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LAND USE CASE LAW UPDATES

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I. FIRST AMENDMENT (SIGN REGULATIONS)

Background. In *City of Austin v. Reagan Nat'l Advert. of Austin*, LLC, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022), the United States Supreme Court held that the on-premise/off-premise distinction in the City of Austin's Sign Code was facially content-neutral, but remanded for the Fifth Circuit to resolve two issues:

> If there is evidence that *an impermissible purpose or justification* underpins a facially content-neutral restriction, for instance, that restriction may be content based. . . .
>
> Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "'*narrowly tailored* to serve a significant governmental interest.'"

Updates. *Reagan Nat'l Adver. of Austin, Inc. v. City of Austin*, No. 19-50354, 2023 U.S. App. LEXIS 7583 (5th Cir. Mar. 30, 2023) was the Fifth Circuit's decision on remand. The court majority summarized the applicable Sign Code provisions as follows:

> The Sign Code defined "off-premise sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Austin, Tex., City Code § 25-10-3(11) (2016). The Sign Code generally prohibited the construction of new off-premises signs, § 25-10-102(1), but allowed existing off-premises signs to remain as "non-conforming signs," § 25-10-3(10). Non-conforming, off-premises signs, though, could not change the "method or technology used to convey [their] message." §§ 25-10-152(A)-(B). The Sign Code permitted on premises signs to be "electronically controlled changeable-copy sign[s]." § 25-10-102(6).
>
> In sum, off-premises signs could not be upgraded [to electronically-controlled signs].

The court analyzed the remanded issues as follows:

> The plaintiffs do not assert that an "impermissible purpose or justification underpins" the City's facially content-neutral restriction. . . . *Thus, we apply intermediate scrutiny*, meaning that the Sign Code's "restriction on speech or expression must be 'narrowly tailored to serve a significant governmental interest'" [citations omitted] (emphasis added) . . .
>
> The government's interests *need not be accomplished through the "least restrictive or least intrusive means*." [citation omitted] "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." [quotation marks and citation omitted] (emphasis added). . .
>
> The City asserts that the regulation of off-premises signs advances its interests in "traffic safety and esthetics." The plaintiffs concede that *the Supreme Court has recognized those interests as substantial governmental goals*. . . .
>
> Those interests continue to be served *even if the Sign Code is underinclusive* by permitting on-premises digital signs. Further, the City "may believe that offsite advertising, with i[t]s periodically changing content, presents a more acute problem than does onsite advertising." Id. This logic applies equally to digital signs: the City may believe that off-premises digital signs generally have more content turnover than on-premises digital signs and therefore pose a larger threat to public safety. . . .
>
> In the context of sign codes, which are part of a "regulatory tradition" dating back well over a century, the Court has not required a great quantum of empirical support. *See Reagan Nat'l Advert.*, 142 S. Ct. at 1469. The Court upheld San Diego's off-premises commercial sign ban based on intermediate scrutiny, relying on the "accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia*, 453 U.S. at 509. *We conclude there is enough evidence and common sense here supporting Austin's Sign Code distinction.* . . .

After observing that the Supreme Court's *Metromedia* decision "does not demand airtight tailoring" for sign regulations, the court majority concluded:

> Municipalities have traditionally been given wide discretion in the domain of sign regulations. Austin is entitled to that latitude. AFFIRMED

A dissenting judge would have held that "the selective prohibition of off-premises signs digitization fails intermediate scrutiny" because the City had "not carried its burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition, ..."

In *Fanning v. City of Shavano Park*, Civil Action No. SA-18-CV-00803-XR, 2023 U.S. Dist. LEXIS 43290 (W.D. Tex. Mar. 14, 2023), the court abstained from deciding a challenge to a sign ordinance "until there is clarity from the Texas courts about whether general-law municipalities like the City of Shavano Park may enact sign ordinances like the ones at issue in this case." The court explained the difficulty in reconciling § 216.901 and § 51.012 in the TEX. LOC. GOV'T CODE, also the "tension" between those statutes and TEX. ELECTION CODE § 259.003 (forbidding most local regulation of political-message signs up to "36 feet" in effective area and "eight feet" in height).

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