

**Fahey Schultz  
Burzych Rhodes**

EXPERT COUNSEL  REAL SOLUTIONS

---

# Practical Steps and Guidance to Enacting a Constitutional Sign Ordinance

---

ATTORNEY JACOB WITTE & LAW CLERK HANNAH MORGAN

NOVEMBER 9, 2021

---

Local municipalities have the broad power to regulate for the general safety, public welfare, and health of local residents.

The diagram consists of two circles connected by a right-pointing triangle. The left circle is dark teal and contains text about municipal power. The right circle is a lighter shade of teal and contains text about First Amendment protection. A right-pointing triangle is positioned between the two circles, pointing from the left circle to the right circle.

As a form of protected expression under the First Amendment, signs are also entitled to special treatment under municipal regulation.

# Municipal Authority to Regulate Signs

- Townships regulate signs to remove clutter, control aesthetics, and improve traffic safety.
- Township ordinances can be struck down if challenged because they regulate based on viewpoint or content of the signs.



# First Amendment and “Free Speech”

---

- The First Amendment provides that a government may not restrict expression because of its messages, ideas, subject matter, or content—it protects “free speech.”

---

# Strict Scrutiny of Content-Based Sign Regulations

---

REED V GILBERT



# Standards of Review

---

- Courts will review laws that burden speech to determine whether they are constitutional or not.
- The level of scrutiny applied by the court will depend on whether the content of the speech is regulated.
- Regulating the content of speech is highly disfavored and courts will require the government to show a very exacting level of justification to uphold these regulations.
  - Laws that do not regulate content receive a less strenuous review.



# Reviewing Content-Based Regulations

*Content-based regulations*, meaning laws that regulate the content or message of speech, are reviewed by courts with **strict scrutiny**.

Under strict scrutiny review, the regulation is *presumed to be invalid* unless the government can show:

- That the regulation seeks to achieve a *compelling* governmental interest; and
- That the regulation is the *least restrictive* means to achieve that objective.

Regulations subjected to strict scrutiny review are almost always invalidated.



# Reviewing Content-Neutral Regulations

*Content-neutral regulations*, meaning laws that do not regulate the content of a message but instead enact restrictions on the time, place, and manner in which a message can be displayed, are reviewed with **intermediate scrutiny**.

To survive intermediate scrutiny review, the government must show that:

- The regulation advances a *substantial government interest*;
- The regulation is *narrowly tailored* to that interest; and
- There are *ample alternative channels* for the information to be communicated (meaning the government does not entirely exclude that message).

Unlike strict scrutiny, a well-structured regulation will generally survive intermediate scrutiny.



# Cleaning Up Your Sign Regulations

---

1. RECOGNIZE Content-Based Regulations

2. REMOVE Content-Based Regulations

3. REGULATE Signs in a Content-Neutral Manner





---

# I. Recognize Content-Based Regulations

---

## What Is a Content-Based Sign Regulation?

A sign regulation is content-based if:

- 1) an individual must read the sign to understand how the regulation applies, or
- 2) the underlying purpose of the sign regulation is to regulate certain subject matters.

# What Do Content-Based Regulations Look Like?

---

If your sign ordinance gives special treatment to, or singles out any of the following, it is probably content-based:

Political signs	Ideological signs	Garage sale signs	Real estate signs	For sale signs
Directional signs for temporary events	“No trespassing” or “No hunting” signs	Church signs	Promotional banners	Open house signs
	Seasonal signs celebrating holidays	Patriotic signs	“For rent” signs	



# Off-Premises vs. On-Premises Distinction

---

- Off-premises signs refer to signs that reference or advertise a business that is not located on the same parcel as the sign, or a product or service that is not made or offered on the same premises as the sign.
- Many local regulations target off-premises signs for aesthetic purposes, in hopes of preventing landowners from erecting unsightly advertisements. Municipalities often use the term off-premises sign to refer to billboards as well.
- In *Thomas v Bright*, the Sixth Circuit Court of Appeals held that restrictions on off-premises signs were content-based and, therefore, an impermissible regulation because they limited on-premises signs to certain messages and discriminated against the speaker.



## Example of Impermissible Content-Based Regulation

“Signs that advertise activities conducted on the property where the sign is located (i.e., ‘on-premises’) can be posted without a permit. Signs that advertise activities occurring ‘off-premises’ require a permit.”

# Commercial Speech Regulation

---

- In most circumstances, commercial speech is less protected by the First Amendment than non-commercial speech. However, in Michigan, due to the Sixth Circuit decision in *International Outdoor, Inc v City of Troy*, all content-based regulations of speech, commercial or non-commercial, are subject to strict scrutiny.
- Content-based regulations now include any regulation that regulates both commercial and non-commercial speech but treats them differently or any regulation that favors one type of speech over the other.



## Examples of Impermissible Content-Based Regulations

- “In the commercial zoning district, any non-commercial signs can be posted without a permit. Retail signs require a permit.”
- “Temporary signs may not contain any commercial advertising.”

# Note: The First Amendment Protects a *Substantial* Amount of Speech

---

- Although it might seem counterintuitive, the government has a very limited ability to regulate messages that are offensive, extremist, objectionable, profane, vulgar, crass or even hateful. Even regulations aimed at the most detestable of messages can be found unconstitutional under strict scrutiny review.
- There are extremely narrow circumstances under which a municipality can regulate the speech based on content. Some of the more common exceptions to the strong presumption against content-based regulations are fighting words, incitement to lawless action, and obscenity.
  - However, these scenarios rarely arise (especially in the context of signs) and, thus, likely do not need to be included in your ordinance.





---

## 2. Remove Content-Based Regulations

---

# Get Rid of Those Content- Based Regulations!!

- Once you recognize what content-based regulations look like, remove them from your ordinance.
- Remember, if an individual has to read the sign in order to understand how the regulation applies OR if the underlying purpose of the regulation is to regulate certain subject matters, the regulation is *content-based*.
- If you have any questions about specific regulations or would like assistance reviewing your current ordinance for its constitutionality, our contact information will be provided at the end of this presentation, and we would be happy to assist you.

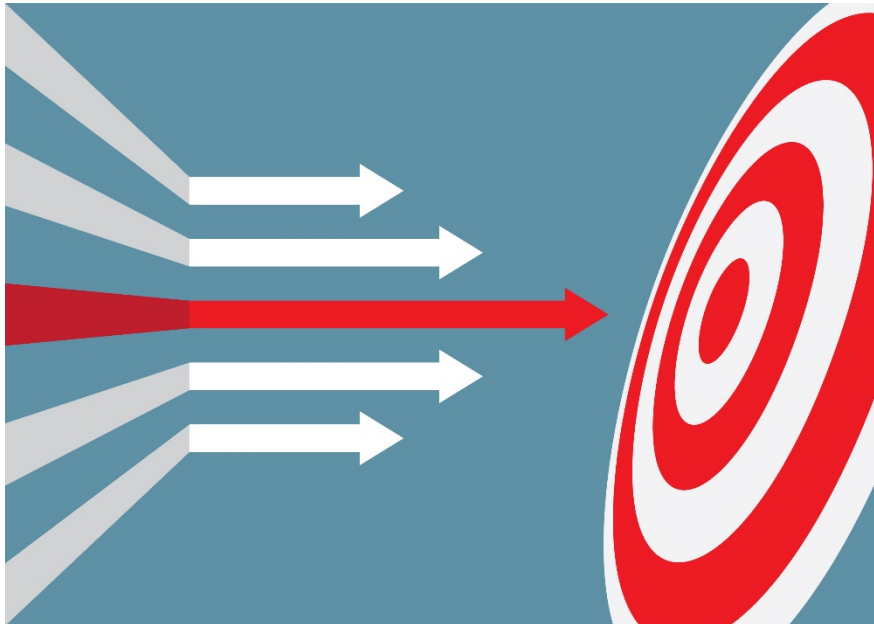
---

# 3. Regulate in a Content-Neutral Manner

---

# Identify Goals and Objectives

---



- First, develop content-neutral objectives for regulating signs which are tailored to your township's community.
- In order to capture your township's objectives, include a clear purpose statement.





# Possible Objectives

---

- Maintaining aesthetics
- Improving traffic safety
- Minimizing adverse effects of signs on public and private property
- Promoting economic development
- Improving communication
- Maintaining property values
- Regulating signs in a content-neutral manner

If possible, you should tie stated objectives to evidence-based findings.

## Example of Purpose Statement

*“The intent of this section is to regulate the location, size, construction, and manner of display of signs in order to minimize their harmful effects on the public health, safety and welfare. While this section recognizes that signs are necessary to promote commerce and public information, failure to regulate them may lead to poor identification of individual establishments, deterioration and blight of the business and residential areas of the Township, conflicts between different types of land use, and reduction in traffic safety to pedestrians and motorists.”*

*“To achieve its intended purpose, this section has the following objectives:*

- 1. To prevent the placement of signs in a manner that will conceal or obscure signs or adjacent businesses;*
- 2. To keep signs within a reasonable scale with respect to the buildings they identify;*
- 3. To reduce visual distractions and obstructions to motorists traveling along, entering, or leaving streets;*
- 4. To promote a quality manner of display which enhances the character of the Township; and*
- 5. To prevent the proliferation of temporary signs which might promote visual blight.”*

## Example of Specific Objectives to Purpose Statement



# Content-Neutral Regulations

---

- Content-neutral regulations dictate the time, place, and manner that signs may be displayed, rather than the content of the sign itself.
- Within the confines of content-neutrality, there are still a wide range of physical characteristics that can be regulated.



## Defining Signs

You should consider including a section at the beginning of your sign ordinance defining the regulated sign types.



Precise definitions of these sign types are critical to properly regulating signs and informing the public how the regulations will apply.



Like all parts of sign regulations, definitions should be *content-neutral*.

# *Content-Neutral* Sign Definitions

## *Animated Sign*

Any sign that uses movement or change of lighting to depict or create a special effect or scene, or by method or manner of illumination, flashes on or off, winks or blinks with varying light intensity, shows motion, or creates the illusion of motion, or revolves in a manner to create the illusion of being on or off.

## *Freestanding or Ground Sign*

A sign supported from the ground by one or more poles, posts, or similar uprights, with or without braces.

## *Temporary Sign*

A sign intended for a use not permanent in nature and intended to be displayed for a limited amount of time.

# *Content-Based* Sign Definitions

## *On-Premises Sign*

A sign which advertises only goods, services, facilities, events, or attractions on the contiguous land in the same ownership or control which is not divided by a public street and is located on said land.

## *Vehicle Business Sign*

A sign applied or attached to a vehicle which is parked or placed upon premises primarily for purposes of **advertising the business or product** for sale on the premises.

## *Political Sign*

A temporary sign used in **connection with** local, state, or national **elections or referendums**.

# Regulating Commercial Speech

While there are limitations on how a township may regulate commercial speech, there are still permissible ways to regulate that are content-neutral.

For example, you can:

- 1) restrict the number of signs permitted on a property,
- 2) limit the height and area of signs, and
- 3) implement spacing requirements.

Just remember you still need to attach these regulations to specific goals and objectives.

To maintain aesthetic character and property values in residential and other non-commercial districts → Limit sign height and area.

To limit off-premises advertising in commercial or industrial districts → Limit the number of ground signs to one per property.

# Substitution Clauses

---

- The best way to prevent regulations that may favor commercial speech over non-commercial speech from being struck down by a court is to include a *substitution clause*.
- The basic idea of a substitution clause is that if the sign ordinance allows a sign containing a commercial message, it must also allow a non-commercial sign to the same extent.
- The clause should apply to every possible dimension of the sign, including location, duration of posting, size or area, materials or design requirements, requirement for permit, etc.



## Substitution Clause Example

*“Notwithstanding anything contained in this Section to the contrary, any sign erected pursuant to the provisions of this Section may, at the option of the owner, contain a non-commercial message in lieu of a commercial message and the non-commercial copy may be substituted at any time in place of the commercial copy. The non-commercial message may occupy the entire sign face or any portion thereof. The sign face may be changed from a commercial message to a non-commercial message or from one non-commercial message to another non-commercial message; provided, however, that there is no change in the size, height, setback or spacing criteria contained in this Section.”*

# Banning Signs

---

- Remember that intermediate scrutiny - which applies to regulations of physical type, size, height, design, and placement of signage - still requires at least *some* channels of communication to be left open.
- Some regulations, even if they are content-neutral, may simply restrict too much speech and provide insufficient alternatives to be heard.



# Invalid Sign Restrictions

---

- Courts have invalidated the following restrictions for lack of ample alternative channels of communication:
  - A complete prohibition on residential yard signs.
  - A restriction on the total number of temporary political signs permitted to be displayed at once.
  - A restriction of residential real estate signs to window signs or signs of illegibly small size.
  - A complete ban on residential real estate signs.
  - A complete ban on residential wall signs while allowing political signs, especially if houses in the community do not have front yards to display political messages on yard signs.





# Banning Categories of Signs

---

- If your township wishes to ban entire categories of signage, you should do so under careful consideration, ensuring there are alternative channels for that type of speech, especially if the form of speech implicated is considered a historically important form of speech (e.g., political speech).



# Banned Signs Likely to Survive Judicial Review

---

- Signs that could most likely be completely banned and still survive judicial review:

**Abandoned signs**

**Bandit signs**

**Roof signs**

**Spotlights**

**Neon signs**

**Any sign unlawfully installed, erected or maintained**

**Signs located on real property without the permission of the property owner**

**Signs that emit sound, vapor, smoke, odor, or gaseous matter**



# Banned Signs Likely to Survive Judicial Review – a Few More

---

*Signs which imitate traffic signals, traffic direction signs, or similar traffic control devices, and signs which make use of words including, but not limited to, “Stop,” “Look,” “Danger,” or any other words, phrases, symbols or characters in such a manner as to interfere with, mislead, or confuse traffic*

***Signs in or upon any river, lake, or other body of water within the limits of the Township, except government regulatory signs, warning signs, or safety signs***



# Regulating Signs through Zoning

---

- A powerful way to permissibly regulate signs is by zoning district or land use.
- As long as the zoning regulations do not mention the content of the signs they regulate and instead restrict their physical characteristics (i.e., in what zoning district certain sign types are permitted), they are likely content-neutral.
- With time, place, and manner regulations in mind, a municipality can revise its Zoning Ordinance to target certain sign characteristics (such as their size and lighting) by zoning district.



# Examples of Zoning Regulations

Content-Neutral Regulation Scheme	Ground Signs		Temporary Ground Signs
	Max Size	Number	General Requirements (All districts)
<b>Agricultural Districts</b>	60 sq ft	2 non-illuminated signs per road frontage	<p>1 non-illuminated temporary ground sign shall be permitted per 10 feet of road frontage.</p> <p>The maximum sign area for each temporary ground sign shall be 4 square feet.</p>
<b>Residential Districts</b>	6 sq ft; 50 sq ft for ingress/egress signs	2 non-illuminated signs per road frontage; 1 non-illuminated sign per point of ingress/egress	<p>All permitted temporary ground signs may be displayed for no more than 120 days.</p> <p>No temporary ground sign may be displayed without the consent of the legal owner of the property on which the sign is mounted or displayed.</p>
<b>Commercial Districts</b>	60 sq ft	2 per road frontage	

# New Approaches to Off-Premises Sign Regulations

---

- The traditional off-premises / on-premises distinction is content-based and has the potential to cause your township legal issues down the road.
- However, it is still possible to regulate these types of signs in a content-neutral way.



Examples of  
*Impermissible*  
On-Premises /  
Off-Premises  
Sign Regulations

Definition of “Off-Premises Signs”

Signs advertising a business, person, activity, goods, products, or services *not* located on the site where the sign is installed.

Restriction

On-premises signs can be externally illuminated, but off-premises signs cannot.

Examples of  
*Permissible*  
On-Premises /  
Off-Premises  
Sign Regulations

Definition of “Off-Premises Sign”

Any sign farther than 200 feet from a building.

Restriction

On-premises signs can be externally illuminated, but off-premises signs cannot.



# More Examples of *Content-Neutral* Regulations

- Rules regulating the dimensions of signs (this can vary among sign types, but it must be based on *content-neutral* criteria).
- Rules dictating where signs can be placed (such as in a front yard, on a roof, in a window, etc.).
- Rules that distinguish between lighted and unlighted signs and the types of permissible illumination.
- Rules regulating signs with moving parts.
- Rules that distinguish between signs on public and private property.
- Rules that dictate how long a sign may be displayed (again, so long as it is based on *content-neutral* criteria).
- Rules that distinguish between types of signs based on physical characteristics (such as wall signs, banners, A-frame signs, ground signs, flags, and so on).

# Conclusion - Checklist

---

- ✓ **Remove all content-based restrictions from the ordinance.**
- ✓ **Identify the regulatory objectives and bolster them with evidence-based findings.**
- ✓ **Create *content-neutral* sign definitions.**
- ✓ **Ensure there is a *content-neutral* regulatory scheme.**
- ✓ **If restricting a class of signs, ensure there are still open channels of communication.**





# Questions

---

Attorney Jake Witte

Law Clerk Hannah Morgan

Fahey Schultz Burzych Rhodes PLC

4151 Okemos Rd., Okemos, MI 48864

Tel: 517-381-0100

[jwitte@fsbriaw.com](mailto:jwitte@fsbriaw.com)

[hmorgan@fsbriaw.com](mailto:hmorgan@fsbriaw.com)

[www.fsbriaw.com](http://www.fsbriaw.com)

*This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to a particular situation. Please contact an attorney if you need assistance related to a specific legal issue.*

