-residential entry signs are proposed for removal. These standards were established for limited circumstances and are primarily speaker based and run contrary to the general prohibition of off-premise commercial signage.
- 6. Signs within right-of-way.** Current regulations (Sec. 11.5, Signs Allowed in Right-of-Way) allow awnings and projecting signs, government signs, emergency signs, political and election signs, and signs identifying a recognizable community or development to be placed, either temporarily or on a permanent basis, within the right-of-way with appropriate license and encroachment agreements. Other right-of-way allowances are

also noted throughout the existing regulations such as directional real estate signs, moveable sidewalk signs, and suspended signs.

One issue with the current regulations is that some are content-based, and thus there need to be more generalized time, place, and manner standards. Depending upon policy direction, these can range in restriction. The following are proposed at this time:

- a. To address signs such as “ghost bikes” that are currently regulated through a separate City policy, and other memorial-type signage, the following is proposed:
 - A. One object or marker placed at the location of a traffic event or incident.
 1. The maximum size shall be 18 square feet
 2. The maximum height shall be 3.5 feet.
 3. The object or marker shall be placed at least three feet from back of curb or edge of pavement, as applicable.
 4. The object or marker shall remain no longer than 45 days after event or incident.
- b. Most government or safety signs will be deleted since they will be located within the new “exempt” sign category.
- c. Deletion of the specific political sign allowance and time limitation, and replace it with a general allowance of any non-commercial sign within the election sign time period allowance a per state statute (similar to the current rules in the UDO), with a minimum set of size and placement standards based upon the state statute.⁴ This allowance could be more expansive to allow non-commercial signs throughout the year, but time limitations may need to be considered for these and tracking/enforcement issues will also need to be considered.

7. Other notable changes proposed.

- a. *Sec. 1.9, Severability:* This section will be reconsidered to be more comprehensive.
- b. *Historic Landmark Signs:* References to this section in Article 11 will be deleted and landmark signs will be more comprehensively incorporated into the general landmark designation section in paragraph 3.16.3, Designation of a Historic Landmark.
- c. *Sec. 5.3, Limited Use Standards; Sec. 5.4 Accessory Uses and Structures; and Sec. 5.5, Temporary Uses:* Speaker-based or content based sign restrictions will be deleted or reworded as necessary. Those initially impacted would be limited use standards for antique shops, electronic gaming, manufactured home sales, satellite dishes, and temporary farmers markets.
- d. *Paragraph 15.3.9, Additional Remedies for Sign Violations:* Deletion of text that allows maintaining a sign that violates the ordinance based upon ignorance of the sign regulations.
- e. *Sec. 17.3, Defined Terms:*
 - The definition of a “sign” will be revised to remove references that would be considered “exempt” signs and to provide a more neutral definition than the

⁴ NCGS 136-32(b) regulates election signs in the right-of-way, and allows such signs “During the period beginning on the 30th day before the beginning date of “one-stop” early voting under G.S. 163-227.2 and ending on the 10th day after the primary or election day.”

current definition, which appears to read as a “commercial” sign definition. The exemption for “trade dress” will be maintained.

- Definitions for “banner”, “commercial sign”, “one-time event”, “temporary sign”, and “on-premise sign” are proposed. Other existing definitions are proposed with modifications.

Preliminary issues for discussion. The following are preliminary issues, identified by staff, that require additional discussion. As text development proceeds, new issues or additional discussions on the following topics may be necessary in order for staff to implement policy direction.

- 1. Real estate directional signs.** The current standards allow for real estate directional signs. Staff has not at this time determined a way to allow these signs within the right-of-way unless other commercial signs are also allowed. These signs are content-based, and as discussed above, any special exemption would need a compelling governmental interest. This may be a concern to the real estate industry.
- 2. Changeable Copy:**
 - a. The proposed changeable copy standards would eliminate “time and temperature” display allowances. Maintaining this allowance would be a content-based standard that would need to have a compelling governmental interest. Staff at this time has not determined a way to allow these, but the impact should be minimal due to the availability of this information.
 - b. Staff has proposed changes to the number of times a message can change in a day. The current text reads eight times a day, but has been interpreted in a variety of ways. To clarify, staff proposed to simply allow the copy to change once every 180 minutes, which amounts to eight times a day.
 - c. The additional allowance of sign area for theaters is proposed to be deleted. This is a speaker-based allowance with no apparent governmental interest.
- 3. Aggregate sign area.** This standard often conflicts with more prescriptive individual sign allowances. Past interpretations and implementations have focused on the individual sign allowances when there was a conflict. Staff proposes deletion of this section to remove such conflicts and remove an overly burdensome standard.
- 4. Signs with public right-of-way.** As noted above, two substantial revisions are proposed for signs in the right-of-way:
 - a. The first will codify allowances for an object or marker at a location of a traffic event or incident. Standards are proposed, including the duration of 45 days, consistent with the policy adopted for “ghost bikes” and other memorials adopted in 2015.
 - b. The second will establish a time period for any noncommercial signs in the right-of-way. The time period would be consistent with the time period established by state statute for political signs in the right-of-way: 30 days prior to early voting through the 10th day after the election day. This would allow a variety of signs during this time period, but not any other time. If there is direction to expand this time period, additional permitting may be necessary. This could be a concern for non-profits and other organizations that post event notifications, or other messages, within the right-of-way.

Staff Contact

Michael Stock, AICP, Senior Planner, 919-560-4137 ext. 28227; Michael.Stock@DurhamNC.gov.

Attachments

Attachment A: Code Assessment Presentation- July 20, 2017

Attachment B: Preliminary Sign Ordinance Revisions