



October 20, 2016

City of Tucson Planning Commission-Citizen Sign Code Committee  
Joint Subcommittee on Sign Code Revision  
201 North Stone Avenue, 3<sup>rd</sup> Floor  
Tucson, Arizona 85701

Via Electronic Mail to Each Member

**RE: Sign Code Revision Project, Purpose Statement in Draft Sign Code Revision (September 20, 2016)**

Dear Members of the Joint Subcommittee:

Scenic Arizona takes this opportunity to address the statement of purpose issue as to any revision of the existing Sign Code in this regard.

As a threshold matter, we reiterate our view that there is nothing in the current purpose statement that runs afoul of the Reed v Gilbert court decision and requires amendment. However, we do agree that the existing section is rather disjointed and would benefit from some reformatting and consolidation of wording in appropriate subparagraph form and that there should be some strengthening of the traffic safety statement. Rather than take that more narrow approach, however, the City staff draft is close to a wholesale replacement that we find lays the ground work for other changes that cannot be supported. We urge that you reject this approach (particularly the language that establishes any type of parity between commercial and non-commercial signs).

To offer the subcommittee more background, please find attached (within this pdf file) excerpts from two post-Reed legal analyses that address sign code purpose statements. Note that one of the two co-authors of the second piece is one of the "legal experts" referred to by City staff as having been consulted (Alan C. Weinstein). However, this co-authored work for publication in a legal journal is dramatically different than the 2009 "model sign code" that Mr. Weinstein wrote with funding from the sign industry and with review by four sign industry representatives and a University of Cincinnati professor whose department had contemporaneously received a \$2 million grant from a sign industry donor. The staff draft has drawn, at least to some extent, from that tainted model code.

As you may note in both of the legal analyses, the two critical items necessary in any purpose statement are aesthetics and traffic safety. In the Tucson context, the latter should include references the protection of mountain and other scenic views and dark skies. Other common items include protection of property values and the catch all "health, safety, and general welfare".

Further review also suggests that the distinct "purpose" and "intent" subsections of the existing code do not really serve a purpose, as each seems to include similar types of language. It would appear that this

distinction, first made in the 1987 code revision, may have been derived from Street Graphics and the Law, the only source seen to date that makes such a distinction.

The substance of the existing purpose statement dates back to the development of the modern Tucson regulations enacted in 1980 (Ordinance 5102, adopted February 4, 1980 and effective March 5, 1980). Most of that language has continued to date with the exception of the 1987 deletion of subparagraph “(e)”, relettering subparagraph (f) to (e) at the same time; and some minor language changes over time related to subsequent reformatting of the code chapter. The 1980 code section is below for reference and separately attached is the Foreword in the 1979 Sign Code Advisory Committee’s recommendations to Mayor and Council from which the purpose statement originated (see the fifth and eight paragraphs of the Foreword).

Sec. 3-2. Declaration of Intent.

The purpose of this chapter in regulating outdoor advertising, outdoor advertising signs and outdoor signs of all types, is to provide fair and comprehensive regulations that will foster a good visual environment for Tucson, enhancing the fragile desert in which we live and creating an aesthetic and enjoyable appearance for our visitors and our residents.

The mayor and council declare the regulation of signs within the City of Tucson is necessary and in the public interest (a) to safeguard and enhance property values within the City of Tucson; (b) to preserve the beauty and unique character of the City of Tucson; (c) to promote and aid in the tourist industry which is an important part of the economy of the City of Tucson; (d) to protect the general public from damage and injury which may be caused by the faulty and uncontrolled construction of signs within the City of Tucson; (e) to protect pedestrians and motorists of the City of Tucson from damage or injury caused or partially attributable to the distractions and obstructions which are hereby declared to be caused by improperly situated signs; f) to promote the public safety, welfare, conveniences and enjoyment of travel and the free flow of traffic within the City of Tucson.

In sum, Scenic Arizona believes that the Reed court decision does not require revision of the existing purpose statement, but a reformatting and consolidation of phraseology based on the existing substantive language is appropriate. Such reformatting should include consolidation of the aesthetics/visual appearance language into the lead paragraph; followed by a separate paragraph on the Sonoran Desert, mountain and scenic views, and dark skies; and further followed by a stronger consolidated traffic safety statement. The balance of the existing subparagraphs should follow in an appropriate order.

Thank you for your consideration of the foregoing and Scenic Arizona may offer specific purpose statement language at or prior to the upcoming Joint Subcommittee meeting.

Sincerely,



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cc: City of Tucson Sign Code Revision Project

## Free Speech Law for On Premise Signs

Daniel R. Mandelker,  
Stamper Professor of Law Washington University in Saint Louis, Revised Edition 2016

Section on Purpose Statements (at Pages 57-58 of 94)

### § 3:3. Must a Sign Ordinance Include a Statement of Purpose?

A statement of purpose is a necessary part of a sign ordinance. It should contain an adequate expression of the aesthetics and traffic safety interests the ordinance advances.<sup>236</sup> A statement of purpose also plays an important role in upholding a sign ordinance. Some courts rely on a statement of purpose to hold, without additional proof, that a sign ordinance directly advances its legislative purposes under the third Central Hudson test.<sup>237</sup> If a sign ordinance does not contain a statement of purpose, courts will hold a governmental interest in aesthetics or traffic safety does not support the ordinance, or that this interest is not directly advanced.<sup>238</sup> In *National Advertising Co. v. Town of Babylon*,<sup>239</sup> for example, the Second Circuit held it had not found any case where “a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech.”

Zoning ordinances may also contain an all-inclusive “health, safety and general welfare” statement of purpose that applies to the entire ordinance. Courts hold a general statement of purpose of this type is not enough to uphold the sign regulations that are part of the zoning ordinance.<sup>240</sup> The Eleventh Circuit, however, held that a general statement of purpose in an ordinance permits a court to examine the record for evidence of a governmental interest that supports the sign regulations.<sup>241</sup> The court also held that a narrow reading of the general statement of purpose in that case, and the “obvious aim” of most of the measures in the sign ordinance, showed that traffic concerns partially supported the regulations.

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<sup>237</sup> *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886 (9th Cir. 2007) (billboards; statement of purpose of sign code was “to optimize communication and quality of signs while protecting the public and the aesthetic character of the City;” that is all our review requires to prove a significant interest); *Outdoor Systems, Inc. v. City of Lenexa*, 67 F. Supp.2d 1231, 1238-1239 (D. Kan. 1999) (billboards; following *Metromedia* and accepting legislative findings that ordinance promoted governmental interests in traffic safety and aesthetics; expert opinions or other evidence not needed where common sense will logically suffice).

<sup>238</sup> *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F. 3d 814, 819 (9th Cir. 1996) (no statement to show aesthetics or safety interest; clear statement would have shown governmental interest in aesthetics and traffic safety); *National Adver. Co. v. Town of Babylon*, 900 F.2d 551, 555, 556 (2d Cir. 1990); *International Outdoor, Inc. v. City of Romulus*, 2008 WL 4792645 (E.D. Mich. 2008) (cross-references to statutes that had statements of purpose not enough); *Abel v. Town of Orangetown*, 759 F. Supp. 161 (S.D.N.Y. 1991) (following *National Advertising*). See also *Adams Outdoor Adver. of Atlanta, Inc. v. Fulton County*, 738 F. Supp. 1431, 1433 (N.D. Ga. 1990) (“[T]his court cannot permit defendant to justify its restriction of protected speech with after the fact. invocations of aesthetics and traffic safety.”). *Contra, Covenant Media of S.C., LLC v. Town of Surfside Beach*, 321 Fed. Appx. 251 (4th Cir. 2009) (such a requirement not implicit in *Central Hudson* standard).

<sup>239</sup> 900 F.2d 551, 555, 556 (2d Cir. 1990) (“At most, courts have taken judicial notice of a common-sense linkage between a stated governmental interest and a restriction in order to assess whether the third part of the *Central Hudson* test -- that a restriction directly advance the governmental interest asserted -- has been satisfied.”).

<sup>240</sup> *National Adver. Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990); *Abel v. Town of Orangetown*, 759 F. Supp. 161 (S.D.N.Y. 1991); *International Outdoor, Inc. v. City of Romulus*, 2008 WL 4792645 (E.D. Mich. 2008). But see *People v. Target Adver. Inc.*, 708 N.Y.S.2d 597 (N.Y. City Crim. Ct. 2000) (relying on general statements of purpose).

# Sign Regulation after *Reed*: Suggestions for Coping with Legal Uncertainty

Alan C. Weinstein and Brian J. Connolly

Research Paper 15-285, September 2015, The Urban Lawyer, Quarterly Journal of the ABA Section of State & Local Government Law,

Section on Purpose Statements (at Pages 56-57 of 64)

## C. Ensure that sign codes contain the three “basic” sign code requirements

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### 1. Purpose statement

All sign codes must have a strong, well-articulated purpose statement to pass constitutional muster. Although *Reed* rejected the notion that only a content neutral purpose is sufficient to withstand a First Amendment challenge, governmental intent remains an important factor in sign code drafting and litigation.<sup>202</sup> After all, the first prong of both the intermediate scrutiny and strict scrutiny tests focuses on whether the government has established a “significant” (intermediate) or “compelling” (strict) regulatory interest.

In *Metromedia*, the Supreme Court upheld both traffic safety and community aesthetics as significant governmental interests sufficient to satisfy the intermediate scrutiny examination. Since that time, it has been standard practice for local governments to articulate traffic safety and aesthetics as regulatory interests supporting sign regulations. Although these are certainly the most-recited regulatory interests in local sign codes, and the ones most routinely acknowledged by courts as meeting the intermediate scrutiny test’s requirement of a significant governmental interest, other regulatory interests may suffice as well. Other regulatory interests articulated in local sign codes include blight prevention, economic development, design creativity, prevention of clutter, protection of property values, encouragement of free speech, and scenic view protection.<sup>203</sup>

<sup>202</sup> In *Desert Outdoor Advertising v. City of Moreno Valley*, the Ninth Circuit struck down a local sign ordinance simply on the grounds that it failed to articulate a regulatory purpose. 103 F.3d 814, 819 (9th Cir. 1996). A local government’s articulation of a regulatory purpose provides an evidentiary basis for the first prong of the intermediate and strict scrutiny tests.

<sup>203</sup> BRIAN J. CONNOLLY & MARK A. WYCKOFF, MICHIGAN SIGN GUIDEBOOK: THE LOCAL PLANNING AND REGULATION OF SIGNS, 12-3, 13-3 (2011), available at <http://scenicmichigan.org/sign-regulation-guidebook>.

# SIGN CODE ADVISORY COMMITTEE RECOMMENDATIONS

FEBRUARY 1979

**KENNETH ABRAHAMS**  
Landscape Architect

**ARTHUR ALLIS**  
Southern Arizona Tucson Innkeepers,  
Ranch And Resort Ass'n.

**RICHARD BURTON**  
Architect

**RICHARD CARTWRIGHT**  
Fourth Ave. Merchants Ass'n

**RON EASTBURN**  
Southern Ariz. Home Builders Ass'n

**ROGER FULTON**  
El Con Merchants Ass'n

**JIM HAYS\*\***  
Park Mall Merchants Ass'n

**BARBARA HENDERSON**  
League Of Women Voters

**CYNTHIA HENRY**  
Southern Arizona  
Environmental Council

**MARILYN HINKINS**  
Arizona Sign Ass'n & Arizona  
Sign Users Ass'n

**ROBERT JAAP\***  
Chamber Of Commerce

**PEGGY LOCKARD**  
Citizen At Large

**EDDIE ROBLES**  
Thunderbird Signs

**\*CHAIRMAN**  
**\*\*VICE CHAIRMAN**

**ALENE SMITH**  
Downtown Advisory Committee

**FRANCIS WOLFE**  
Pearson's Sign Co.

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## F O R E W O R D

This sign code revision was undertaken by fifteen citizens, appointed by the Mayor and Council on April 24, 1978. The committee members represent the sign industry, business, professional and lay persons. In order to avoid an excessive breadth of scope that proved to be difficult for past sign committees, Mayor and Council gave the committee the following guidelines:

1. Regulate signage by district rather than by zone or use.
2. Allow with modifications to the current regulations, billboards, vehicle signs, cloth and banner signs and pole signs.
3. Prohibit sky signs and flashings, animated or moving signs.
4. Reduce the number, height and area of all permitted signs.
5. Establish an amortization period of a maximum of five years.
6. Consider the method of enforcement and fees schedules.

In the beginning the members of the committee agreed that a bare majority of quorum present was insufficient to provide the degree of conviction needed for the code changes we were asked to recommend. Therefore, we established the following criteria for the approval of our recommendations to the Mayor and Council:

1. A quorum of eight.
2. A minimum of eight favorable votes, eight being a majority of the total membership of the committee.
3. A minimum of 2/3 of the quorum present.

After spending over nine months studying the complex problems of sign usage, we feel we have weighed the public and private viewpoints presented to us. We have listened carefully to all those who wished to speak before us. We recognize and strongly subscribe to the right of businessmen to advertise their businesses. Still, we also recognize and subscribe to the fact that in a growing and tourist-oriented community, streets should provide clear identification for both business and the general public; that the right to advertise must be kept within boundaries and not take precedence over the right of the citizens and visitors of this town to enjoy the rare natural beauties our desert offers.

We wish to promote an aesthetically pleasing environment and enhance the City of Tucson as a place in which to live, vacation and do business. We wish to encourage signs, which, by their good design, are integrated with and harmonious to the buildings and sites which they occupy. An individual may ignore advertising in papers or magazines, and the advertising presented on television screens, but there is no way that individual can ignore the multitude of colors, words, lights and images screaming from our noisy landscape.

The purpose of this chapter in regulating outdoor advertising, outdoor advertising signs and outdoor signs of all types is to provide fair and comprehensive regulations that will foster a good visual environment for Tucson, enhancing the fragile desert in which we live and creating an aesthetic and enjoyable appearance for our visitors and our residents. It is intended that these regulations will simplify and clarify the Code, make it more workable, and insure adequate, comprehensive and effective enforcement.

In considering the Mayor and Council's request for an amortization period of a maximum of five years, the committee voted instead to recommend the use of an abatement period, a method of eliminating non-conforming signs which requires that when a use changes to a different category of use, all signs come into compliance with the new code. The majority opinion of the committee was that it is inequitable to request amortization and removal of signs which were originally installed legally with all required permits.

FOREWORD (continued)

Due to the uniqueness of our city, presenting a cosmopolitan center, a major university, a high number of artisans, three historic districts, numerous shopping centers ranging in size from neighborhood corners to gigantic malls, a number of "strip" business zones, professional offices strung from the Central Business District ten miles and more into the residential districts and a freeway through an area of the city, the City of Tucson frequently has a multitude of zones immediately adjacent to each other, presenting inequitable sign allowances to individual businesses. In order to alleviate these inequalities, and allow for the uniquenesses inherent in certain business establishments and areas of our city, we recommend that sign regulations be determined by a district basis, rather than by zoning.

We declare the regulation of signs within the City of Tucson is necessary and in the public interest (a) to safeguard and enhance property values within the City of Tucson; (b) to preserve the beauty and unique character of the City of Tucson; (c) to promote and aid in the tourist industry which is an important part of the economy of the City of Tucson; (d) to protect the general public from damage and injury which may be caused by the faulty and uncontrolled construction of signs within the City of Tucson; (e) to protect pedestrians and motorists of the City of Tucson from damage or injury caused, or partially attributable to the distractions and obstructions which are hereby declared to be caused by improperly situated signs; (f) to promote the public safety, welfare, convenience and enjoyment of travel and the free flow of traffic within the City of Tucson.