Personal and Confidential Attorney/Client privileged communication. Do not copy or distribute without approval. Place in a separate file. This is not a public record.

MEMORANDUM

TO: Dane County Towns Association

FROM: Eric J. Larson

DATE: April 4, 2018

RE: Updates to Dane County Sign Regulations
Legal Review

Ladies and Gentlemen:

I received your request that I review the draft updates to the Dane County Zoning Code sign regulations. I have had an opportunity to carefully consider this matter.

Based upon my review I am not able to approve the form of same at this time. In general, this ordinance makes distinctions between various signs based on content, and regulates the signs differently based on their content. This is in violation of *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015). Substantial additional changes will be needed to bring this ordinance into compliance with current law in my opinion. I will outline a number of general and specific thoughts, below.

I. General Comments

1. *Reed v. Town of Gilbert* arose out of the following facts. A small church in the Town of Gilbert, Arizona held Sunday services at various temporary locations in the Town. They advertised the location for any particular Sunday service by placing 15-20 temporary signs around the Town, frequently in the public right-of-way. The signs displayed the church's name along with a time and location of any upcoming service. The signs were posted early in the day on Saturday and removed midday on Sunday. The Town of Gilbert concluded that this violated the Town's Sign Code, and two citations were issued. The church filed a complaint in the Federal Court arguing that the Sign Code abridged their freedom of speech in violation of the 1st and 14th Amendments of the United States Constitution.

The U.S. Supreme Court analyzed the Town of Gilbert's Sign Code and noticed that different types of signs were given different treatment. Political signs were allowed to be larger and were allowed to be displayed for a longer period of time than ideological signs. Directional signs also had separate and different treatment. The Court noted there were 23 categories of signs each treated differently based upon the content of what was stated on the sign. The Court found this to be content-based regulation of speech and subjected the Ordinance to the highest level of review, known as "strict scrutiny." Under strict scrutiny, local regulations are presumptively unconstitutional, and rarely survive. The Court described the standard this way:

> "Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. Thus, it is the Town's burden to demonstrate that the Code differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end."

The Court quickly disposed of the case, having reached those conclusions, by saying that the Town simply cannot demonstrate that level of governmental interest. The Court noted that the Town sought aesthetic appeal and traffic safety, but "the Code's distinctions fail as hopelessly under-inclusive." Temporary directional signs are no greater an eyesore than ideological or political signs, in the Court's analysis. Limiting signs with certain content while allowing signs with different content also does nothing to limit threats to traffic safety, in the Court's analysis. The Town of Gilbert's Sign Code was therefore struck down as unconstitutional. The church who brought the litigation reportedly received more than $1,000,000 in attorneys' fees alone, independently of damages.

2. If content-based Sign Ordinances are subject to strict scrutiny, and the Government cannot meet that standard, how do we proceed? The key is to revise the sign regulations so that they do not depend on the content, but instead depend on dimensional standards that apply uniformly regardless of the content of the sign. The Court briefly addressed this practical concern toward the end of the lead opinion:

> "The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have

> nothing to do with the sign's message: size, building material, lighting, moving parts, portability. And on public property, the Town may go a long way toward entirely forbidding the posting of signs so long as it does so in an even handed, content-neutral manner. … A Sign Ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers and passengers – such as warning signs, marking hazards on private property, signs directing traffic, or street numbers associated with private houses – might well survive strict scrutiny."

I have offered additional thoughts regarding this issue many times, including to the Wisconsin Towns Association. I am attaching a copy of an outline that I presented to the Towns Association in 2016, shortly after the Court's decision.

3. If revisions to the Dane County Sign Code have been made following the *Reed* decision, I believe the revisions have not gone far enough and this issue should be further considered. I recommend that we take this opportunity to bring the Dane County Zoning Ordinance sign regulations into compliance with content neutral distinctions required by *Reed v. Town of Gilbert.* Rather than regulate different kinds of signs different ways based on their content, we should regulate based on the physical impacts that signs have on the community, with a focus on size limitations, placement limitations, construction standards, duration for temporary signs, and the like. Communities throughout the State of Wisconsin have engaged in this process over the past 2+ years since the *Reed v. Town of Gilbert* decision was issued. I have worked through this process with many municipalities throughout the State over that time. The result can accomplish much the same intent as the current regulations, but in a way that is enforceable and is not subject to substantial risks of challenge.

II. Specific Comments

1. Note: each page says at the bottom that terms highlighted in yellow indicate new language or changes. Nothing in the document is highlighted in yellow, however.

2. Line 6201: Parts of the definition of sign, including the exclusion for "community information signs" rely upon the content of the sign. This makes the definition of sign suspect following *Reed v. Town of Gilbert*.

3. Line 6231: The definition of community information sign is content-based and therefore should be revised or removed.

4. Line 6234: The definition of construction sign is content-based and therefore should be revised or removed.

5. Line 6237: The definition of crop sign is content-based and therefore should be revised or removed.

6. Line 6241: The definition of development sign is content-based and therefore should be revised or removed.

7. Line 6243: The definition of directional sign is content-based and therefore should be revised or removed.

8. Line 6254: The definition of farm sign is content-based and therefore should be revised or removed.

9. Line 6259: The definition of garage sale sign is content-based and therefore should be revised or removed.

10. Line 6276: The definition of home occupation sign is content-based and therefore should be revised or removed.

11. Line 6282: The definition of limited family business or limited farm business sign is content-based and therefore should be revised or removed.

12. Line 6303: The definition of parking lot sign is content-based and therefore should be revised or removed.

13. Line 6305: The definition of political sign is content-based and therefore should be revised or removed. This issue is very significant, given that it was one of the focus issues in the *Reed v. Town of Gilbert* case.

14. Line 6308: The definition of private property protection sign is content-based and therefore should be revised or removed.

15. Line 6322: The definition of real estate sign is content-based and therefore should be revised or removed.

16. Lines 6335-6337: I do not understand this change to the definition of sign face. The version of this definition that exists prior to this change strikes me as preferable given the way the term is used in the ordinance.

17. Line 6341: The definition of subdivision sign (permanent) is content-based and therefore should be revised or removed.

18. Line 6344: The definition of subdivision sign (temporary) is content-based and therefore should be revised or removed.

19. In Section 10.0802(1), I recommend that you consider adding a prohibition against placing signs in public right-of-way, unless they are public signs.

20. Lines 6505-6511: These exempt signs all rely on content-based distinctions, and therefore fail to comply with *Reed v. Town of Gilbert*. I recommend that this be revisited and revised or removed.

21. Lines 6533-6535: Why are we regulating the maximum size of public signs? This could violate the Manual on Uniform Traffic Control Devices, which we are required by law to follow. I recommend that this be deleted.

22. Lines 6536-6538: These regulations of temporary real estate signs are content-based and therefore should be removed or revised.

23. Lines 6552-6554: These regulations of crop signs are content-based and therefore should be removed or revised.

24. Line 6563: This line includes an incomprehensible statement that should be clarified. It says, "No display period not run concurrently." I am not sure what this is intended to say.

25. Lines 6565-6572: These are content-based distinctions that must be clarified or removed. The regulation of "directional signs" and "political signs" were directly at issue in the *Reed v. Town of Gilbert* case, and these were found to be unconstitutional distinctions. The focus of the regulations need to be dimensional standards: size, area of placement, duration of placement allowed, height, and such similar issues that have absolutely no relevance to what the sign might say. In 2018, after the 2015 U.S. Supreme Court decision in *Reed v. Town of Gilbert*, we should not adopt an ordinance that maintains regulations based on whether they are directional signs or political signs or based on any other distinctions that depend on the content of what is said on the sign.

26. In the table that begins in line 6579, and in the tables that follow, I note that these are some of the most permissive sign requirements that I have ever seen in a sign ordinance. Do you truly mean to allow wall signs in your residential districts, for example? Do you truly mean for your commercial districts to be allowed every type sign, with no limit on total square footage? Do you really mean to allow 32-foot permanent ground signs on lots in your residential districts? Do you really mean to allow 300-foot wall signs on lots in your residential districts? These are all

policy considerations, not legal considerations, but I encourage you to ensure that these very permissive standards are truly as you intend, not only on these issues that I have singled out, but throughout these tables.

27. It is very common, after the *Reed v. Town of Gilbert* case, for municipalities to create a maximum square footage of sign area for each particular zoning district. I do not see that concept incorporated in this ordinance. This, again, can result in a much more extensive proliferation of signs throughout the County, than would occur if it were regulated.

28. Lines 6591-6609: Are these types of signs meant to be allowed in addition to the other signs that are mentioned in the tables? Or is the square footage described in the tables reduced correspondingly, if any of these signs are added?

29. Line 6606 shows private property protection signs having a maximum size, that is shown in inches, while all other signs are described in square feet. 324 square inches is equal to 27 square feet. 27 square feet is a pretty big sign for a residential lot (10' x 2.7', for example). Is that intended?

30. Lines 6607-6609: This describes temporary real estate signs without a permit but is shown in a section (10.804) that describes signs allowed with a permit. It is not in the correct part of the Code, therefore and should be put in a section that relates to temporary signs that do not require a permit. For that matter, it is already shown in lines 6536-6538, and can be removed from this location.

31. In table 4, Dimension and Location Standards for Wall Signs, the footnote with two asterisks is incomprehensible and should be rewritten. What is "the nearest adjacent road which is not within the right-of-way of another road?"

32. Lines 6674-6677: I recommend against this requirement that nonconforming signs come into compliance if the message is changed. That is a content-based regulation that has no relation to the physical features that are the typical subject of zoning regulation.

33. Lines 6741-6743: I recommend that this be revised to expand on the possible violations. For example, I recommend this change:

> "~~Failure to attain a zoning permit for a sign shall follow the violations and penalties rules and procedures as defined~~ Any violation of this Chapter 10, Subchapter II is subject to all

penalties and remedies described in Section ~~10.101(4)~~10.25(5).”

Eric J. Larson

EJL:egm
C:\MyFiles\Dane Co Towns Assoc\Memo Dane Co Sign updates 4.2.18.docx