PART 1 – DIAGNOSTIC REPORT:

LEGAL ISSUES IN REGULATING SIGNS

CITY OF HIGH POINT, NORTH CAROLINA

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Part 1 – Diagnostic Report: Legal Issues in Regulating Signs

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Introduction

Overview

The City of High Point's Sign Ordinance was originally drafted 27 years ago, in 1992, and over the years has undergone several amendments to respond to evolving changes in sign types, sign technology, and special sign needs that have arisen over the years. It has also been affected by the creation of overlay districts that contain distinctive sign provisions ensuring developing corridors have appropriate sign regulations.

"Part 1 – Diagnostic Report: Legal Issues in Regulating Signs" addresses the legal foundation for Constitutionally-appropriate sign regulations, particularly ensuring that in drafting new sign regulations the City does not, inadvertently or otherwise, infringe on its citizens' First Amendment's right to freedom of speech. Local governments are empowered to regulate signs under the police power – the capacity to regulate behavior and enforce order for the betterment of the health, safety, morals, and general welfare of the communities' inhabitants; the First Amendment, however, provides some limits on that power.

"Part 2 – Diagnostic Report: Sign Ordinance Analysis," is a companion report prepared as a separate document. It is an in depth analysis of the City's existing Sign Ordinance as well as other sign provisions found throughout the Development Ordinance. The Report is accompanied by recommendations, observations and remaining questions the Consultant Team has on regulatory nuances within the current Sign Ordinance, as well as a summary of business and citizen viewpoints on issues related to signs.

Purpose of this Report

The purpose of Part 1: Legal Issues in Regulating Signs, is to summarize major legal and Constitutional issues involved in regulating signs. This report discusses those issues and tries to place them in a context to assist City staff and officials in deciding how to proceed with next generation sign regulations.

Consultant Team

Eric Damian Kelly, PhD, JD, FAICP, the primary author of this report, is a lawyer (licensed in Colorado) and planner and emeritus professor of urban planning at Ball State University. Kelly a is a planner/lawyer, known across the country for his expertise in drafting Constitutionally-defensible sign ordinances and has written extensively on the regulation of signage. Since 1995, he has served as General Editor of the LEXIS/Matthew Bender legal treatise *Zoning and Land Use Controls;* Chapter 17 of the 10-volume set deals with the regulation of signs and billboards. Kelly was project manager for the creation of the multi-jurisdictional unified development code that was adopted by High Point in 1992 that included the current Sign Ordinance.

Connie B. Cooper, FAICP is a nationally-recognized planning consultant with a lengthy and successful track record of drafting comprehensive plans, zoning ordinances, sector plans, and conducting public engagement forums, as well as having 15-years of public-sector service as a planning director.

Legal Context of Regulating Signs

Communities have regulated signs for more than a century; some of the early sign regulations pre-date comprehensive zoning ordinances (see, for example, *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917), and *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911), appeal dismissed, 231 U.S. 761, 34 S. Ct. 325, 58 L. Ed. 470 (1913)). Local governments can regulate signs under the police power, provided that the regulations "constitute content-neutral time, place, and manner regulations." *Lamar Adver. Co. v. City of Douglasville*, 254 F. Supp. 2d 1321, 1327 (D. Ga. 2003), citing *Thomas v. Chicago Park Dist*., 534 U.S. 316, 322-24, 151 L. Ed. 2d 783, 122 S. Ct. 775 (2002). Most local governments today regulate content at least indirectly by making special provision for real estate signs, political signs, temporary signs, warning signs, directional signs and others.

The U.S. Supreme Court handed down a major decision in a sign case in 2015. In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (U.S. 2015), an Arizona case, the Supreme Court reversed a Ninth Circuit decision that had upheld a local sign ordinance that included a glossary of sign-type definitions, many of them content-based, and that exempted 23 categories of signs from the ordinance with many of those exemptions also content based. The Court was essentially unanimous in holding that content-based distinctions in sign ordinances are problematic, with the 5-member majority opinion saying that they are subject to "strict scrutiny." Although it is possible for an ordinance to survive strict scrutiny, doing so requires the showing of a "compelling governmental interest," a very high bar indeed.

This case is important and thus gets considerable discussion in this memo.

Precursors

This decision comes from the line of cases that have followed the confusing welter of opinions in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L.Ed. 2d 800 (1981), striking down San Diego's sign ordinance because the effect of its distinction between on-premise and off-premise signs was to restrict non-commercial messages more than some commercial ones. In 1988, in *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988), the Court applied strict scrutiny in striking down a sign ordinance in Washington that prohibited signs located within 500 feet of an embassy that would bring a government into "public odium" or "public disrepute." More recently the Court held:

> In an 8-1 decision, held unconstitutional a federal law prohibiting the sale of media depicting animal cruelty. *United States v. Stevens*, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (U.S. 2010);
>
> Affirmed (8-1) an appellate court decision reversing a district court judgment for the plaintiff on a tort claim by the family of a soldier killed in war against the Westboro Baptist Church, whose members picketed the soldier's funeral with signs that said, among other things, Thank God for dead soldiers, God hates fags, Fag troops, Pope in hell and You're going to Hell *Snyder v. Phelps*, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (U.S. 2011);
>
> Struck down (7-2) a California law preventing the sale of violent video games to persons under the age of 18. *Brown v. Entmt Merchs. Assn*, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (U.S. 2011).

As noted below, the majority opinion in *Reed* cites several times to *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (U.S. 2011), a challenge to a Vermont law that restricted the release of medication prescribing information by individual physicians. According to the opinion, data miners compile such information and sell it to drug companies, which use it to fine-tune their marketing strategies. In a 6-3 decision, the Court applied "heightened" (not "strict") scrutiny to this law and found it wanting. The Court said in part:

> On its face, Vermont's law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.

131 S.Ct. at 2663, 180 L.Ed. 2d at 554.

The opinion is long and complex, but for purposes of this discussion one point stands out. The Court requires that the government show a "substantial government interest" to defend the regulation, rather than the "compelling" interest required under strict scrutiny. Further, in *Sorrell*, the Court continued to recognize a somewhat lower level of protection for commercial speech than for noncommercial speech:

> It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech. Indeed the government's legitimate interest in protecting consumers from "commercial harms" explains "why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Discovery Network*, 507 U.S., at 426, 113 S. Ct. 1505, 123 L. Ed. 2d 99; see also *44 Liquormart,* 517 U.S., 502, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (opinion of Stevens, J.). The Court has noted, for example, that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *R. A. V.,* 505 U.S., at 388-389, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (citing Virginia Bd., supra, at 771-772, 96 S. Ct. 1817, 48 L. Ed. 2d 346).

131 S.Ct. at 2672, 180 L.Ed. 2d at 564.

Overview of *Reed v. Town of Gilbert* Decision

From this often-split Court, there were four separate opinions in *Reed*, but there was no dissent. The Court was essentially unanimous in holding that content-based distinctions in sign ordinances are subject to heightened ("strict" according to the majority) scrutiny. The Court here did not decide whether traffic safety and aesthetic concerns (the typical policy underpinnings of sign ordinances) are "compelling" governmental interests but held that, if those are assumed to be compelling interests, the Town's ordinance was "hopelessly underinclusive" (135 S. Ct. at 2231, 192 L. Ed. 2d at 250). The Court noted that the ordinance:

> [A]llows unlimited proliferation of larger ideological signs while strictly limiting the number, size and duration of smaller, directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

135 S. Ct. at 2231-32, 192 L. Ed. 2d at 250-51.

The Court held squarely:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993). We have thus made clear that "'[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment,'" and a party opposing the government "need

> adduce 'no evidence of an improper censorial motive.'" *Simon & Schuster, supra*, at 117, 112 S. Ct. 501, 116 L. Ed. 2d 476. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

135 S. Ct. at 2228, 192 L. Ed. 2d at 246-47.

Although Kagan (joined by Breyer and Ginsburg) argued in a concurring opinion that the Court erred in applying strict scrutiny, she said of the town and its ordinance:

> The Town of Gilbert's defense of its sign ordinance—most notably, the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. See ante, at 14-15 (discussing those distinctions). The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs.

135 S. Ct. at 2239, 192 L. Ed. 2d at 258-59.

Details from *Reed*

We want to look briefly at some of the details of the decision and then place it in context. Justice Thomas wrote the opinion of the Court, with the Chief Justice and Justices Scalia, Kennedy Alito and Sotomayor joining. Alito, Beyer and Kagan concurred. Justice Kagan wrote a concurring opinion, joined by Justices Ginsburg and Breyer. As in other recent First Amendment decisions, there was no break along ideological lines; there was simply broad support for the First Amendment with somewhat different philosophical approaches.

The core dispute presented unappealing facts from the city's perspective. The challenged ordinance provided for three types of noncommercial signs: "ideological signs," which could be up to 20 square feet in size and were allowed in all zoning districts without time limits (135 S. Ct. at 2224, 192 L. Ed. 2d at 243); "political signs," which relate to an election, and which can be 16 square feet in size on residential property and up to 32 square feet on commercial property and on "undeveloped municipal property" and rights-of-way; political signs are time-limited, allowed up to 60 days before a primary election and until 15 days after a general election (135 S. Ct. at 2224-25, 192 L. Ed. 2d at 243); and "temporary directional signs relating to a qualifying event," which can be only six feet in size and can appear only 12 hours before the event and 1 hour afterward (135 S. Ct. at 2225, 192 L. Ed. 2d at 243). Reed was (and may still be) the pastor of a "small, cash-strapped" church that held services in a variety of available locations and needed and wanted to publicize those. Reed and his church-members were apparently not serious lawbreakers; they erected the signs on Saturday morning (perhaps 24 hours before the service rather than 12) and took them down Sunday afternoon (maybe 4 or 5 hours after the service). They were cited by the city for violations and city inspectors apparently rejected an attempt by Reed and his church to reach "an accommodation."

Citing a handful of cases (see discussion below) and the definitions of the three types of signs described in the previous paragraph, the Court held "The Town's Sign Code is content-based on its face" (135 S. Ct. at 2227, 192 L. Ed. 2d at 245). After its citation of the three definitions above, it went on to say:

> The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from

> a sign expressing the view that one should vote for one of Lock's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government.

135 S. Ct. at 2227, 192 L. Ed. 2d at 245.

The Ninth Circuit had held that the ordinance was content neutral because the town did not attempt to censor a particular message and its justifications for the ordinance (traffic safety and aesthetics) were unrelated to the sign's message. *Reed v. Gilbert,* 707 F.3d 1057, 1071-72 (9th Circ. 2013). The Supreme Court flatly rejected this position, saying:

> A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification or lack of "animus toward the ideas contained" in the speech.

135 S. Ct. at 2228, 192 L. Ed. 2d at 246, citing and quoting in part *Cincinnati v. Discovery Network*, 507 U.S. 410, 429, 113 S. Ct 1505, 123 L.Ed.2d 99 (1993), striking down an ordinance in which Cincinnati officials tried to limit the number of newspaper boxes on sidewalks by adopting a narrow definition of "newspaper." In the Court's opinion, Thomas went on for a full page in a standard legal reporter format discussing why facially content-based ordinances are subject to strict scrutiny. In a somewhat shorter section of text, the majority opinion also rejected the argument that a "viewpoint neutral" ordinance should be acceptable, even if it mentions content. The Court also rejected the argument that there should be an exception from the content-neutrality requirement for "event-based" laws (2135 S. Ct. at 2231, 192 L. Ed. 2d at 249-50).

Justice Alito's concurring opinion in *Reed*, in which Justices Kennedy and Sotomayor joined, basically lists the types of distinctions that a local government can safely make in its sign ordinance after this decision.

Justice Kagan, joined by Ginsburg and Breyer, expressed concern about the breadth of the Court' decision:

> So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter. *

135 S. Ct. at 2237, 192 L. Ed. 2d at 256.

Impacts of *Reed v. Gilbert*

If, as some courts have held, the decision in *Reed v. Gilbert* applies only to noncommercial speech, the implications are limited. If the decision also applies to commercial speech, the implications are more profound. Thus, it is worth looking at this issue.

At least prior to the *Reed* decision, the basic standard for review of regulation of commercial speech is set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). The *Central Hudson* test, as re-stated by the plurality in a subsequent decision by the Supreme Court, is this:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800(1981), citing *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). *Central Hudson* was cited by the Supreme Court in *Sorrell v. IMS Health Inc.,* 131 S. Ct. 2653, 180 L. Ed. 2d 544 (U.S. 2011), and other major courts continue to cite it as good law. See discussion below.

The Supreme Court's decision in *Reed* included no discussion of commercial speech. Some federal courts have held squarely that it does not apply to commercial speech. In *Cal. Outdoor Equity Partners v. City of Corona*, 2015 U.S. Dist. LEXIS 89454, at 26-27 (C.D. Cal. 2015), the court said:

> Reed does not concern commercial speech, let alone bans on off-site billboards. The fact that Reed has no bearing on this case is abundantly clear from the fact that Reed does not even cite Central Hudson, let alone apply it. *Metromedia*, 453 U.S. at 511-14, and its progeny remain good law; the City's sign ban is therefore not patently unconstitutional.

A federal court in Indiana held:

> GEFT argues that the on-premises and off-premises distinction that relates only to commercial signs constitutes a content-based regulation of speech subjecting it to strict scrutiny under the test set forth in Reed. The City rejoins that Reed addressed only noncommercial speech and did not change or otherwise affect the long line of precedent holding that commercial speech is subject to intermediate rather than strict scrutiny under the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Because the Amended Sign Ordinance provides that the on-premises/off-premises distinction applies only to commercial speech, the City maintains that *Reed* has no application here.
>
> This issue appears to be an open question following *Reed*. Few courts have had occasion to address it post-*Reed*, but the majority of courts that have considered the question have held that the holding in *Reed* is limited to noncommercial sign regulations and does not alter or otherwise affect precedent relating to municipal regulations of commercial signs.

GEFT Outdoor LLC v. Consol. City of Indianapolis & Cnty. of Marion, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016), [citing and quoting the California case autoed just above] Accord, *Roland Digital Media, Inc. v. City of Livingston*, 2018 U.S. Dist. LEXIS 216200 (M.D. Tenn. 2018).

Accord, *Contest Promotions, LLC v. City & Cty. of San Francisco*, 704 Fed. Appx. 665, 2017 U.S. App. LEXIS 15392, affirming *Contest Promotions, LLC v. City & Cnty. of San Francisco,* 2015 U.S. Dist. LEXIS 98520 (N.D. Cal. 2015), which discusses this issue in more depth.

See, also, *Lamar Central Outdoor, LLC v. City of Los Angeles,* 245 Cal. App. 4th 610, 199 Cal. Rptr. 3d 620 (2016), rev. den., 2016 Cal. LEXIS 3804, applying California law but discussing federal law, including Reed, and reaching the same conclusion.

Moreover, it is worth remembering that it was only 40 years ago that the Supreme Court first decided that the First Amendment applies to commercial speech in *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (advertising prescription drug prices) and *Bates v. State Bar of Arizona*, 33 U.S. 350, 355, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (advertising legal services). In the four decades since, however, the Court has accorded significant

Constitutional protection to commercial speech. In *Reed* the Court majority cited multiple times to its decision in *Sorrell v. IMS Health Inc.,* 131 S. Ct. 2653, 180 L. Ed. 2d 544 (U.S. 2011), which was very much a commercial speech case. In Sorrell, the Court struck down a Vermont law that prohibited the mining of data about the prescribing practices of physicians, data used by pharmaceutical representatives to target their presentations to individual doctors. The decision was 6 to 3. The majority opinion in *Sorrell* said in part:

> Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. To sustain the targeted, content-based burden § 4631(d) imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure s drawn to achieve that interest. There must be a "fit between the legislature's ends and the means chosen to accomplish those ends." As in other contexts, these standards ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.. [multiple citations omitted]

131 S.Ct. at 2667-68, 280 L.Ed.2d at 560.

What is significant in *Sorrell* for those drafting sign regulations is that it applies a "heightened" scrutiny test and thus requires a "substantial government interest" to support content-based distinctions. That is a relatively high bar, but a lower one than "strict scrutiny" and the "compelling government interest" test that it requires. This maintains the Constitutional primacy of noncommercial speech but certainly does not leave commercial speech without protection.

Noncommercial Signs

Much modern sign litigation is over billboards and other commercial signs, but it is important to put that in context. For nearly two centuries the only concern under the First Amendment was with noncommercial speech. It was not until the 1970s, that the Supreme Court first held that the First Amendment also applied to commercial speech, beginning with *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), (striking down a state law prohibiting the advertising of prescription drug prices) and *Bates v. State Bar of Arizona*, 33 U.S. 350, 355, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (striking down bar rules that prohibited the advertising of legal services). Twenty years later it built on that line of cases as it struck down a state law prohibiting the advertisement of liquor prices. *44 Liquormart, Inc., v. Rhode Island,* 517 U.S. 484, 508, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

None of those cases, however, suggested that commercial speech was Constitutionally equal to noncommercial messages. The Supreme Court directly addressed that issue in 1994 in *City of Ladue v. Gilleo,* 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994). The dispute centered on the city's enforcement of a broad prohibition on most signs at a residence against Gilleo's yard sign that read "Peace in the Gulf" [recall that this was during the first "Gulf War"]. After her yard sign was damaged and then disappeared, Gilleo placed a similar message on a paper sign that she placed in a window — also prohibited by the local ordinance. Although it was not at the heart of the Supreme Court's decision, it is worth noting that she would have been allowed to place a commercial sign offering her home for sale in her yard. Gilleo sought an injunction against enforcement of the ordinance and prevailed in the federal district court and in the Eighth Circuit; the town appealed to the Supreme Court.

The Court noted in its unanimous opinion striking down the ordinance:

> Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

Ladue, 512 U.S. 43, 54-55, 114 S. Ct. 2038, 2045, 129 L. Ed. 2d 36, 47. The Court also had this to say about these signs:

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.
>
> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. [internal citations omitted] Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.

Ladue, 512 U.S. 43, 56-57, 114 S. Ct. 2038, 2045, 129 L. Ed. 2d 36, 48-49.

The Supreme Court's decision in *Ladue* is essentially black-letter law. As of February 2019, it has been followed in 61 court decisions, including three in the Fourth Circuit (which includes North Carolina).

The modern era of sign law actually started with a case involving commercial signs, but dealing with the importance of non-commercial messages. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) involved a challenge to an ordinance in which San Diego attempted to ban billboards but did so awkwardly, banning all "outdoor advertising display signs" but excepting on-site signs, which it defined as:

> "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed."

San Diego ordinance as quoted in *Metromedia*, 453 U.S. 490, 494, 101 S. Ct. 2882, 2886, 69 L. Ed. 2d 800, 806. The plurality opinion with four justices was joined by two more "concurring in the judgment," which struck down the ordinance. Three others, including the chief justice, dissented in full or in part. The fatal problem with the ordinance was the preference for some types of commercial speech (on-site advertising) over noncommercial speech, as stated by Justice White in his plurality opinion, was this:

> We conclude that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative

> interests, e. g., onsite commercial advertising, are stronger than its competing interests in esthetics and traffic safety. It has nevertheless banned all noncommercial signs except those specifically excepted.

Metromedia (plurality opinion, by White), 453 U.S. 490, 520, 101 S. Ct. 2882, 2899, 69 L. Ed. 2d 800, 823.

Six years after the Supreme Court decision in *Ladue*, the town of Mamakating, New York, attempted to enforce a restrictive ordinance on signs against a resident who posted the following signs:

> Warning: Town Justice Allows Neighbors Biting Dog to Run Loose!!; Tie Up Your Biting Dog; [next two refer to a wood stove used by a neighbor] Poison Your Own Air, Not Ours!; Stop the Smoke Pollution; God Will Not Forsake Us; and Let the Truth be Known [and] Neighbors and Town Want to Do Away With Our Freedom of Speech and Our Right to Protest!

Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322, 324 (S.D. N.Y. 2000).

The property owner was apparently allowed two 12-square-foot signs expressing personal opinion (87 F.Supp. 2d at 325). Those signs, like most others in the town, required a permit, and town officials had a good deal of discretion to grant or deny the permits (87 F.Supp. 2d at 324-25). The court found the entire regulatory scheme, as well as a replacement ordinance that had 18 categories of exemptions, unconstitutional.

Another federal court rebuffed local efforts to require that a local merchant who hung a 100-square-foot warning to terrorists sign from his building obtain a permit for the sign. *Savago v. Village of New Paltz,* 2002 U.S. Dist. LEXIS 15215 (N.D.N.Y. 2002).

Flags

Key cases involving the regulation of flags have been the Fourth Circuit's decision in *Central Radio Co. v. City of Norfolk*, 811 F.3d 625 (4th Circ. 2016) and a leading decision from another circuit, *Dimmitt v. Clearwater*, 782 F. Supp. 586, 593, n. 8 (M.D. Fla. 1991), aff'd 985 F.2d 1565 (11th Circ. 1993). The Fourth Circuit cited *Dimmitt* in its decision in the Norfolk case. In striking down a Norfolk, Virginia, sign ordinance as unconstitutional, the Fourth Circuit had this to say about provisions of the code that imposed restrictions on some flags but not others:

> With respect to the City's stated interest in preserving aesthetic appeal, for example, the flag of a private or secular organization was "no greater an eyesore" than the flag of a government or religion, id. (quoting City of *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 425, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993)), and works of art that referenced a product or service did not necessarily detract from the City's physical appearance any more than other works of art. Yet, the former sign code allowed the unlimited proliferation of governmental and religious flags, as well as works of art that met the City's dubious criterion, while sharply restricting the number and size of flags and art bearing other messages. See Dimmitt, 985 F.2d at 1570 (stating that the asserted interests in aesthetics and traffic safety "clearly are not served by the distinction between [exempted] and other types of flags; therefore, the regulation is not 'narrowly drawn' to achieve its asserted end").
>
> The City also has not shown that limiting the size and number of private and secular flags, as well as works of art that referenced products or services, was necessary to eliminate threats to traffic safety. There is no evidence in the record that secular flags were any more distracting than religious ones, or that a large work of art displaying a reference to a product threatened the safety of motorists any more than any other large, exempted pieces of artwork.

Central Radio Co. v. City of Norfolk, 811 F.3d 625 (4th Circ. 2016)

In a Florida case, brought by a car dealer challenging an ordinance that required permits for flags but exempting U.S. government flags, the district court found the ordinance unconstitutional, commenting in a footnote:

> The Court has other problems with the ordinance that it will not discuss at length. For example, the City has provided no justification for the ordinance's limitation to governmental flags. Surely a Greenpeace flag or flags displaying other organizations' logos would be entitled to some First Amendment protection.

Dimmitt v. Clearwater, 782 F. Supp. 586, 593, n. 8 (M.D. Fla. 1991), aff'd 985 F.2d 1565 (11th Circ. 1993).

Real Estate Signs

In a 1977 decision, the Supreme Court essentially granted special status to real estate signs in residential areas, striking down an ordinance in a New Jersey township that prohibited most such for-sale signs in an apparent effort to stop the then somewhat common of "block-busting" and to stem white flight. In an 8-0 decision, with Justice Rehnquist not participating, the court struck the ordinance down, holding in part:

> The constitutional defect in this ordinance, however, is far more basic. The Township Council here, like the Virginia Assembly in Virginia Pharmacy Bd., acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs - with offerors communicating offers to offerees - but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." Virginia Pharmacy Bd. denies government such sweeping powers.

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 96-97, 97 S. Ct. 1614, 1620, 52 L. Ed. 2d 155, 164 (1977).

None of the opinions in *Reed v. Gilbert* cited the 40-year-old decision, and it was cited favorably but without discussion in *Sorrell v. IMS Health Inc*., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011), to which Justice Thomas referred in the majority opinion in *Reed.*

Digital Signs including Billboards

At stakeholder meetings to discuss the update to the sign ordinance, several people expressed interest in seeing more electronic signs, primarily to inform visitors and residents about current and forthcoming events. Although much of the focus of that discussion was on billboards, digital signs can be used in many other contexts. The technology of digital signs has improved markedly in the last decade or so, and the costs have come down – to the point that such technology has been used by small businesses, religious institutions, and schools in North Carolina and elsewhere. There is likely to be increased interest in such signs as more potential users discover the improved technology and dropping costs.

Thus, it will be important for the City to make a policy decision on where and how such technology is appropriate. It is important that City officials (particularly members of council) understand the issues so that they can set a policy that will allow reasonable use of such technology but that will draw a firm boundary around it – a boundary from which officials are not inclined to grant variances, waivers or ordinance amendments.

Jerry Wachtel, an engineer well-known for his work in dealing with sign regulation, said in an article for *Planning* magazine in 2011:

> [Digital Billboard] technology is advancing faster than policy-makers can deal with it. Until recently, these advances were limited to sign size, brightness and image fidelity. The newer technologies focus on capturing the motorists' attention in ever more sophisticated ways….[1]

There have been several research studies addressing the safety issues, some of the studies funded by the industry. In a 2004 article published by the Scottish Institute of Civil Engineers, Brandon Wallace reviewed published studies from the U.S., Australia and elsewhere and concluded, regarding billboards and driver distraction:

> (a) The effect is real. However, it is situation-specific. Many billboards and signs may have no measurable impact on road safety, but there is overwhelming evidence that, at least in some situations, signs and billboards can be a threat to road safety.
>
> (b) Almost all studies agree that too much 'visual clutter' at or near intersections and junctions can interfere with drivers' visual search strategies and lead to accidents.[2]

In a separate research report by the same author, based on his review of the same studies, he concluded:

> It is clear from the various accident investigation/accident causation databases that external-to-vehicle distraction is a serious risk factor in accidents. Moreover it is likely that it is under-reported as a contributory factor, and that the actual risk factor is far higher than the reports which analyse [sic] these databases suggest.
>
> There are (at least) two main kinds of distraction. The first is associated with visual 'clutter', and occurs mainly at junctions. Evidence for this kind of distraction is provided by the various laboratory experiments quoted above, and correlational studies (for example, the Holohan study).
>
> The other main kind is associated with 'low arousal' monotonous situations, and occurs either when the driver is 'surprised' by a billboard or sign, or else when s/he fixates on it after a long period of driving. Evidence for this is suggested by the Ady study, amongst others.[3]

A particularly interesting study for a lay reader is the "Canadian Eye-Tracking Study," reported in 2006 on the website of the Out of Home Marketing Association of Canada. According to the web summary (from the industry):

- More than half (55%) of the Out-of-Home ads were seen by participants on their first drive by.

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[1] Wachtel, Jerry. 2011. :Digital Billboards, Distracted Drivers," *Planning,* March 2011, 25—17.

[2] Wallace, Brandon. 2004. "Driver Distraction by Advertising: Genuine Risk or Urban Myth?" Proceedings of the Institution of Civil Engineers, *Municipal Engineer 156,* September 2003, Issue ME3, 185-90.

[3] Wallace, Brandon. 2003. "External to Vehicle Driver Distraction," Social Research, Development Department Research Program, Research Findings No,. 168/2003, Scottish Executive Social Research.

- Participants looked at each Out-of-Home ad an average of 2.04 times.
- TRIOs (Out-of-Home signs with three rotating ads) were looked at more often (2.46 times vs. 1.91 times for a standard poster).
- Women were slightly more likely to see ads than were men (57% vs. 53%).
- Passengers were more likely to see ads than drivers (73% vs. 52%).
- Drivers looked more frequently than did passengers (2.1 times vs. 1.9 times).[4]

In a 2003 study performed by the Virginia Tech Transportation Institute for the billboard industry ["Foundation for Outdoor Advertising Research and Education"], the conclusions were significantly different:

> The overall conclusion from this study is that the presence of billboards does not cause a change in driver behavior, in terms of visual behavior, speed maintenance, or lane keeping.[5]

The authors, however, noted a significant limitation to the study:

> One limitation of this study was that there were few electronic boards along the route, so no conclusions can be drawn regarding driver behavior in the presence of this type of billboard. All three of the electronic billboards available on the route were included, however, for a total of 10% of the sampled billboards. Future research into this topic should focus on routes with a greater number of available electronic billboards so that an electronic/non-electronic analysis can be conducted.[6]

When, however, Suzanne Lee, one of the researchers in the study testified about its conclusions in a federal court in upstate New York, the judge had this to say about the study:

> Dr. Lee presented the results of a study that she conducted in Charlotte, North Carolina. This study purported to show that driver behavior was not influenced by the presence of billboards. (the "Lee Study"). The Lee Study was funded by the Foundation for Outdoor Advertising Research and Education, a close affiliate of the Outdoor Advertising Association of America, which is the leading trade association for those who erect billboard advertising (the "OAAA"). Trial testimony revealed that representatives of the OAAA were intimately involved in the design and conduct of the Lee Study. Indeed, the results of the Lee Study were presented at a meeting of the OAAA where billboard industry leaders characterized the study as proving "definitively" that billboards do not inhibit driver performance. The Lee Study has been neither widely disseminated nor subject to peer review. Nor have the conclusions of the Lee Study been replicated in any other study.
>
> When considering the testimony of Dr. Lee, the court holds that the Lee Study is so infected by industry bias as to lack credibility and reliability. This conclusion is supported not only by industry involvement in the design and execution of the study but also by the lack of peer review and the fact that there is no other scientific study with the same or similar conclusions

[4] Falbo, Mary. 2006. "Canadian Eye-Tracking Study," Out of Home Marketing Association of Canada website https://www.newad.com [this report no longer appears on the site, but there is a slide-show summary at http://oma.org.au/__data/assets/pdf_file/0017/6623/Eye_Tracking_Study.pdf]

[5] Lee, Suzanne B., Erik C.B. Olsen, and Maryanne C. DeHart, Virginia Tech Transportation Institute, "Driving Performance in the Presence and Absence of Billboards: Executive Summary," Dec. 15, 2003, p. 3.

[6] Lee, et al., id.

> regarding driver distraction. For these reasons, the court rejects Dr. Lee's conclusions regarding traffic safety.[7]

A fascinating study for the lay reader is the "100-Car Naturalistic Driving Study," funded by the Federal Highway Traffic Safety Administration and performed by the Virginia Tech Transportation Institute, with 14 researchers involved.[8] There was extensive instrumentation in each of the vehicles, 78 of which were the driver's personal vehicles.[9] The resulting data set was extensive, including:

- approximately 2,000,000 vehicle-miles of driving;
- almost 43,000 hours of data;
- data on 241 primary and secondary drivers;
- a 12- to 13-month data collection period for each vehicle; and
- five channels of video and numerous vehicle state and kinematic variables for any given point in time.[10]

The researchers noted:

> Drivers apparently adapted rapidly to the instrumentation, probably within the first hour. The resulting database contains many extreme cases of driving behavior and performance, including severe drowsiness, impairment, judgment error, risk taking, willingness to engage in secondary tasks, aggressive driving, and traffic violation (just to name a few) that have been difficult to examine using other techniques.[11]

For our purposes here, one of the most striking findings of the study was this:

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[7] Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295, 308 (E.D.N.Y. 2005).

[8] Dingus, T.A., et al., "100-Car Naturalistic Driving Study' Phase II – Results of the 100-Car Field Experiment," April 2006.

[9] The study described the instrumentation:

> Each of the sensing subsystems within a vehicle was independent, so that any failures were constrained to a single sensor type. Sensors included a box to obtain data from the vehicle network, an accelerometer box for longitudinal and lateral acceleration, a system to provide information on distance to lead and following vehicles, a system to detect conflicts with vehicles to either side of the subject vehicle, an incident box to allow drivers to flag incidents for the research team, a video-based lane tracking system to measure lane keeping behavior, and video to validate any sensor-based findings. The video subsystem was particularly important as it provided a continuous window into the happenings in and around the vehicle. There were 5 camera views monitoring the driver's face and driver's side view of the road, the forward road view, the rear road view, the passenger side road view, and an over-the-shoulder view for the driver's hands and surrounding areas. The video system was digital, with software-controllable video compression capability. This feature allowed synchronization, simultaneous display, and efficient archiving and retrieval of 100-Car Study data.

Dingus, et al., pp. xxviii-xxvix.

[10] Dingus, et al., p. xxvi.

[11] Dingus, et al., p. xxvi.

> Almost 80 percent of all crashes and 65 percent of all near-crashes involved the driver looking away from the forward roadway just prior to the onset of the conflict. Prior estimates related to "distraction" as a contributing factor have been in the range of 25 percent[12]

Although the primary report on the 100-car study does not indicate in detail what external events distracted drivers, a Canadian study attempted to do exactly that.[13] Researchers tallied more than 1000 glances and, after eliminating about 200 for a variety of reasons, analyzed the rest. One conclusion seems particularly significant (although the authors did not flag it as such):

> [A]ctive sign types (video, scrolling text, and the partially active roller bar signs) received significantly more glances per sign (1.31 glances per subject per sign) than the billboard signs (0.64 glances per subject per sign).[14]

The authors seemed to find another conclusion as somewhat more significant:

> Long glance durations (glances longer than 0.75 s). Active signs, especially video signs, received significantly more long glances than passive billboard signs. These glances are particularly critical when there is traffic within three stripes – gaps, as this will cut in half the time available for drivers to react.[15]

A separate article in the same volume by two of the same authors specifically addressed the impact of video advertising on "driver fixation" patterns.[16] Using eye-tracking devices worn like glasses and recording data for the researchers, the authors gathered data from 25 subjects, driving the same route in Toronto. They concluded in part:

> The eye-movement study indicated that video signs attract driver attention, in that the probability of a driver looking at a video sign on a given approach was almost 1 in 2. In some cases, glances at video signs were made unsafely, that is with short headways (1 s or less) or long durations (1.47 s) or at wide angles (up to 31°) off the line of sight.[17]

A December 1994 study by the Wisconsin Department of Transportation examined accident data for roads passing by the Milwaukee County Stadium, which had installed an electronic variable message sign in April 1984.[18] The sign changed images an average of 12 frames per minute (1 every 5 seconds).[19] The study found a 43 percent increase in crashes in the first year after activation of the sign and a 36 percent increase in the average annual crash rate over three years.[20] It found an 80 percent increase in side-swipe crashes in the first year after the sign was activated, but that fell to an 8 percent increase over three years.[21] Rear-end crashes increased by 60 percent in the first year, but the increase fell to 21

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[12] Dingus, et al., p. 349.
[13] Beijer, Dann, Alison Smiley and Moshe Eizenman, "Observed Driver Glance Behavior at Roadside Advertising Signs," *Transportation Research Record: Journal of the Transportation Research Board No. 1899*, 2004, pp. 96-103.
[14] Beijer,et al., p. 100.
[15] Beijer, et al., p. 102.
[16] Smiley, Alison, Thomas Smahel and Moshe Eizenman, "Impact of Video Advertising on Driver Fixation Patterns," *Transportation Research Record: Journal of the Transportation Research Board No. 1899*, 2004, pp. 76-83.
[17] Smiley, et al., p. 82.
[18] Wisconsin Department of Transportation [hereinafter WSDOT], "Milwaukee County Stadium Variable Message Sign Study," Dec. 1994.
[19] WSDOT, p.5.
[20] WSDOT, p.2.
[21] WSDOT, Id.

percent per year over three years.[22] There was little narrative in the study, but the major conclusion was this:

> It is obvious that the variable message sign has had an impact on traffic, most notably in the increase in the side-swipe crash rate.[23]

A 2009 report funded by the Federal Highway Administration provided a comprehensive survey of existing literature on the effects of "commercial electronic variable message signage" (CEVMS) on driver distraction and traffic safety.[24] The emphasis of the 87-page report was on the need for further research, not an entirely surprising approach from a group of researchers with experience in the well-funded field. The report said in part:

> The conclusion of the literature review is that the current body of knowledge represents an inconclusive scientific result with regard to demonstrating detrimental driver safety effects due to CEVMS exposure. This outcome points toward the importance of conducting carefully controlled and methodologically sound future research on the issue.[25]

One of the authors, however, disagreed in a separate report, drawing on the same body of existing research. In a report with the heavy but entirely descriptive title of "A Peer---Reviewed Critique of the Federal Highway Administration (FHWA) Report Titled: "Driver Visual Behavior in the Presence of Commercial Electronic Variable Message Signs (CEVMS),"[26] Jerry Wachtel, now writing as president of a consulting organization called The Veridian Group said in part:

> When evaluated against the growing number of recent research studies, conducted world---wide, that increasingly demonstrate concerns for the adverse effects of billboard distraction on driver performance, particularly under conditions in which the driver must respond to suddenly appearing or developing traffic hazards, one must question the contribution of this study and the conclusions that can be drawn from it to this important field of research. As relevant new research (Edquist J. H., 2011), (Herrstedt, 2013), (Divekar G. P., 2012), (Belyusar, 2014) continues to be published, we urge the authors of this eagerly anticipated FHWA study to clearly document their methods and results in light of the peer reviewed comments directed at the draft report, and the concerns expressed herein.[27]

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[22] WSDOT, id.

[23] WSDOT, p. 3.

[24] Molino, John A., Jerry Wachtel, John E. Farbry, Megan B. Hermosillo, Thomas M. Granda, "The Effects of Commercial Electronic Variable Message Signs (CEVMS) on Driver Attention and Distraction: An Update," Office of Real Estate Services, Federal Highway Administration, 2009. Available for download at https://rosap.ntl.bts.gov/view/dot/950 (accessed February 2019).

[25] Molino, et al., 2009, p. 39.

[26] Wachtel, Jerry. "Driver Visual Behavior in the Presence of Commercial Electronic Variable Message Signs (CEVMS)," The Veridian Group, 2015. Available for download at http://nebula.wsimg.com/722c5bb9d76d4b10b6d7add54d962329?AccessKeyId=388DC3CA49BF0BEF098B&disposition=0&alloworigin=1 (accessed February 2019). Wachtel says that his report is a critique of a 2013 FHWA study and provides a link to an FHWA website – where the most recent report on this subject is the 2009 report, cited above. The critique fits the 2009 report and one has to suppose that the now-missing 2013 report was an update of that.

[27] Wachtel, 2015, p. 45.

The final words in the report, quoting one of the fifteen listed outside peer reviewers of the Wachtel report, provide what may be particularly good advice for public officials making decisions about regulations for such signs:

> One [peer reviewer], heavily involved in road and traffic safety, said: "if there is a lack of scientific certainty and there is a question around safety – the response should be no. In the context of (outdoor advertising sign) permits, this is particularly important as permits for signs have a minimum life of a decade.[28]

Digital Signs in the Courts

Sign companies have challenged local efforts to regulate digital signs and billboards. In light of the evidence discussed above – and of common sense – courts have had little difficulty upholding the regulations.

In a thoughtful opinion, upholding an ordinance completely banning electronic message boards in Concord, New Hampshire, the First Circuit Court of Appeals had this to say:

> Concord's interests in traffic safety and community aesthetics would be achieved less effectively without the ordinance's prohibition on EMCs. We give some respect to the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. Metromedia, 453 U.S. at 509 (plurality opinion). It is given that a billboard can constitute a traffic hazard. It follows that EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous. Indeed, plaintiff's own witness stated that bypassers focus more on rapidly blinking electronic signs than static signs. This constitutes a greater hazard. Further, for drivers a flashing light is often a signal of hazard on the roadway, a signal which itself slows and disrupts the traffic flow.

Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27, 35 (1st Cir. N.H. 2008).

The New Hampshire Supreme Court upheld the same ordinance, in a challenge by a different merchant, saying in part:

> Finally, with respect to the fourth prong of the *Central Hudson* test, the trial court found that the City has available other, more narrowly tailored means to meet its desired objectives. To protect its interests, the City could regulate the number, proximity or placement of electronic display signs or it could ban all types of electronic signs, including those displaying time, date and temperature. We disagree that the City, by prohibiting all electronic signs displaying commercial speech, has drawn an ordinance broader than necessary to meet and advance its substantial interests of traffic safety and aesthetics. The most effective way to eliminate the problems raised by electronic signs containing commercial advertising is to prohibit them. See *Metromedia*, 453 U.S. at 508. The City continues to allow other means of commercial advertising of a non-electronic nature.

Carlsons Chrysler v. City of Concord, 156 N.H. 399, 405, 938 A.2d 69, 74 (2007).

The federal court in New Hampshire followed *Naser* in upholding a local ordinance that allowed "electronic changing signs" only in the single "commercial" district in a town and in some immediately adjoining areas; the administrator thus denied a permit for such a sign to a church that wanted to erect one on its property along a major road, outside the commercial district. *Signs for Jesus v. Town of Pembroke*, 230 F. Supp. 3d 49 (D.N.H. 2017). The court also noted the Supreme Court decision in *Reed v.*

[28] Wachtel, 2015, p. 45.

Town of Gilbert, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015) and found that the ordinance, which referred to the technology and lighting of the signs, was content-neutral and thus not subject to strict scrutiny.

A federal court in Michigan followed *Naser* in *Hucul Adver., LLC v. Charter Twp. of Gaines*, 2012 U.S. Dist. LEXIS 131136 (W.D. Mich. 2012), aff'd *Hucul Adver., LLC v. Charter Twp. of Gaines*, 2014 U.S. App. LEXIS 2407 (6th Cir. Mich., 2014), where it upheld an ordinance that limited billboards to two industrial districts and to an area adjacent to highway M-2; it also provided that "[n]o digital billboard shall be located within 4,000 feet of another digital billboard abutting or visible from either side of M-6." (2012 U.S. Dist. LEXIS 131136 at 2, citing the local ordinance). In response to the billboard company's citation of an appellate Michigan decision rejecting a distinction between "static" and "readily changeable" billboards (see *Outdoor Systems, Inc. v. City of Clawson*, 262 Mich. App. 716, 724, 686 N.W.2d 815 (2004), the court said this:

> *Clawson* is distinguishable from this case because it involved a total prohibition on readily changeable signage, regardless of size. Id. at 821. Moreover, to the extent Clawson suggests that a municipality cannot draw distinctions between digital and static billboards, the Court disagrees with the case and declines to follow it. It is not unreasonable for municipalities to draw distinctions between digital and static billboards because their increased visibility and changing display have a greater effect on safety and aesthetics. Plaintiff acknowledged that digital billboards are visible from a greater distance. (Dkt. No. 27, Ex. C, Hucul Dep. 24.) Plaintiff's sales consulting expert acknowledged that the changing message on digital billboards is more effective at drawing the viewer's attention. (Dkt. No. 27, Ex. E, Hyde Dep. 19.).

2012 U.S. Dist. LEXIS 131136 at 13-14.

In a 2016 decision, the North Dakota high court rejected a challenge to the denial of a special use permit for an electronic billboard, where the decision focused significantly on traffic safety and potential driver distraction. *Dakota Outdoor Adver., LLC v. City of Bismarck, Bd. of Comm'rs*, 2016 ND 210, 886 N.W.2d 670 (2016).

Local governments do not always win. A digital sign was involved in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267-69 (11th Cir. Fla. 2005) (discussed above in the section on "Exemptions in Certain Types of Signs"), but the problem there was not that the city wanted to regulate the medical clinic's digital sign but that the sign ordinance had 26 exemptions, many of them content-based. The city of Portland, Oregon, lost on some issues in litigation over digital signs, but the problem in that case was that the ordinance allowed the signs and staff issued permits for them; litigation arose after citizen complaints led council members to attempt to revoke the permits, without granting the billboard company a hearing or other elements of due process. *Emerald Outdoor Advertising L.L.C. v. City of Portland*, 1999 U.S. Dist. LEXIS 20912 (D. Ore. 1999); the case was not approved for publication (it is available from third parties) and thus cannot be cited as precedent, an indication that the court did not consider its conclusions worthy of future consideration.

An issue not discussed above is that of aesthetics. A half century ago, many jurisdictions, including North Carolina, held that aesthetic considerations alone were inadequate to support local regulations. However, in 1982, the North Carolina Supreme Court joined what it then said were a majority of jurisdictions in adopting a more modern rule:

> We therefore hold that reasonable regulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case. We feel compelled to caution the local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of regulations based

solely upon aesthetic considerations that this is a matter which should not be delegated by them to subordinate groups or organizations which are not authorized to exercise the police power by the General Assembly.

State v. Jones, 305 N.C. 520, 530-531, 290 S.E.2d 675, 681 (1982).

Sign Regulations in North Carolina State Law

Political Signs in Right-of-Way

North Carolina General Statutes (N.C.G.S.) §136-32, within the Chapter on Transportation, the Section specifically allows "political signs" in the rights-of-way of state maintained highways, other than "full controlled access" highways. The law limits such signs to 42 inches (3.5 feet) in height above the roadbed and 864 square inches (6 square feet) in size. It defined "political sign" as "any sign that advocates for political action." Municipalities retain the right to regulate signs in the rights-of-way of locally maintained streets and roads.

The full provisions of this section read:

§ 136-32 Regulation of signs.

(a) Commercial Signs. -- No unauthorized person shall erect or maintain upon any highway any warning or direction sign, marker, signal or light or imitation of any official sign, marker, signal or light erected under the provisions of G.S. 136-30, except in cases of emergency. No person shall erect or maintain upon any highway any traffic or highway sign or signal bearing thereon any commercial or political advertising, except as provided in subsections (b) through (e) of this section: Provided, nothing in this section shall be construed to prohibit the erection or maintenance of signs, markers, or signals bearing thereon the name of an organization authorized to erect the same by the Department of Transportation or by any local authority referred to in G.S. 136-31. Any person who shall violate any of the provisions of this section shall be guilty of a Class 1 misdemeanor. The Department of Transportation may remove any signs erected without authority or allowed to remain beyond the deadline established in subsection (b) of this section.

(b) Compliant Political Signs Permitted. -- During the period beginning on the 30th day before the beginning date of "one--stop" early voting under G.S. 163A-1300 and ending on the 10th day after the primary or election day, persons may place political signs in the right-of-way of the State highway system as provided in this section. Signs must be placed in compliance with subsection (d) of this section and must be removed by the end of the period prescribed in this subsection.

(c) Definition. -- For purposes of this section, "political sign" means any sign that advocates for political action. The term does not include a commercial sign.

(d) Sign Placement. -- The permittee must obtain the permission of any property owner of a residence, business, or religious institution fronting the right-of-way where a sign would be erected. Signs must be placed in accordance with the following:

(1) No sign shall be permitted in the right-of-way of a fully controlled access highway.

(2) No sign shall be closer than three feet from the edge of the pavement of the road.

(3) No sign shall obscure motorist visibility at an intersection.

(4) No sign shall be higher than 42 inches above the edge of the pavement of the road.

(5) No sign shall be larger than 864 square inches.

(6) No sign shall obscure or replace another sign.

(e) Penalties for Unlawful Removal of Signs. -- It is a Class 3 misdemeanor for a person to steal, deface, vandalize, or unlawfully remove a political sign that is lawfully placed under this section.

(f) Application Within Municipalities. -- Pursuant to Article 8 of Chapter 160A of the General Statutes, a city may by ordinance prohibit or regulate the placement of political signs on rights-of-way of streets located within the corporate limits of a municipality and maintained by the municipality. In the absence of an ordinance prohibiting or regulating the placement of political signs on the rights-of-way of streets located within a municipality and maintained by the municipality, the provisions of subsections (b) through (e) of this section shall apply.

Blinding, Deceptive or Distracting Lights

N.C.G.S. §136-32.2 also specifically prohibits placing blinding, deceptive or distracting lights unlawful along state maintained highways.

(a) If any person, firm or corporation shall place or cause to be placed any lights, which are flashing, moving, rotating, intermittent or steady spotlights, in such a manner and place and of such intensity:

(1) Which, by the use of flashing or blinding lights, blinds, tends to blind and effectively hampers the vision of the operator of any motor vehicle passing on a public highway; or

(2) Which involves red, green or amber lights or reflectorized material and which resembles traffic signal lights or traffic control signs; or

(3) Which, by the use of lights, reasonably causes the operator of any motor vehicle passing upon a public highway to mistakenly believe that there is approaching or situated in his lane of travel some other motor vehicle or obstacle, device or barricade, which would impede his traveling in such lane;

[he or it] shall be guilty of a Class 3 misdemeanor.

(b) Each 10 days during which a violation of the provisions of this section is continued after conviction therefor shall be deemed a separate offense.

(c) The provisions of this section shall not apply to any lights or lighting devices erected or maintained by the Department of Transportation or other properly constituted State or local authorities and intended to effect or implement traffic control and safety. Nothing contained in this section shall be deemed to prohibit the otherwise reasonable use of lights or lighting devices for advertising or other lawful purpose when the same do not fall within the provisions of subdivisions (1) through (3) of subsection (a) of this section.

(d) The enforcement of this section shall be the specific responsibility and duty of the State Highway Patrol in addition to all other law-enforcement agencies and officers within this State; provided, however, no warrant shall issue charging a violation of this section unless the violation has continued for 10 days after notice of the same has been given to the person, firm or corporation maintaining or owning such device or devices alleged to be in violation of this section. (1959, c. 560; 1973, c. 507, s. 5; 1975, c. 716, s. 5; 1977, c. 464, ss. 7.1, 17; 1993, c. 539, s. 983; 1994, Ex. Sess., c. 24, s. 14(c).)

Construction Signs on Fencing Wrapping

In an unusual provision of state law, the State legislature has preempted local control of signs or images on "fence wrap" around construction sites, with this language that is included in the zoning enabling legislation for municipalities:

> (j) Fence wraps displaying signage when affixed to perimeter fencing at a construction site are exempt from zoning regulation pertaining to signage under this Article until the certificate of occupancy is issued for the final portion of any construction at that site or 24 months from the time the fence wrap was installed, whichever is shorter. If construction is not completed at the end of 24 months from the time the fence wrap was installed, the city may regulate the signage but shall continue to allow fence wrapping materials to be affixed to the perimeter fencing. No fence wrap affixed pursuant to this subsection may display any advertising other than advertising sponsored by a person directly involved in the construction project and for which monetary compensation for the advertisement is not paid or required

N.C.G.S. §160A-381(j).