EXHIBIT B

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October 14, 2020

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VIA EMAIL

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RE: Cease and Desist Sign Removal and Demand for Municipal Code Amendment

Dear Mr. Case:

I write on behalf of members of the Selah Alliance For Equality ("S.A.F.E.") regarding troubling reports that City Administrator Don Wayman has, in his official capacity, on multiple occasions personally removed S.A.F.E. signs that portray messages with which he and other members of the City's leadership (including Mayor Raymond) disagree, that he has directed Selah Public Works Department employees to remove the signs, and that he has allegedly encouraged private citizens to remove the signs. These reports are alarming, especially weeks away from national and local elections. As explained more fully below, removing these signs is unconstitutional, as is the Selah Municipal Code upon which the City and Mr. Wayman apparently relied to remove and hold signs belonging to, and posted by, S.A.F.E. And, if it is true that Mr. Wayman has encouraged private citizens to take the signs, he is encouraging them to commit theft under Revised Code of Washington 29A.94.040 and 9A.56.050 (the City's removal of these signs is also an unconstitutional "taking").

We demand that the City:

1. Immediately direct Mr. Wayman to stop removing the signs at issue, cease and desist from directing any city employee to remove the signs, and inform members of the public, via Mayoral Proclamation, that it is illegal to remove the signs, and warn them of the potential criminal and monetary penalties that they may face if they are caught stealing anyone's signs;

2. Immediately encourage local police and county prosecutors to enforce RCW 29A.84.040, which prohibits removal or defacement of lawfully placed political signs;

3. Within 30 days, revise its municipal code regarding signage placement and permitting to be content-neutral (as explained in more detail below), contain appropriate time and place permissions and restrictions (especially related to placement on public property), and commit to enforcing this code in a content-neutral manner;

4. Account for and return each and every sign or other item of property belonging to S.A.F.E., or one of its members, within 24 hours of receipt of this letter.

Regrettably, we do not write this letter in a vacuum. The apparent campaign to remove the signs is simply another example of the City's continued pattern and practice of twisting its laws to suppress speech because certain members of the City's government disagree with the content of the messages. We also understand that the City has censored submissions by Selah residents for the "public comment" period of City Council meetings. While these proposed comments are critical of the City and its officials, they appear to reasonably comport with the City's content requirements for public comment. We have already written several letters regarding the City's erasure of chalk messaging conveying support for the Black Lives Matter movement (while leaving other chalk messaging and chalk art intact). Three members of our firm even traveled to Selah on August 10, 2020 to meet with you in an effort to reach a compromise on these issues in order to avoid needless and costly litigation over the City's suppression of expression. At that meeting, you told me that the City planned to respond to our proposals approximately one week from the date of the meeting. Despite repeated efforts to contact you, I have yet to hear from you or any City official. I am certainly more empathetic now to the frustration that other citizens of Selah have expressed at the City's indifference to their efforts to address these issues.

A. BACKGROUND

1. The City Manager Has Removed Signs Supporting the Black Lives Matter Movement and Criticizing the City Manager.

There are three sets of yard signs at issue. The first convey support for the Black Lives Matter movement. They state "BLM" in the shape of the Selah apple logo, followed by "Black Lives Matter" and the logo for S.A.F.E. The second group of signs state "Fire Donald Wayman" and instruct that "For More Information Visit: NOWAYMAN.ORG," followed by the S.A.F.E. logo, "Selah Alliance for Equality." NOWAYMAN.ORG is a website that calls for the termination of Selah City Manager Don Wayman. The third group states: "Hate Has No Place In Selah" and "Support Equality for ALL," followed by the S.A.F.E. logo and a notice of a civic event to take place on October 17 at 1:00 p.m., at Millennium Plaza. Recent iterations of the first two sets of signs have also contained the notice about the October 17 event.

Citizens of Selah, who desire to express their support for the Black Lives Matter cause, and who seek to encourage the City to terminate Mr. Wayman's employment, placed these signs in public areas alongside several other signs that convey both political and non-political messages. These other signs, which promote everything from political candidates, local businesses, and events like garage sales, had been in place for weeks; most are still there.

We understand that Mr. Wayman, and others in City leadership object to the signs' messages. At least regarding the signs encouraging termination of his employment, Mr. Wayman's sentiments are understandable. However, his personal beliefs or objections do not justify his confiscation of these signs, which the evidence shows that he did in his capacity as City Manager, driving a City vehicle, during work hours. He also directed Public Works employees under his management to remove the signs in their

capacity as city employees, in accordance with Selah Municipal Code 10.38.040. We have reviewed evidence that he also encouraged private citizens to do the same, and at least some have done so.

2. The City Maintains the Right to Remove the Signs and Declines to Prosecute Private Citizens Who Remove the Signs.

S.A.F.E. member Anna Whitlock reported the sign removal to the police. On August 21, 2020, Ms. Whitlock reported that she was missing 12 signs valued at approximately $60.00. She was informed by the police that the Public Works Department had removed the signs pursuant to municipal code 10.38.040. Ms. Whitlock then contacted Selah Code Enforcement Officer Erin Barnett for clarification regarding (a) why the signs were not considered political signs, (b) whether and how to obtain a permit for the signs, and (c) whether other nearby non-political signs were likewise required to obtain a permit. Though Ms. Barnett is the Selah Code Enforcement Officer, she advised Ms. Whitlock that she was required to speak with Mr. Wayman directly about the issue. Later, on August 30, 2020, Ms. Whitlock discovered that 63 signs, valued at $378.00, had gone missing from locations around the city. She again contacted the police, who informed her that they did not have information on who had taken the signs, but that the signs did not appear to meet the requirements of having a proper permit or meet the definition of a "political sign" under Selah Municipal Code.

Pursuant to city code 10.38.040, sign permits are obtained from the "building official," whom I understand to be Jeff Peters, not Mr. Wayman.[1] This Municipal Code exempts "[p]olitical signs,[2] located on private property, which, during a campaign, advertise a political party or candidate(s) for public elective office or promote a position on a public issue, provided such signs shall not be posted more than ninety days before the election to which they relate and are removed within fifteen days following the election." 10.38.050.

Ms. Whitlock sought to press charges under RCW 29A.84.040, under which "[a] person who removes or defaces lawfully placed political advertising including yard signs or billboards without authorization is guilty of a misdemeanor punishable to the same extent as a misdemeanor that is punishable under RCW 9A.20.021. The defacement or removal of each item constitutes a separate violation." Selah City Prosecutor Margita Dornay declined to file charges for two reasons: (1) Selah has not adopted this statute by reference, and (2) the statute would not apply to the signs at issue because they are not "political advertising" as the term is defined under RCW 42.17A.005(40).

It appears that the City officials, the police officers, and the City Prosecutor all believe that Selah's Municipal Code authorizes City officials and even private citizens to remove the S.A.F.E. signs described in this letter with impunity. As explained below, this erroneous interpretation of law, and an

[1] Ms. Whitlock was unable to get information regarding the enforcement of city code from the City Code Enforcement Officer, she was directed to Mr. Wayman, rather than the building official Mr. Peters, regarding her questions about obtaining a permit.

[2] Selah City Code defines a "political sign" as "a sign advertising a political party or candidate(s) for public elective offices, or a sign urging a particular vote on a public issue decided by ballot." 10.38.030.

unconstitutionally-written municipal code has resulted in an unlawful taking of S.A.F.E. property by the City and theft by private citizens.

B. FIRST AMENDMENT AND FREE SPEECH CLAUSE

Ms. Dornay's response to Ms. Whitlock suggests that Selah's officials may not be aware of current legal precedent related to sign regulation. Selah's Sign Regulations "implicate several concerns in our free speech jurisprudence: regulation of political speech, regulation of political speech in a public forum, and regulation based on the content of the speech." *See Collier v. City of Tacoma*, 121 Wn.2d 737, 746 (1993) (en banc). **First**, SMC 10.38.040-050 restricts political speech in traditional public forum more than other speech, which violates the First Amendment and article 1, section 5 of the Washington Constitution. **Second**, SMC 10.38.050 limits political speech on private property to 90 days prior to an election, in violation of the Washington Constitution. **Third**, even if the City's sign regulations were content-neutral and otherwise constitutional (they are not), the City's selective removal of only these signs constitutes selective enforcement in violation of the First Amendment.

1. Selah Code Regulates Signs Based on Subject Matter, In Violation of the First Amendment and Article 1, Section 5 of the Washington Constitution.

The right to speak in a traditional public forum is at the heart of the First Amendment and the free speech clause of the Washington Constitution.[3] Streets, and particularly the areas between the streets and sidewalks, are a traditional public forum. *Sanders v. City of Seattle*, 160 Wn.2d 198, 208 (2007) (en banc) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *Collier v. City of Tacoma*, 121 Wn.2d 737, 747 (1993). The intersections of arterial streets are also considered traditional public forums. *City v. Willis*, 186 Wn.2d 210, 220-21 (2016) (en banc). "Because these places occupy a special position in terms of First Amendment protection, the government's ability to restrict expressive activity is very limited." *Collier*, 121 Wd.2d at 747 (citing *Boos v. Barry*, 485 U.S. 312, 318 (1988)).

Under SMC 10.38.040, "no sign governed by the provisions of this chapter shall be erected … without first receiving a sign permit from the building official." SMC 10.38.040 does not distinguish between signs placed on public and private property, or between public areas. It was applied against the S.A.F.E. signs located in a traditional public forum as described above. In this public forum, Selah may only "impose reasonable restrictions on the time, place, and manner of protected speech," if "the restrictions are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication." *Collier*, 121 Wn.2d at 747 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This is a high burden: even if a municipal code is content-neutral, Washington applies a "compelling state interest" test to time, place, and manner restrictions. *Id.*

[3] Washington has adopted the federal analysis to determine whether a particular class of public property is considered a traditional public forum under the Washington state constitution. *Sanders v. City of Seattle*, 160 Wn.2d 198, 208 (2007) (en banc).

Selah's code, however, is not content-neutral, because certain categories of subject matter are exempt, including banners advertising grand openings or special sale events. SMC 10.38.050. Other categories of subject matter are exempt if on private property, including political signs or signs advertising a public charitable or civic event, within certain timeframes. *Id.* "The United States Supreme Court has held that [a sign] ordinance is content-based if it distinguishes between permissible and impermissible signs at a particular location by reference to content." *Collier*, 121 Wn.2d at 749 (citing *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516-17 (1981)). "The question is not whether all those within the classes defined by the state are treated equally but, rather, whether the classification itself is permissible." *Id.* at 750 (internal citations omitted) (collecting cases involving unconstitutional content-based restrictions on political and other subject matter signs). Regulations that target speech based on its content "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992).[4]

The Tacoma ordinances struck down in *Collier* may sound familiar. One generally limited the posting of signs on public streets and other public areas, exempting political signs placed on parking strips by the owner of the abutting property preceding an election. 121 Wn.2d at 743. The other ordinance limited the posting of political signs to a specific period of time surrounding an election. *Id.* Other signs, such as real estate signs or signs attached to any building or sidewalk advertising the business carried on in the building, were exempt from the chapter. *Id.* The Washington Supreme Court struck down both ordinances. The regulations were viewpoint-neutral but were content-based "in that they classify permissible speech in terms of subject matter." *Id.* at 752–53. Thus, time, place, and manner restrictions on speech that are "viewpoint-neutral, but subject-matter based, are valid so long as they are narrowly tailored to serve a compelling state interest and leave open ample alternative channels of communication." *Id.* at 753.

Likewise, in 2015, the U.S. Supreme Court invalidated the sign code in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015), which distinguished between ideological signs, political signs, and temporary directional signs, and singled out different types of signs for special treatment. The Court announced a new standard: "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Thus, a speech-restrictive law is content-based, and presumptively unconstitutional, if the law "'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–64 (2011)). Post-*Reed*, sign ordinances making reference to content, as Selah has, will not survive strict scrutiny. SMC 10.38.050 exempts certain signs from the permit requirement based upon content. "[A] government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed*, 135 S. Ct. at 2226 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

You may not have seen it, but the Municipal Research and Service Center ("MRSC"), which provides a very useful web-based resource for municipal governments, maintains a resource dedicated to helping

[4] There is no case law to suggest that the First Amendment is restricted to Hatch Act interpretations.

municipal governments conform their local sign ordinances to the *Reed* standard.[5] For example, it lists city ordinances that are properly tailored to *Reed*, including neighboring Yakima. Like Selah, Yakima requires a permit prior to erecting a sign. YMC 15.08.030. However, Yakima exempts all "[p]ortable and freestanding signs" that meet certain formatting and location requirements. YMC 15.08.050. The regulation is content-neutral and appears to conform to the *Reed* constitutional standard. *See Members of the City Coun. of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The MRSC addresses signs on public property following the Court's decision in *Reed*:

> Since *Reed* indicates that a local government can regulate a sign's location, then it would appear permissible to prohibit or restrict signs on public property. If you enact limitations, however, you will need to treat all signs equally, based on such factors as size and location. So, for example, if you allow political campaign signs on public property, you would need to allow other types of temporary signs on public property also.[6]

In sum, regardless of how the City has elected to enforce this provision against specific speakers (which, as we explain below, constitutes selective enforcement in violation of the First Amendment), Selah's sign regulations are *facially unconstitutional* and will not survive a court challenge.

2. Selah's Sign Regulation Further Violates the Free Speech Clause of the Washington Constitution under *Collier* Because It Imposes A Pre-Election Time Restraint.

The Court in *Collier* specifically held that it is unconstitutional to limit the time in advance of an election that political signs may be posted in the places where political signs are allowed. The first of the two Tacoma ordinances struck down in *Collier* defined political signs and limited their posting "to a period of not more than 60 days prior to … the date of the election for which the signs are intended." *Collier*, 121 Wn.2d at 742 (citing TMC 2.05.275(1)). Selah City Code mirrors this language nearly exactly: the provision specifically pertaining to political messaging requires that "such signs shall not be posted more than ninety days before the election to which they relate[.]" 10.38.050.

In *Collier*, Tacoma put forth two justifications for the time restraint: traffic safety and city aesthetics. 121 Wn.2d at 754. The Court rejected both as applied to the pre-election time restraint. First, while acknowledging that aesthetics can be a significant governmental interest, the court held that, "it has not been determined to be an interest sufficiently compelling to justify restrictions on political speech in a public forum." *Id.* at 754. Like speech in a public forum, political speech is a subject matter that sits squarely within the protections of the First Amendment. *Id.* at 746 ("Wherever the extreme perimeters of protected speech may lie, it is clear the First Amendment protects political speech, giving it greater protection over other forms of speech.") (internal citations omitted). Neither was traffic safety a

[5] http://mrsc.org/getdoc/8dd96137-b60b-4c62-8672-328ff3ad439f/The-Importance-of-Your-Sign-Code.aspx. I have attached a copy of this article to this letter, with relevant sections highlighted, for your review.
[6] http://mrsc.org/getdoc/8dd96137-b60b-4c62-8672-328ff3ad439f/The-Importance-of-Your-Sign-Code.aspx.

sufficiently compelling government interest: "Once political signs are allowed on a temporary basis, 'it is difficult to imagine how prohibiting political signs at other times significantly promotes highway safety." *Id.* at 756.

As the court held, ordinances that "restrict political expression by imposing durational limitations on the preelection posting of political campaign signs" are unconstitutional. *Id.* at 757. The 60-day restriction:

> unlike the typical time, place, and manner restriction, does not attempt to determine whether and at what times the exercise of free speech rights is compatible or incompatible with the normal uses of a traditional forum or place. The Tacoma ordinances … unnecessarily restrict the preelection posting of signs promoting the candidacy of certain individuals or advocating a certain viewpoint on an upcoming ballot proposition. Tacoma has not shown that its restrictive time period of 60 days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of political speech. Before the city may impose durational limits or other restrictions on political speech to advance aesthetic interests, it must show that it is seriously and comprehensively addressing aesthetic concerns with respect to its environment.

Id. at 758. The ordinances were not sufficiently narrow in scope to serve a compelling interest, especially "[g]iven the preferred status accorded political speech," *see id*. We are confident that a court will similarly consider Selah's temporal regulation of political speech facially unconstitutional.

3. The City is Selectively Enforcing its Sign Regulations, in Violation of the First Amendment.

Even if Selah's sign regulations were content-neutral (they are not), the City selectively enforces its Code by removing signs containing messages with which the City (or certain City officials) disagree while leaving other signs in place. S.A.F.E.'s signs were placed in City-owned public street medians and the traditional public forum of space between a street and the sidewalk. The signs were surrounded by others bearing various political and non-political messages, including yard and garage sale signs, "now hiring," "Jesus Heal Our City," and invitation to a craft show, "Se leen las cartas se hacen limpias y amarres," an advertisement for the Rotary Operation Harvest Community Food Drive, and various individuals seeking election. To our knowledge, the other temporary yard signs were erected without permits and remained in the public area after the S.A.F.E. signs were removed.

As we have conveyed in prior letters to the City, selective enforcement of the law is unconstitutional. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (under the First Amendment, "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *see also Cohen v. California*, 403 U.S. 15 (1971). Courts elsewhere have identified probative factors in

determining whether a City's refusal to strictly enforce a sign code constituted evidence of discriminatory effect, including:

> (1) evidence of a 'consistent pattern' of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequences of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.

Central Radio Co. Inc. v. City of Norfolk, Va., 811 F.3d 625, 635 (4th Cir. 2016). Each of these factors applies to Selah's treatment and targeting of the members of the Selah community who chalked messages that were aggressively erased, submitted public comments for City Council meetings that were not read, and who have now placed signs calling attention to the issues of racial justice, and for the termination of Mr. Wayman. Selah's decision to remove BLM and anti-discrimination signs (and only these signs) occurs during an historic national reckoning on issues of racial justice in small towns and large cities alike; and in the context of nearly four months of dispute with the City over what constitutes appropriate political speech in Selah. It occurs following the City Manager's alleged politicization and micromanagement of the Public Works and Police Department,[7] the Mayor's public naming and shaming of individual private citizen activists who had previously spoken out against the City's aggressive tactics,[8] the City's threats of prosecution of activists for "malicious mischief," and the Mayor and City Council's wholesale refusal to stop this behavior, modify Selah Municipal Code, or meaningfully engage with Selah citizens who disagree with them. Never before (we hope, and at least according to public records received from the City to date) has the City erased chalk from the roads and sidewalks as it has the past four months, censored so many public comments, or used City time and resources to walk the streets cherry-picking political signs to remove. This behavior has been, in a word, unprecedented.

C. PRIVATE THEFT AND PUBLIC TAKING OF PRIVATE PROPERTY

The signs belonged to members of S.A.F.E., who lawfully placed them on public medians. Removal of these signs by private citizens violates Washington laws prohibiting theft, and should be prosecuted as a crime by appropriate authorities. Mr. Wayman's removal of S.A.F.E. signs, in his official capacity as City Manager, is an unconstitutional "taking" of private property by a government entity.

[7] *See* August 31, 2020 Letter from Chief Hayes to Mayor Raymond, stating in part: "I told you that [Mr. Wayman] micro-manages to the point I no longer felt like I was an effective leader within the police department and that I felt he was using the police department as a tool in this conflict over chalk art being done by persons aligning themselves with a support group of black lives matter."

[8] https://selahwa.gov/council/wp-content/uploads/sites/12/2020/08/July-28-2020-Minutes-Selah-Council.pdf.

1. The Signs are Private Property, Confiscated Illegally Under Washington Law.

City Administrator Wayman has encouraged private citizens to remove the S.A.F.E. signs. In so doing, he has encouraged Selah citizens to violate Washington law. RCW 29A.94.040 provides:

> A person who removes or defaces lawfully placed political advertising including yard signs or billboards without authorization is guilty of a misdemeanor punishable to the same extent as a misdemeanor that is punishable under RCW 9A.20.021. The defacement or removal of each item constitutes a separate violation.

RCW 29A.84.040. City Prosecutor Dornay declined to prosecute the several individuals found to remove the signs at Mr. Wayman's direction. Ms. Dornay did so on two bases: first, because Selah did not incorporate this provision of the RCW into the City's municipal code, and second, because the signs at issue did not qualify as "political advertising."

Of course, just because Selah has not incorporated a provision of the RCW does not make the conduct legal. The question is simply one of jurisdiction: the Yakima County Prosecuting Attorney's Office, instead of the Selah Prosecuting Attorney's Office, would file charges against these individuals, which is why the City should encourage the county prosecutor's office to assist in enforcing this law.[9] However, Selah *has* incorporated chapter 9A.56 RCW, including theft in the third degree, which applies to property regardless of whether it falls under the definition of "political advertisement." *See* SMC 6.02.020 (incorporating RCW 9A.56.050). Regarding Ms. Dornay's second point, that is for the Yakima County Prosecuting Attorney's Office to determine, but we note that Chapter 29A does not refer to or expressly incorporate the definition under RCW 42.17A.005(40). To the extent that these signs fall outside of the campaign finance laws definition (which for reasons explained below, they do not), the definition under campaign finance laws would be narrower.

The City is wrong to claim that these messages are not political because that they do not pertain directly to a candidate or issue on the 2020 ballot. Political signs can relate to a matter of public interest and public concern which is not temporary in nature and is not bounded by an upcoming election. *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994) ("For Peace in the Gulf"); *Savago v. Village of New Paltz*, 214 F. Supp. 2d 252 (N.D.N.Y. 2002) ("Keep looking over your shoulder terrorists we're coming for you. God Bless America"); *State ex rel. Dept of Transp. v. Pile*, 603 P.2d 337 (Okla. 1979) ("GET US OUT OF THE UNITED NATIONS"). These types of signs—unrelated to a specific election or candidate for public office—are commonly referred to as "cause" signs. A "cause" sign may relate to current events, local happenings, controversial issues, or they may announce a position about an issue of local, state, or international concern. *See City of Ladue*, 512 U.S. 43. The Black Lives Matter movement is a "cause," as is the call to fire the City Administrator.

[9] If the City Prosecutor declines to do so, we will ask the County Prosecutor's office to review this case and note that we tried to obtain cooperation from the City, but none was rendered.

Even if the definition under 42.17A applies, the signs are a "means of mass communication, used for the purpose of appealing, … indirectly, for … other support or opposition in any election campaign." *See* RCW 42.17A.005(40). S.A.F.E.'s signs are connected to local and national elections. A key goal of the Black Lives Matter movement following Mr. Floyd's death is to effect a shift in 2020 elections, local and federal, and the Black Lives Matter platform sets forth local and federal policy change. The "No Wayman" signs are connected to local politics. The Mayor of Selah, an elected official, has the sole authority to appoint the City Administrator, and the City Council approves of the Mayor's appointment. SMC 1.10.015(a). The signs signal public opinion to these elected officials of Selah.

Ms. Dornay further declined to prosecute under RCW 9A.56.020, on the basis that the signs are "treated as any other property left on City right of way and can be removed." As explained above, the signs were lawfully placed in the public area. Members of S.A.F.E. did not abandon the property. "An 'abandonment' requires 'clear, unequivocal and decisive evidence' of an intent to abandon." *Olin v. Goehler*, 39 Wash. App. 688, 693 (1985). "The primary element … is an actual intent to relinquish the rights being abandoned." *Nelson v. Pacific Cty.*, 36 Wash. App. 17, 22 (1983). Thus, whether the signs were lawfully placed in the public median is immaterial; the operative question is whether the members of S.A.F.E. who placed the signs there had an "actual intent" to relinquish their rights to their property. Clearly, that is not the case here. Indeed, the purpose of placing a sign in a highly-trafficked, public area, is to convey a message when you are not present. Furthermore, once Ms. Whitlock contacted the City and asked for the signs to be returned and to be left alone, there can be no further doubt regarding whether the members of S.A.F.E. had abandoned their signs. They had not.

2. Takings Clause

A "property owner has an actionable Fifth Amendment taking claim when the government takes his property without paying for it." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167, 204 L. Ed. 2d 558 (2019). "If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says … And the property owner may sue the government at that time in federal court for the 'deprivation' of a right 'secured by the Constitution.'" *Id.* at 2170. Mr. Wayman did not only encourage private citizens to break the law by confiscating the signs, he also removed and seized the signs. He did so in his official capacity as City Administrator, therefore his actions constituted a "taking." *See Horne v. Dept. of Agriculture*, 576 U.S. 350 (2015) (Takings Clause applies to personal property as well as real property).

D. CONCLUSION

While our prior exchanges over chalking messages on streets and sidewalks involved debated and nuanced interpretations of several laws and precedent, the United States Supreme Court has effectively settled this debate over signs. Selah Officials cannot take S.A.F.E. signs. Neither can the Selah Municipal Code, as currently enacted, remain in force. It is facially unconstitutional, which must be fixed—now.

I reiterate here what we explained in our in-person meeting: these issues are about much more than chalk (and now signs). The people of Selah deserve better government, better management, and better treatment.

We strongly encourage the City to promptly revise its Municipal Code to comply with the U.S. Supreme Court's ruling in *Reed*, and the Washington Supreme Court's ruling in *Collier*, to immediately return any and all properly unlawfully taken from Selah residents, and to leave the S.A.F.E. signs alone.

If the City does not do these things immediately, we will not hesitate to file suit to challenge the Code's constitutionality, and to seek a restraining order against the City and its officials.

Sincerely,

Joseph P. Cutler
JPC

MRSC
Local Government Success

The Importance of Bringing Your Sign Code Up-to-Date

October 29, 2015 by Steve Butler
Category: Sign Control

The U.S. Supreme Court's decision in *Reed v. Town of Gilbert* is a major case with far-reaching impacts on local government. While the *Reed* case addressed regulation of temporary directional signs, its ramifications go beyond just that one category of sign regulation. The potential impacts of this case may also extend beyond the regulation of signs. With that said, this post will focus just on sign codes.

Summary of Major Findings from the *Reed* Case

Content neutrality is not a new issue for sign regulations. Before the *Reed* case, however, the U.S. Supreme Court and other courts would consider the *intent* of a sign regulation and strike down "content-based" regulations only when the courts determined they were "adopted to suppress speech with which the government disagreed." With *Reed*, the new standard is that any law or regulation of speech that is based on the content of the speech is presumptively unconstitutional and subject to "strict scrutiny," which is the most rigorous standard for First Amendment review. Strict scrutiny requires a challenged regulation to be "narrowly tailored to serve a compelling governmental interest," with legal experts stating that such scrutiny is almost always fatal to the regulation in question. See the MRSC blog post, US Supreme Court Issues Significant Sign Code Decision, for a more detailed summary of the *Reed* case.

The primary takeaways of the *Reed* case are that local sign regulations must be content-neutral *and* that a sign code will be subject to "strict scrutiny" judicial review if it applies different standards based on:

- a sign's content (i.e., what is written or portrayed on the sign);
- the purpose of the sign; or
- who is putting up the sign.

In other words, if you have to differentiate the type of sign being regulated by reading the sign's content or knowing the sign message's author, then the regulation is probably unconstitutional. Before *Reed*, most regulations, if challenged, would have been subject to a "lesser" scrutiny test.

With the *Reed* decision, you can still regulate noncommercial signs in a content-neutral "time, place, or manner" approach, using such factors as:

- Location, such as commercial vs. residential locations or zoning districts (for example, highway commercial, downtown commercial, and single-family residential);
- Size and height;
- Type of structure (for example, freestanding signs, monument signs, permanent façade signs, banner signs, and inflatable roof signs);
- Use of materials;
- Maximum number;
- Lighted vs. unlighted signage;
- Fixed message signs vs. signs with changing messages (electronic or otherwise);
- Moving parts;
- Portability (for example, A-frame or sandwich board signs).

Less clear are restrictions on signs advertising a one-time event or regulations differentiating between on-premise vs. off-premise signs (even though those two types of signs are included on a list in Supreme Court Justice Alito's list of "rules" for effective regulations that are not content-based, set out in his concurring opinion in *Reed*), since such restrictions could be viewed as counter to *Reed's* generalized rule that, "if you have to read what a sign says to determine whether it complies with the sign code, then the sign code is impermissibly content-based."

There is also the open question of whether the *Reed* case pertains only to noncommercial signs, with a lesser constitutional standard being applied to commercial sign regulations (see the recent MRSC blog post for more details about this issue).

What Can Local Governments Do to Regulate Signs?

All is not lost. Local government can still regulate signs, albeit with a narrower, more content-neutral focus than they may have applied in the past.

With the *Reed* case raising many issues about local sign regulations, the following is a partial list of how cities, counties, and towns might be able to deal with some specific sign situations:

- Signs on public property: Since *Reed* indicates that a local government can regulate a sign's location, then it would appear permissible to prohibit or restrict signs on public property. If you enact limitations, however, you will need to treat all signs equally, based on such factors as size and location. So, for example, if you allow political campaign signs on public property, you would need to allow other types of temporary signs on public property also.
- Public safety signs: It is permissible – and necessary - for cities, towns, and counties to exempt these signs (such as speed limit and stop signs) from regulation under sign codes and to allow their placement in the ROW, where other signs are not allowed.
- A-frame/sandwich board signs on public sidewalks (usually commercial signs related to an activity): Local action on portable signs, such as A-frames, depends upon one's reading of the *Reed* case. If it applies only to noncommercial signs, then your existing regulations for such signs would only be reviewed under the "lesser scrutiny" constitutional test and may not need to be changed. On the other hand, if *Reed* is deemed to extend to

commercial speech, then a local government may need to decide whether to either prohibit them altogether or allow all such signs, subject to numerical and locational limits (based on local needs and preferences).

- Political signs: Regulating political signs will prove to be a particularly sticky issue. Local regulations will not be able to differentiate political signs from other types of temporary noncommercial signs in a content-neutral manner. As such, the common post-election durational limitation on election campaign signs will have to go. Again, it appears that local governments may apply size, numerical, locational, and other limits to such signs, although that may not be a popular approach to some people.
- Attention-getting device/inflatable signs: If you want to regulate such signs, add them as a specific type of sign and develop standards for them, based on their structural characteristics. Examples include large rooftop balloon signs and air-activated graphics signs (e.g., inflatable "waving man" signs).

Helpful Tips

While not meant to be comprehensive in scope, the following list contains tips that we recommend you consider when reviewing and updating your sign regulations:

1. Review your sign code to identify any content-based standards and amend them to eliminate any standards based on content (which is the primary point being discussed in this article).
2. Do not enforce any existing content-based sign regulations.
3. Have a strong purpose statement (based on such factors as traffic safety and aesthetics) and link it closely to your sign regulations.
4. Have the adopting ordinance cite specific factual studies and analyses that relate to your sign code's purpose and intent (you can either prepare your own study, or rely on one done by another entity if its findings are pertinent to your jurisdiction).
5. Revise your sign definitions to ensure they are not based on content. One example would be to define "temporary signs" based on material (since they are usually made of cardboard or wood, rather than metal and heavy plastic) and size (since they are usually much smaller than a permanent sign).
6. Add a severability clause (for example, "If one or more sections of this sign code are found to be invalid, the remaining sections stand on their own and are still valid"), either in the adopting ordinance or the code itself.
7. Add a substitution clause to avoid claims of favoritism towards signs with commercial or noncommercial messages (one example is "Whenever a commercial message is allowed to be displayed, then a noncommercial message will be automatically allowed as well").
8. Avoid having exemptions in your sign code, because they are usually not content-neutral (common examples are exemptions for "grand openings" or "special events").
9. Work closely with your municipal or prosecuting attorney!

Even though it raises a lot of unanswered questions, the *Reed* case makes it clear that local governments need to review their sign codes and update them in response to a changing legal landscape. It is important for Washington cities, counties, and towns to heed that advice, and embark upon the significant work of regulating signs in a manner that both meets local expectations and passes constitutional muster.

Good Reference Materials

1. A detailed research paper entitled "Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty," written by Alan C. Weinstein and Brian J. Connolly, The Urban Lawyer, Quarterly Journal of the ABA Section of State & Local Government Law, 2015
2. A YouTube video of a webinar titled "Reed v Town of Gilbert: The Supreme Court's New Rules for Temporary – and Other – Signs," sponsored by the National Planning Webcast Series Consortium, July 30, 2015.

Photo courtesy of Graham Ballantyne.

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About Steve Butler

Steve joined MRSC in February 2015. He has been involved in most aspects of community planning for over 30 years, both in the public and private sectors. He received a B.A. from St. Lawrence University (Canton, New York) and a M.S. in Urban and Regional Planning from the University of Wisconsin-Madison. Steve has served as president of statewide planning associations in both Washington and Maine, and was elected to the American Institute of Certified Planner's College of Fellows in 2008.
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