



Takoma Park City Council Meeting – November 13, 2019 Agenda Item 10

Work Session

Regulation of Private Signs in the Public Right of Way

Recommended Council Action

Discuss desired policy regarding the placement of private signs, including campaign signs, in the public right of way.

Context with Key Issues

The proliferation of campaign signs in the public right of way during recent elections, the failure to remove the campaign signs following the election, and lack of clarity for residents of the current ordinance led to the reconsideration of the City's policy regarding signs in the right of way. The review of the current City Code by the City Attorney revealed potential constitutional concerns. In addition, the current Code has proven difficult for residents and businesses to understand and for City staff to enforce.

The current City Code regulates signs in "public areas." It generally prohibits signs advertising commercial goods or services, but allows signs for yard sales, bake sales, and home day-care providers. The Code allows the posting of noncommercial signs for up to 14 days. It prohibits the posting of signs "on any lamppost, lantern, bench, public trash receptacle, live tree or the Old Town Clock," limits the size to no greater than 20 inches in any dimension, and requires the sign to indicate the date it was posted and the identity of the person who posted it. The Code also allows the City Manager to waive the rules for a sign when a waiver is in the public interest.

The current Code, which was enacted before the Supreme Court recognized that commercial speech enjoys First Amendment protection, is practically and legally problematic for several reasons.

Placement. It is unclear to the public where signs that are allowed to be posted could be posted. There are certain locations where posting of signs are specifically prohibited (as mentioned above), utility companies prohibit posting of signs on utility poles and boxes, and, as the easement owner of the rights of way, the City does not permit the posting of signs on trees, lawns and medians in the right of way. In Takoma Park, the boundaries of the rights of way can vary greatly vis a vis the location of a street; in some cases, private property can go right up to the curb or can be well back from the street so it is not always obvious if a sign is on private property or in the right of way.

Content. The current Code favors certain types of commercial speech, and it gives the City Manager nearly unfettered discretion to waive restrictions, thereby facilitating potential unconstitutional viewpoint discrimination, and it favors signs with certain commercial content over other commercial content (by exempting home daycare, bake sale, and yard sale signs from regulations applicable to other commercial signs), thereby facilitating potential unconstitutional content regulation.

Promoting aesthetics and public safety are both well-established substantial government interests that provide a valid basis for the regulation of signs. Sign regulations are often tailored to minimize visual blight and protect sight lines for drivers. The pertinent constitutional question is whether a given sign regulation is narrowly tailored to promote this interest. Ordinances that restrict speech more than necessary or that include exemptions that call into question the true purpose of the regulation will be deemed unconstitutional and leave the City vulnerable to a lawsuit.

In the attached memorandum, the City Attorney has identified several approaches to sign regulation and categorized them by their likely constitutionality. His suggestion is that the Council start by identifying the greatest sign-related harms that the City wishes to address (e.g., the most problematic types of signs and the most problematic locations for signs) and the types of signs that are most important to allow. Once these priorities are identified, then work can be done to develop an ordinance that promotes the highest priority policies to the extent constitutionally and administratively feasible while avoiding taking constitutional risks and overburdening staff with response to lower priority policies.

Council Priority

A livable community for all.

Environmental Considerations

A prohibition of signs would reduce visual pollution and trash.

Fiscal Considerations

Fiscal considerations would vary based on the approach to signs taken by Council and would most likely be related to staffing impacts.

Racial Equity Considerations

Race equity considerations may vary based on the approach to signs taken by Council.

Attachments and Links

- Memorandum – Regulation of Signs in the Public Right-of-Way (October 22, 2019)



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MEMORANDUM

TO: Takoma Park Mayor and City Council
FROM: Kenneth Sigman, City Attorney
SUBJECT: Regulation of signs in the public right of way
DATE: October 22, 2019

The purpose of this memorandum is to explain the impetus for reviewing the City's regulation of signs, explain Montgomery County's policy regarding signs in the public right of way, and advise you of the legal parameters of the City's authority to regulate signs in the public right of way.

Existing City Policy

The proliferation of campaign signs in the public right of way during recent elections and the failure to remove the campaign signs following the election led to the reconsideration of the City's policy regarding signs in the right of way. The review of the current City Code revealed potential constitutional concerns. In addition, the current Code has proven difficult for residents and businesses to understand and for City staff to enforce.

The current City Code regulates signs in "public areas." It generally prohibits signs advertising commercial goods or services, but allows signs for yard sales, bake sales, and home day-care providers.

The Code allows the posting of noncommercial signs for up to 14 days. It prohibits the posting of signs "on any lamppost, lantern, bench, public trash receptacle, live tree or the Old Town Clock," limits the size to no greater than 20 inches in any dimension, and requires the sign to indicate the date it was posted and the identity of the person who posted it. The Code also allows the City Manager to waive the rules for a sign when a waiver is in the public interest.

The current Code, which was enacted before the Supreme Court recognized that commercial speech enjoys First Amendment protection, is practically and legally problematic for several reasons. It places only minimal restrictions on where signs can be posted in the right of way, it favors certain types of commercial speech, and it gives the City Manager nearly unfettered discretion to waive restrictions, thereby facilitating potential unconstitutional viewpoint discrimination, and it favors signs with certain commercial content over other commercial content (by exempting home daycare, bake sale, and yard sale signs from regulations

applicable to other commercial signs), thereby facilitating potential unconstitutional content regulation.

Montgomery County Policy

Montgomery County's regulation of signs in the public right of way is found in the Zoning Ordinance. The County requires a permit for the erection of signs in the right of way, limits the posting of permitted signs to holidays and weekends or to a period of fourteen days during any six-month period. It also limits the size and height of signs in the right of way, requires that they be set back from the roadway, driveways, and other signs, and prohibits placement in the median.¹

First Amendment Parameters

The application of the First Amendment to sign regulations is remarkably complex. Supreme Court decisions addressing the issue tend to have multiple concurring and dissenting opinions. In addition, rather than addressing the regulation of signs in the public right of way, court cases generally address challenges to the regulation of signs on private property, typically billboards. Therefore, I am unable to provide absolute guidance on what the City can and cannot do.

The City's regulation of signs must be "content neutral" or we will be subject to the strict scrutiny standard of judicial review. Strict scrutiny review requires the government to prove that a law is "narrowly tailored to promote a compelling Government interest," a nearly insurmountable burden. A 2015 Supreme Court decision appears to require application of strict scrutiny when governments distinguish between commercial and noncommercial speech in sign regulations, but many subsequent lower court decisions have interpreted the decision as not applying to commercial speech. Therefore, although there is some risk, I believe the City can prohibit commercial signs in the right of way while allowing noncommercial signs.

Content neutral sign regulations are regulations that can be applied without reading the content of the sign. Time, place, and manner regulations that apply to all signs are content neutral. Examples of content neutral regulations include size limitations, location restrictions, and durational limitations.

Regulation of commercial speech generally is subject to the intermediate scrutiny standard of judicial review.² Under intermediate scrutiny, the government must demonstrate that the regulation of commercial speech is "narrowly tailored to serve a significant government interest and leave[] open alternative channels of communication. An ordinance is narrowly tailored if it does not burden substantially more speech than necessary to further the government's legitimate interests[.]" However, when a regulation of commercial speech is content-based (e.g., favors yard sale signs over "we buy junk cars" signs), then the regulation

¹ The City of Rockville prohibits all private signs in the right of way.

² Commercial speech that is misleading or that relates to illegal activity is not protected by the First Amendment.

may be subject to strict scrutiny. The law is unclear on this point, with courts indicating that content neutrality between commercial messages is necessary to remain under intermediate scrutiny, but, to my knowledge, never formally deciding the issue.

The City clearly cannot provide more favorable treatment to commercial speech than noncommercial speech. For example, the courts have struck down ordinances that allow on-premises commercial signs but prohibit on-premises noncommercial signs, so we could not allow businesses to post signs advertising their business in the right of way adjacent to their business but prohibit businesses or residents from posting noncommercial signs in the right of way in front of their property. This issue can be addressed with a savings clause that allows the placement of a noncommercial sign wherever a commercial sign is allowed.

Promoting aesthetics and public safety are both well-established substantial government interests that provide a valid basis for the regulation of signs. Therefore, the pertinent constitutional question is whether a given sign regulation is narrowly tailored to promote the interest. Ordinances that restrict speech more than necessary or that include exemptions that call into question the true purpose of the regulation will be deemed unconstitutional.

For illustrative purpose, I have listed several approaches to sign regulation and categorized them by their likely constitutionality.

Safe Policies:

- Prohibit all non-governmental signs in the right of way.
- Allow all signs (regardless of content) in the right of way but impose content neutral time, place, and manner regulations on all signs in the right of way.
- Require a permit for the posting of signs with neutral permit criteria.

Riskier Policies:

- Allow all noncommercial signs in the right of way and prohibit all commercial signs in the right of way.
- Allow only favored commercial signs, such as yard sale and home daycare signs, while generally prohibiting commercial signs in the right of way.
- Allow the posting of signs in the right of way by adjacent property owners regardless of content.
- Allow commercial signs in the right of way only in commercial districts.

Unconstitutional Policies:

- Prohibit all signs in the right of way except those containing certain favored messages, such as lost pet signs, community event signs, and yard sale signs.
- Give discretion to staff to waive sign restrictions.

Recommendation

Given the lack of clarity on the constitutional parameters of regulating signs in the right of way, the Council must balance its interest in limiting the proliferation of signs, the public's First Amendment rights, the City's tolerance for the risk of litigation, and practical considerations regarding enforcement.

To develop a policy, I suggest that the Council start by identifying the greatest sign-related harms that the City wishes to address (e.g., the most problematic types of signs and the most problematic locations for signs) and the types of signs that are most important to allow. Once these priorities are identified, then we can develop an ordinance that promotes the highest priority policies to the extent constitutionally and administratively feasible while avoiding taking constitutional risks and overburdening staff with respect to lower priority policies.