

Zoning Signs*

Fact Sheet

Spring 2019

Signage lies at the intersection of the First Amendment and Land Use law. The First Amendment protects citizens from laws that abridge freedom of speech, and signs are considered a form of speech. Meanwhile, local governments in West Virginia may enact zoning laws affecting the use of land, including the use of land to display a sign.

Local governments have a recognized interest in regulating their communities through zoning for the purposes of public health, safety, and welfare, the last of which includes for the purposes of preserving community aesthetics. Both public safety and community aesthetics are clearly involved in regulating signage. Signs affect public safety to the extent they may distract drivers or pedestrians or may, instead, assist drivers and pedestrians. Community aesthetics can be greatly affected by unsightly signage or improved with clean, well-maintained, and inviting signage.

Even so, a recent case, *Reed v. Town of Gilbert*, clarified that zoning must regulate signage strictly based on objective sign qualities. Sign regulation based on the content of a sign, in most cases, is unconstitutional.

Avoiding Content-based Regulation

Content-based regulation of signage, for the most part, is unconstitutional and manifests in several forms. Most obvious, zoning may not regulate based on the message or viewpoint of a sign, such as by allowing unlimited display of the United States flag while limiting other flags.

In addition, regulations that differ according to speakers or subject matter are content based. These include regulations that allow churches different signage than schools or that have specific requirements for political signs. More nuanced, sign regulations should avoid distinctions based on a sign's function or purpose, such as a grand opening or sponsorship signs, or a sign's association with an event, such as a holiday or an election.

Content-based Exceptions

A few content-based distinctions in sign regulation are, or likely are, constitutional. First, obscenity is not speech protected by the First Amendment and therefore may be prohibited in signage. Signs that resemble traffic safety or similar signs, or that might otherwise impose a public safety threat, likely can be prohibited.

What is a Sign?

Any device with the essential purpose to communicate, designed to communicate, or where context results in communication, and such communication is aimed at persons in a public right-of-way.

Commercial v. Noncommercial Signs

Commercial speech is less protected by the First Amendment than noncommercial speech and may, therefore, be regulated differently. Nevertheless, the most prudent approach for communities is to make as few distinctions as possible between commercial and noncommercial signage, primarily because articulating a governmental interest for differing treatment is difficult.

* Municipalities are also authorized under 8-12-5(31) “[t]o regulate the *location and placing* of signs, billboards, posters and similar advertising.” This authority is notably less comprehensive than the authority to regulate signs through zoning.

How to Regulate Signs

Through zoning, communities may detail sign regulations that meet the needs of each specific district or overlay. Communities may regulate the types or forms of signs that may be displayed (e.g. freestanding, monument, or wicket) as well as the specific materials that may be used. Several aspects of the physical parameters of displaying signs may be regulated through zoning: height, setbacks, spacing, orientation, number, percent coverage of windows and doors, and landscaping.

The sign face, the portion of the sign displaying the message, may be regulated in the colors, number of words, fonts, and size of lettering permitted. In addition, specific sign features may be regulated: lighting, movement, motion, flashing, sound, flames, smoke, and other display features. Communities may also regulate duration of display, maintenance and removal, and signs as nonconforming structures.

Special Considerations

Residential Signage

Preserving residential character includes careful consideration of the signage permitted in residential areas. Communities should be equally careful, however, in not limiting signage “too much.” Displaying signs from one’s residence has been described as “an important and distinct medium of expression” by the Supreme Court of the United States. In this and other cases, regulations prohibiting or excessively limiting real estate signs and limiting residences to two political signs have been found unconstitutional.

Off-premises Signs

Off-premises signs are commercial signs that convey a message not related to the principal use of a property. Off-premises signs may have a tendency to increase the overall amount of signage within a community, something often undesired. However, communities should remain mindful that limiting off-premises signage affects not only commercial billboards, a commonly recognized form of off-premises sign, but also advertising a church bake sale or a new locally owned restaurant with a wicket sign planted at the corner of the community’s grocery store.

Murals & Design Guidelines

Case law has been largely inconsistent as to whether and to what extent murals should be regulated as signs. The most prudent approach for communities is to treat all murals as signs, typically “wall signs.” Community concerns unique to murals can be addressed through objective design guidelines that review the compatibility of a proposed sign’s objective qualities with the objective qualities of existing signs in the area.