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In This Issue

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Commercial Leasing
Construction
Real Estate
Zoning & Land Use

Sign, Sign, Everywhere a Sign (Ordinance): Reed v. Town of Gilbert, the First Amendment and Signs

By Matthew Roberts

On June 18, 2015, the United States Supreme Court ruled in Reed v. Town of Gilbert that an Arizona town's sign ordinance unconstitutionally regulated the content of speech posted on signs within the town. Like so many modern localities, the Town of Gilbert had adopted a sign ordinance regulating signage within the town, including the total number of certain signs that could be displayed, their size and how long such signs could be displayed.

The town based these restrictions upon the type of sign to be displayed and created categories of signs subject to different regulations. In particular, the town created different regulations for ideological signs, political signs and temporary signs. The town based these differences in its police power considerations for the town's aesthetics and traffic safety, and claimed it did not disagree with any particular message on a given sign.

Under these sign regulations, the town cited the Good News Community Church on several occasions for violating the temporary sign regulations, because the church had not removed them in time and failed to include all the information required on a temporary sign. The church, in response, sued the town, claiming the ordinance was an unconstitutional content-based restriction of its freedom of speech.

The Supreme Court agreed. The court found that the ordinance, on its face, was based upon the content expressed on a given sign, because it created different signage regulations entirely depending on the message to be conveyed. As such, the law was presumptively unconstitutional. It would be up to the town to show that the ordinance survived "strict scrutiny," a legal standard requiring the government to prove its regulations are narrowly tailored to serve a compelling government interest.

The court found the town failed to meet this standard. Benign motives like local aesthetics and traffic safety would not suffice where those motives applied equally to signs the town did not restrict as heavily as temporary signs. The court noted

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the town had a number of content-neutral alternatives, such as restricting size, building materials, lighting, parts and might even be able to forbid their placement on public property. If applied evenly across all types of signs, regardless of their message, the ordinance could probably survive.

Reed v. Town of Gilbert is a reminder that the First Amendment to the United States Constitution remains a powerful tool in land use and zoning law cases. Many Virginia localities have adopted sign ordinances that could be subject to scrutiny if they fail to apply their regulations evenly across all signs, or fail to have a strong reason to create such differences. As the Supreme Court has indicated, local aesthetics and traffic safety simply will not be enough to save a content-based restriction on speech.

This article was originally published on our Virginia Real Estate, Land Use & Construction Law blog.

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Arlington County Board Approves the Retail Action Plan

By Lauren Keenan Rote

On Saturday, July 18, the County Board approved the Retail Action Plan by a vote of 4 to 1, with direction to further amend some facets of the proposed plan. Board Member Libby Garvey voted against the Plan.

During a rather extensive discussion which focused a great deal on the feedback that Board Members and Staff received calling for more flexibility within the Plan, the Board ultimately decided to broaden the “red” category to permit more uses. Many critics of the Plan believed the red category was too restrictive. The use category of Services and Repairs will now also be permitted within the red category.

The Board also voted to incorporate the Process document released by AED within the Plan itself to help aid Developers and the Board in applying the Plan to future and existing site plans. This document, originally requested by Chairwoman Hynes at one of the working sessions, was designed to aid the analysis of a site plan when there were other conflicting policy documents. In essence, the Process document helps to demonstrate when the retail action plan may stand up to or yield to existing policy documents like sector plans and the like.

The Arlington Economic Development staff will be updating the Plan to incorporate the latest revisions made by the Board. There was no timeline specified as to when that may be final, however, the Plan has been approved.

In addition to approval, the Board decided a periodic review of the plan was needed, as retail trends change quickly. With this end in mind, they requested that the Plan be reviewed on a periodic, ongoing basis.

This article was originally published on our Virginia Real Estate, Land Use & Construction Law blog.

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D.C.'s Historic Preservation Laws – Not the Zoning Regulations – Remain the Biggest Impediment for Pop-Up Development

By Zachary Williams

Much has been written about "pop-ups" in the District of Columbia, including a summary of the pop-up dispute and proposed changes to the D.C. zoning regulations in this newsletter last fall. The lengthy and contentious public debate culminated in new zoning regulations, effective on June 26, 2015, that ostensibly limit pop-up development in some areas of the city. However, despite the new regulations, the rise of pop-ups will continue to be seen given the appetite for new housing stock in D.C. The fight now appears to be shifting to design review and local neighborhoods' use of the city's historic designation laws to slow down or stop pop-up development.

In short, the new zoning regulations addressing pop-ups may slow the pace, but will not stop the development of pop-ups. The new regulations are limited to the R-4 zone, which does not include the location of several of the most infamous pop-up battles in the city, such as Lanier Heights, which is zoned R-5-B. Even in R-4 zones, pop-ups have not been forbidden, but instead are now permitted through a special exception. By-right maximum height in the R-4 zone has been reduced from 40 to 35 feet, which, according to one pop-up architect will have little effect on pop-ups as they are often designed to be only 35 feet or less in height.

A new legal battle in the Petworth area of D.C. highlights a new front in the pop-up wars. In a lawsuit filed by a developer in the U.S. District Court for the District of Columbia, Case No. 1:15-cv-01166-CRC, against several local residents, the residents are accused of conspiring to request designation of a new historic district in Petworth in order to stop the developer from moving forward with plans for redeveloping row homes in the area. In fact, many row home neighborhoods in D.C. are already within historic districts, such as Foggy Bottom, Mount Pleasant, and Capitol Hill, where redevelopment requires review and approval by the Historic Preservation Review Board. In these historic districts, redevelopment is required to conform to the historic character of the neighborhood, which inherently limits redevelopment, including conversions of row homes to pop-ups.

More than ever, potential historic district or landmark designation should be on any developers' mind when looking at a new project in D.C. Early outreach to the community and local ANC is always recommended in the early stages of a project to avoid the sorts of neighborhood battles seen in Petworth and Lanier Heights. As with any project nearby residential areas, design and architecture that is receptive to the community's concerns and desires often goes a long way in engendering local support for new projects.

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