

## **Legal Q&A**

**By Laura Mueller**

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### **Q: What authority does each city have to regulate signs and billboards?**

A: A city has authority to regulate or prohibit most signs or billboards in the city or the city's extraterritorial jurisdiction (ETJ). TEX. LOC. GOV'T CODE §§ 216.003; 216.902. A city's purpose for such regulation usually involves protecting the appearance or aesthetics of the city, which helps with property values, or improving traffic safety. A city ordinance may prohibit or regulate most signs and all billboards so long as the ordinance's provisions do not abridge the constitutional rights of a sign owner or conflict with any state statute. If a city council decides to regulate billboards in a way that affects existing billboards, a city may require removal, relocation, or reconstruction of existing billboards pursuant to the authority in Chapter 216 of the Local Government Code. TEX. LOC. GOV'T CODE ch. 216. However, to regulate existing billboards in this way, a city must strictly follow the procedures in Chapter 216.

### **Q: What authority does a city have to regulate signs and billboards in the ETJ?**

A: Both general law and home rule cities have some authority to regulate signs and billboards in the ETJ. TEX. LOC. GOV'T CODE § 216.902(a). The statute granting cities the authority to regulate in the ETJ makes no distinction between general law and home rule cities, so either type of city may do so. However, in lieu of regulating signs in the ETJ, a city may request that the Texas Transportation Commission regulate the signs within the city's extraterritorial jurisdiction. A city that chooses to regulate in its ETJ should ensure that its ordinance clearly extends the regulation to that area.

### **Q: What are the state law and constitutional limitations on a city's regulation of billboards and signs?**

A: Under state law, a city generally may not prohibit or restrict the size of signs with a primarily political message, such as a campaign sign located on private land, unless the sign has billboard-like proportions. TEX. LOC. GOV'T CODE § 216.903. A city may not charge a placement fee, require permits for political signs, or charge more for removal than it would for other signs. *Id.* In addition, some state laws expressly preempt city authority. For example, cities in Harris County and surrounding counties have limited regulatory power regarding onsite signs in their ETJ. TEX. LOC. GOV'T CODE § 216.035. City ordinances also need to consider the first amendment protections afforded to signs with a noncommercial or political message. The courts have dealt with signs with a noncommercial or political message that are located on residential property, and have held invalid city regulations that would prohibit or severely regulate such signs. *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Also, a recent Supreme Court opinion, has further clarified that content-based restrictions will be reviewed strictly by the courts. *See Reed v. Town of Gilbert*, No. 13-502 (June 18, 2015). In *Reed*, the Court struck down a town ordinance that treated signs differently based on content, directional signs versus ideological signs. The Court invalidated the ordinance because the town could not show that the content-

based distinction furthered a compelling interest and was narrowly tailored to achieve the town's interests. *Id.* Practically, this new case means that any ordinance provision that requires a city employee to read the content of a sign before taking action will be subjected to strict scrutiny by a court. This heightened review would include restrictions on political signs, and it could include restrictions on onsite versus offsite signs as well as restrictions based on commercial versus non-commercial speech. However, a city sign code can still prohibit all signs on city property and limit the size, building materials, and other aesthetic aspects of a sign. A sign ordinance could – in theory – have content based restrictions, but the standard to uphold these restrictions is very strict. The full import of *Reed* will be reviewed in the coming months.

**Q: May a city prohibit political signs from being placed in the city's right-of-way?**

A: Yes. A city has the authority to regulate and prohibit signs in its rights-of-way, including political signs. A sign owner must request a city's permission before a sign may be legally placed in a city's right-of-way. TEX. TRANSP. CODE Ch. 393. Under Texas Transportation Code Section 393.0025, a city may choose to regulate sign placement in the city's rights-of-way. Absent city regulation, state law generally prohibits signs in city rights-of-way. However, for first amendment reasons, a city generally cannot prohibit signs in its rights-of-ways based on content. For example, a city may not prohibit all political signs in the rights-of-way and allow other types of signs. *See Reed v. Town of Gilbert*, No. 13-502 (June 18, 2015).

**Q: May an ordinance contain exceptions allowing certain signs but prohibiting others?**

A: Whether a city may regulate some signs, but not others, depends on many factors. For example, a city generally may regulate signs on the basis of size but not regulate signs solely on the basis of content without showing that the restriction is narrowly tailored to meet a compelling interest. *See Reed v. Town of Gilbert*, No. 13-502 (June 18, 2015). However, some cases have upheld the ability of cities to distinguish based on the type of sign being regulated. For example, a city can often regulate offsite advertising more strictly than onsite advertising. *See, e.g.*, TEX. LOC. GOV'T CODE § 216.035; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981) (“Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests.”). *But see Reed v. Town of Gilbert*, 13-502 (June 18, 2015) (“Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining a regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefor, are subject to strict scrutiny.”). Most content-based regulations will likely be struck down, unless the restrictions can meet the strict scrutiny test set out by the courts. *See Reed v. Town of Gilbert*, 13-502 (June 18, 2015); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981). Regardless of the inherent validity of an exception or distinction, exceptions that defeat the stated purposes of an ordinance by being over inclusive or under inclusive (for example, aesthetics or traffic safety) can result in an entire ordinance being struck down. *See id.*

**Q: May a city remove existing signs?**

A: Yes. A city may require a sign's removal, relocation, or reconstruction under Chapter 216 of the Local Government Code. TEX. LOC. GOV'T CODE ch. 216. Cities usually only prospectively ban or regulate signs because the removal, relocation, or reconstruction of an existing sign often costs the city money and may result in litigation.

**Q: What is the procedure for removing an existing sign?**

A: A city must first have an ordinance that applies to existing signs. Before a city may require removal of a sign, the city must determine compensation for the sign owner through a municipal sign board. The sign board's membership is provided for by state law, and the board determines the amount of compensation. TEX. LOC. GOV'T CODE § 216.005. Before the board makes a determination on the amount of compensation, the city must give the sign owner an opportunity for a hearing. Once regulatory action is taken and compensation for the sign is determined by the municipal sign board, "any person aggrieved by a decision" may appeal to district court. TEX. LOC. GOV'T CODE § 216.014. Compensation may be examined by a court for its reasonableness. If the compensation payments are provided over a period longer than one year, the duration's reasonableness will also be examined.

**Q: How may a city regulate electronic billboards?**

A: In 2008, Texas Transportation Commission rule changes became effective that permit electronic billboards on state highways within a city's limits or ETJ, subject to the city's written consent. 43 TEX. ADMIN. CODE § 21.253. Those rules apply only to an area that is adjacent to a state highway. A city may regulate or prohibit electronic billboards in other areas within the city and its ETJ. The Texas Department of Transportation (TxDOT) rules allow an electronic billboard adjacent to a state highway only if an applicant: (1) receives a permit from TxDOT; (2) complies with TxDOT billboard rules; and (3) receives written consent from the city through either a city permit or a letter from the city. The rules were drafted in such a way that, even if TxDOT rules would allow an electronic billboard along a state highway in a city or its ETJ, the city can prohibit the sign by simply refusing permission.