



August Case Law Update August 31, 2015

A summary of Wisconsin court opinions decided during the month of August related to planning

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United States Court of Appeals for the Seventh Circuit

Regulation of Speech After *Reed v. Town of Gilbert*

It did not take long for the U.S. Supreme Court's June decision in *Reed v. Town of Gilbert* concerning sign regulation to impact other cases. (For a summary of decision in *Reed v. Town of Gilbert*, see the [APA-WI June Case Law Update](#).) In *Norton v. City of Springfield*, the U.S. Court of Appeals for the Seventh Circuit (the federal intermediate appellate court covering the region that includes Wisconsin) found that an ordinance prohibiting panhandling in the City of Springfield, Illinois' "downtown historic district" violates the First Amendment because it embodies content discrimination subject to strict scrutiny under the U.S. Supreme Court's decision in *Reed v. Town of Gilbert*.

(A recent article in the [New York Times](#) discussing *Reed v. Town of Gilbert* described the legal concept of "strict scrutiny" in the following way: "Strict scrutiny requires the government to prove that the challenged law is 'narrowly tailored to serve compelling state interests.' You can stare at those words as long as you like, but here is what you need to know: Strict scrutiny, like a Civil War stomach wound, is generally fatal.")

The *Norton* case highlights how *Reed v. Town of Gilbert* has significantly changed the legal framework for understanding content-based regulation of speech -- something frowned upon under the First Amendment. The City of Springfield's ordinance at issue in *Norton* prohibited panhandling in the City's "downtown historic district," an area encompassing less than 2% of the City. (For those of you who are Abraham Lincoln buffs and have been to Springfield, you know the area.) The ordinance defined panhandling as an oral request for an immediate donation of money. Signs requesting money and oral pleas to send money later were allowed. The plaintiffs in the case contended that the ordinance's rule barring oral requests for money now but not regulating requests for money later was a form of content discrimination in violation of the First Amendment.

The case went before the Seventh Circuit Court of Appeals two times. Initially, the Court of Appeals decided that Springfield's anti-panhandling ordinance **did not** draw lines based on the content of anyone's speech. Following that decision, however, the plaintiffs petitioned for a rehearing. The Court of Appeals deferred consideration of the petition for rehearing to wait for the U.S. Supreme Court to issue its decision in *Reed v. Gilbert*.

Following the U.S. Supreme Court's decision in *Reed v. Town of Gilbert*, the Seventh Circuit Court of Appeals reconsidered the Norton case and the **outcome was much different** -- the Court enjoined enforcement of the City's anti-panhandling due to First Amendment concerns. According to the Seventh Circuit Court:

[The U.S. Supreme Court in] *Reed* understands content discrimination differently [than the way it was considered before]. It wrote that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." . . . Springfield's ordinance regulates "because of the topic discussed". The Town of Gilbert, Arizona, justified its sign ordinance in part by contending, as Springfield also does, that the ordinance is neutral with respect to ideas and viewpoints. The majority in *Reed* found that insufficient: "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." . . . It added: "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among view-points within that subject matter."

Sign regulations after *Reed*

The Seventh Circuit's decision in *Norton* underscores the sweeping impact of the Supreme Court's decision in *Reed* for sign regulations. Local governments need to review their sign ordinances and ask "Does this regulation apply to a sign because of the content on the sign?" In other words, if you have to read the message to figure out how a sign is to be regulated, then it is content-based and subject to challenge under *Reed*. Examples include the categorical regulations found in many sign codes for "political signs," "temporary directional signs," "ideological signs," "identification signs," "real estate signs," "homeowner association signs," "drive-through restaurant signs" "business hours of operation signs," or signs based on other content distinctions.

Previous U.S. Supreme Court cases recognized content-based distinctions between commercial and non-commercial speech. The Court drew distinctions based on the content of the sign and held that regulation of commercial speech is subject to a lower level of scrutiny by the courts than non-commercial speech. *Reed* did not overrule the line of cases drawing distinctions between commercial and non-commercial speech so, at least for the time being, sign ordinances that include provisions for commercial signage, such as special regulations for "temporary business signs" should be okay.

Justice Thomas, who wrote the majority opinion for the Court in *Reed*, offered some other content-based regulations that may be acceptable if they are narrowly tailored to ensure public safety: "such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses." It will be critical that local communities clearly articulate the purpose for these regulations.

Justice Thomas also offered examples of content-neutral sign regulations that are not impacted by *Reed*. Regulations that have nothing to do with a sign's message include: size, building materials, lighting, moving parts, and portability. Justice Thomas also states: "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 evenhanded, content-neutral manner." This would include the public right-of-way. If signs are allowed, the regulations must not distinguish based on the content of the message, like only allowing signs by non-profit organizations such as a church sign about a spaghetti supper.

Justice Alito wrote a concurring opinion that included a non-exhaustive list of the type of sign regulations that would be content-neutral. (The full list was included in the June Case Law Update.) However, the list raises some questions. Justice Alito's list includes time restrictions on signs for one-time events. This seems at odds with the temporary directional sign challenged in *Reed*. Nevertheless, after *Reed* it would presumably be appropriate to have sign ordinances that regulate "temporary signs" based on factors other than the event that is the subject of the sign such as allowing the sign to remain for a certain number of days.

Justice Alito's list also indicated that it would be appropriate to have signs that distinguish between on-premises and off-premises signs. In order to determine if a sign is off-premises or on-premises, the local government will need to read the sign. Presumably the on-premise/off-premise distinction is still valid based on Justice Alito's statement and the fact that prior U.S. Supreme Court decisions recognized those distinctions and those decisions were not overruled. For example, not allowing off-premise billboards in residential areas should still be appropriate.

As communities remove content-based restrictions, they can explore alternatives such as allowing "yard signs" (as opposed to "yard sale" which would not be content-neutral) of a certain number and dimension in residential districts. Regulations could also be based on the type of building material of the sign. From a planning perspective, it will be important to stand back and evaluate what a community is trying to accomplish through sign regulations and how much regulation is necessary. It is important to review other ordinances that may relate to speech, like Springfield's panhandling ordinance, to insure they are content-neutral.

Certainly we will see additional cases on these issues.

Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

Boundary Change Via Intergovernmental Agreement Was Proper

On February 19, 2013, voters in the Town of Harrison in Calumet County approved incorporating a 4.6-square-mile area as the Village of Harrison. On June 6, 2013, the Town and Village of Harrison published notice of a joint public hearing "to discuss proposed Intergovernmental Cooperation Agreement affecting the provision of municipal services, apportionment of costs of municipal services, apportionment of assets and liabilities, and boundary line adjustments between the Town of Harrison and the Village of Harrison." The Town and Village of Harrison sent notice of the meeting via certified mail to 1910 property owners entitled to receive notice pursuant to Wis. Stat. § 66.0301(6). [Note: this case deals with an intergovernmental agreement enacted under the general intergovernmental cooperation authority, NOT under the authority to create cooperative boundary agreements under Wis. Stat. § 66.0307.]

The Town and the Village boards approved the agreement on July 2, 2013. The agreement permitted the Village board to “trigger the boundary line change” through the adoption of an ordinance, which the Village board passed on August 6, 2013. As a result of the boundary change, 1736 parcels that had been located in the Town were relocated to the Village. The nearby Cities of Kaukauna and Menasha, the Village of Sherwood, and some individual property owners sued the Village and Town of Harrison arguing that the agreement is void because it involved a “major” boundary change that exceeded the scope allowed by statute and that the Town and Village did not comply with the statutory notice requirements for intergovernmental agreements because the notice did not tell property owners that approval of the cooperative agreement would mean they would be relocated to the village.

The Wisconsin Court of Appeals disagreed. The Court noted that the statute is silent on the scope of boundary changes permitted by intergovernmental agreements. The Court was unwilling to read language into the statute creating a distinction between “major” boundary changes and more modest boundary changes. As for the notice, the Court also noted that the statute does not specify what information must be contained in the notices. As a result, the Court concluded the general notice that there would be “boundary line adjustments” was sufficient to meet the statutory requirements.

The case is [City of Kaukauna v. Village of Harrison](#) and is recommended for publication in the official reports.

Distinguishing Between Rules, Ordinances, and Resolutions

[Wisconsin Carry, Inc. v. City of Madison](#), involved the validity of a rule adopted by the City of Madison’s Transit and Parking Commission that prohibits a person from traveling in a city bus with a weapon (the “bus rule”). The City of Madison General Ordinances authorize the City’s Transit and Parking Commission, the City agency responsible for overseeing the City’s bus system, to establish “rules and procedures” related to transit. The Commission adopted the bus rule under that authority. Wisconsin Carry, Inc., an organization that describes itself as a “gun rights organization,” and one of its members, brought suit asking the court to declare that the bus rule is preempted by Wis. Stat. § 66.0409 which prohibits local governments from adopting “ordinances” and “resolutions” that regulate firearms. The Wisconsin Court of Appeals determined that the Commission’s rule is neither an ordinance nor a resolution and therefore the rule was not preempted by the prohibition on local regulation of firearms.