Legistar ID No.: 2016-0380

AGENDA REQUEST FORM

FOR: Council Meeting of September 6, 2016

FROM:
City Attorney Kit Williams

ORDINANCE OR RESOLUTION TITLE AND SUBJECT:

AN ORDINANCE TO AMEND § 151.01 **DEFINITIONS**, § 174.03 **EXEMPTIONS**; § 174.04, § 174.10 **ON-SITE FREESTANDING SIGNS** AND § 174.12 **WALL SIGNS** TO MORE CLOSELY CONFORM TO THE LATEST UNITED STATES SUPREME COURT DECISIONS ON SIGN ORDINANCES AND TO DECLARE AN EMERGENCY

APPROVED FOR AGENDA:

City Attorney Kit Williams

August 11, 2016
Date

OFFICE OF THE
CITY ATTORNEY

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TO: **Mayor Jordan**
City Council

CC: **Don Marr**, Chief of Staff
Jeremy Pate, Development Services Director

FROM: **Kit Williams**, City Attorney

DATE: **August 11, 2016**

RE: **Necessary Revisions of the Sign Ordinance**

During the International Municipal Lawyers Mid-Year Seminar in April and also the Arkansas City Attorneys Seminar in June, there were presentations and discussions about the effect of the United States Supreme Court decision, *Reed v. Town of Gilbert*, on municipal sign ordinances. Although I believed the absolutist language of Justice Thomas would appear to make sign ordinances almost unworkable, leading constitutional scholars and authorities have concluded that Justice Alito's two page Concurring Opinion (joined by Justices necessary for the majority opinion) clarifies and limits some of Justice Thomas' sweeping declarations. The other three Justices concurred in the overruling of the Town of Gilbert sign ordinance which they opined could not even pass a "laugh test". They opined Justice Thomas' overbroad analysis and opinion was unnecessary for the decision and simply dicta (the hallmark of judicial activism). Dicta is often not given any precedential value in later Court decisions. Therefore, six of the nine Justices agreeing that the Town of Gilbert sign ordinance was unconstitutional would not agree to Justice Thomas' sweeping (and unnecessary to the decision) language except as tempered and "clarified" by Justice Alito's concurrence. (attached).

I believe we must make some amendments to our Sign Chapter while preserving its most important protections for our citizens including Fayetteville's unique aesthetic accomplishment of banning billboards and all other off-site signs.

Accordingly, I have been working on revisions of the sign ordinance which are attached.

These revisions have been supplied to the Mayor, Chief of Staff, Jeremy Pate and Planning staff (which administers the Signs Chapter of the Unified Development Code) for their input and suggestions. Jeremy Pate and Planning were kind enough to supply a ten page memo with exhibits with their suggested revisions, most of which have been incorporated into the proposed ordinance. The Mayor and Chief of Staff have also reviewed these proposals and concur in what I believe are necessary changes to comply with the United States Supreme Court decisions.

I should note that very little in the actual workings and application of **Signs** Chapter will be changed if the City Council approves this ordinance. We can no longer refer to "campaign" or "political" signs, but instead must refer to them as "temporary non-commercial" signs. We had limited such small campaign signs to one per every candidate or issue the property owner wished to support. We can no longer do that because that would require the City to read the content of the sign (which is now only permissible to differentiate between commercial and non-commercial and on-site versus off-site).

Thus, **there will now be no limit on the number of small (real estate size) non-commercial signs a property owner may wish to place on his or her property. These temporary signs are still limited to the period of 60 days before the election until 3 days after the election just as before the proposed amendment**. Large (up to 32 square feet) temporary non-commercial signs are still authorized for the period of 60 days before until 3 days after the election and limited to one for any building lot whether it be residential, commercial, or other. Commercial lots with over 100 feet of street frontage may instill one large temporary non-commercial sign per 100 feet of street frontage. This is identical to the current law.

The Whereas Clauses of the ordinance describe the recent United States Supreme Court decision, *Reed v. Town of Gilbert*, in which Justice Thomas writing the majority opinion made such sweeping (and unnecessary for the decision) statements that a reader might assume no city sign regulation could survive. Fortunately, Justice Alito (who had joined Thomas' majority opinion) wrote a two page Concurrence to provide "further explanation" of Thomas' decision. Alito concluded: "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."

Many of the most important changes are in the Definition of "Sign." It is much shorter, but now divides signs into three categories: (1) Non-Commercial; (2) Commercial and (3) Governmental and attempts to distinguish and remove "artistic murals" from the definition of a sign.

Most authorities also agree that cities may not favor commercial speech (and commercial signs) over non-commercial speech (and non-commercial signs). Amending § 174.10 **On-Site Freestanding Signs** and § 174.12 **Wall Signs** to move P-1 Institutional from its current grouping with residential (requiring very small signs) to the commercial area. P-1 Institutional would include churches, hospitals, government buildings whose speech and signs would likely not be treated as commercial and therefore are entitled to the size allowance for commercial districts and businesses rather than the much smaller size for residential districts. Without this change, the City could be challenged as favoring commercial speech with larger signs than non-commercial (school and religious) speech.

The United States Supreme Court has given great latitude to local governments' use of signs (traffic, directional, way finding, banner on light poles, informative, etc.). The Court has held that the *First Amendment* does not restrict the local government's own speech or signs, it only restricts the local government's regulation of private speech and signs. Therefore, we will place any necessary current regulations concerning government signs within a City Policy rather than leaving them in the Unified Development Code. This change will remove potential ways to attack the City without changing our actual practices regarding signs on City lamp poles, cross street banners, etc.

The Town of Gilbert's opponent cited its regulations and restrictions on placing temporary signs in the public right of way. Therefore, I am concerned about § 174.07 (B). I think it is better policy to let nonprofits who wish to direct the public to their event know that any property owner can post a non-commercial sign the same size as real estate sign on their property. This non-commercial sign could be the directional sign needed for the event. This would keep the City out of the regulation of these temporary directional signs and maintain a very clear understanding that street right of ways are for government signs only. Thus, I have removed all subsections within § 174.07. The replacement § 174.07 simply prohibits non-governmental entities or persons from placing signs on public property or street right of way.

CONCLUSION

I am supplying you the proposed Signs Chapter now because these changes need to be passed during your September 6th City Council meeting to be effective for the general election campaign. That is also why I have included an Emergency Clause.

Temporary non-commercial signs (which include all election campaign signs) will be authorized by this amendment to be installed by all property owners 60 days before the November 8th election day (which by my reckoning will be September 9, 2016 as October has 31 days).

Planning may still suggest another minor change or two, but I think the attached ordinance is pretty much in final form for your consideration.

SUPREME COURT OF THE UNITED STATES

No. 13–502

CLYDE REED, ET AL., PETITIONERS v. TOWN OF GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y., 447 U. S. 530, 537 (1980).

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not 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 free-standing 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. See Pleasant Grove City v. Summum, 555 U. S. 460, 467–469 (2009). 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.

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*Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests." Ward v. Rock Against Racism, 491 U. S. 781, 798 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.