

November 25, 2015

SENT VIA US MAIL AND EMAIL

W.J. Lane, Mayor
Scottsdale Mayor and City Council
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

Re: Scottsdale's Special Events Sign Ordinance

Dear Mayor W.J. Lane:

It has come to the attention of the Goldwater Institute that the City of Scottsdale has unconstitutionally prohibited or arbitrarily restricted the use of temporary directional signs for certain business owners seeking to promote their special events off premise. Under Section 8.537 of the Scottsdale Basic Zoning Ordinance, the city regulates the use of signage for special events through an application process that requires event sponsors to “prepare and submit an application, consisting of a complete list and description of all signs, including directional signs...and proposed times for erecting and removing the signs” to be “reviewed and approved by the general manager.” Scottsdale Basic Zoning Ordinance § 8.537(1)(B). The code further states that “[t]emporary off premises directional signs shall be limited in sign area to six (6) square feet for each sign,” but “[t]he total number and location of such signs shall be approved by the general manager.” *Id.* at § 8.537(1)(B)(5). In other words, the number and location of signs shall be arbitrarily decided by city officials based on criteria unknown to the applicant.

Because of this process, unequal treatment abounds in Scottsdale, creating a caste system in which prominent events—such as Barrett Jackson and the Phoenix Open—are allowed an unlimited number of signs of unlimited size in unlimited locations while less prominent events are often only allowed on premise signs showing ingress to the event. Under this system, city officials decide which events are allowed to thrive and proliferate and which ones are restrained from advertising. This is not only unfair, but it is also an unconstitutional violation of free speech.

Section 8.537 of the Scottsdale Basic Zoning Ordinance plainly violates the Arizona and U.S. Constitutions. The United States Supreme Court very recently struck down a similar sign ordinance in Gilbert, Arizona. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). The Court clarified that a law which “is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Id.* at 2228 (citations omitted). And “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” *Id.* at 2230. Furthermore, “a regulation that targets a sign

because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.” *Id.* at 2231.

In its analysis of the Gilbert ordinance, the Court determined that it “single[d] out signs bearing a particular message: the time and location of a specific event.” *Id.* at 2231. Because Gilbert’s sign code imposed content-based restrictions on speech, those provisions could stand only if they survived strict scrutiny, requiring the town to prove that they furthered a compelling interest and were narrowly tailored to achieve that interest. *Id.* Applying strict scrutiny, the Court determined that Gilbert’s sign code was underinclusive and therefore not narrowly tailored to preserve Gilbert’s aesthetic appeal and traffic safety, the interests the town identified to support the distinctions drawn by the sign code. *Id.* at 2231–32.

Like the sign ordinance at issue in *Reed*, Scottsdale’s sign code draws content-based distinctions among categories of signs and favors certain signs over others. For example, the Scottsdale code distinguishes permanent signs (§ 8.500), temporary signs (§ 8.600), and semi-permanent signs (§ 8.601). Inexplicably, it regulates special events under the section for permanent signs at § 8.537. Under the section for temporary signs, the code allows only four types of “temporary commercial signs.” Under the section for semi-permanent signs, the code regulates many types of signs, including “temporary noncommercial signs,” which are treated more favorably than special events and temporary commercial signs.

According to § 8.601, because semi-permanent signs “are less prone to create problems of litter and deterioration than temporary signs but more than permanent signs,” they are subject to less stringent restrictions. For example, temporary noncommercial signs¹ may be posted for 120 days, whereas the duration of special-events signs is left to the discretion of the general manager. Noncommercial signs can be thirty-two (32) square feet in size if placed behind a dedicated scenic corridor easement; all other noncommercial signs can be sixteen (16) square feet. Special-events signs are limited to six (6) square feet. The code does not seem to limit the placement of temporary noncommercial signs other than prohibiting their placement “in any right-of-way or public property,” § 8.601(L)(4)—the same limitation for other signs. In contrast, the placement of special-event signage is left to the discretion of city officials.

Additionally, under § 8.303, the code states that all *commercial* signs require a permit. Other signs “require approval, but may not require a permit,” including “[s]igns erected during the Christmas holidays as identification of temporary sales areas for Christmas trees and other holiday oriented items” and temporary *noncommercial* signs. Holiday signs and noncommercial signs are therefore treated more favorably than any other commercial sign and more favorably than signs for special events.

Scottsdale’s sign code not only targets special events and commercial activities but also seems to discriminate within these categories. For example, farmers markets are subject to harsh restrictions, but city-favored events are allowed great latitude; signage for holiday sales does not require a permit, but most other commercial activities do; and noncommercial signs do not require a permit, nor are they subject to the same placement and size restrictions as commercial

¹ Inexplicably, the code labels these signs as temporary after stating that the signs “below” (including temporary noncommercial signs) are less prone to create problems because they are semi-permanent.

or special-events signs. Further, Scottsdale has specifically targeted special-events signage, subjecting it to the arbitrary discretion of city officials unlike other types of signs, but “a regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.” 135 S. Ct. 2218 at 2231. “Here, the Code singles out signs bearing a particular message: the time and location of a specific event.” *Id.* at 2231. “Because the [city]’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny,” requiring Scottsdale to prove that the restrictions further a compelling interest and are narrowly tailored to achieve that interest. *Id.*

Given that Scottsdale allows unlimited noncommercial signage, including political signs, and favors special events that draw thousands of attendees in relation to smaller special events, its sign code is underinclusive and not narrowly tailored to achieve traffic safety and maintain city aesthetics. Scottsdale’s limitations on temporary directional signs, then—its near prohibition of directional signs for smaller events—is an unconstitutional restriction of speech.

Given the serious and ongoing violation of the free speech rights of Scottsdale residents as well as those looking to do business in Scottsdale, the City should immediately cease enforcement of Section 8.537 of the Basic Zoning Ordinance and revise its code to comply with the Arizona and U.S. Constitutions.

We request a response to this letter within thirty (30) days outlining the action the City has taken to address the constitutional infirmities of its code.

Goldwater Institute staff is readily available to discuss the constitutional and legal issues raised by this ordinance. Please do not hesitate to contact us if there are any points we can help clarify.

Sincerely,

Veronica Thorson
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Scharf-Norton Center for Constitutional Litigation
at the Goldwater Institute

cc. Suzanne Klapp (Councilmember)
Virginia Korte (Councilmember)
Kathy Littlefield (Councilmember)
Linda Milhaven (Councilmember)
Guy Phillips (Councilmember)
David N. Smith (Vice Mayor)
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Bruce Washburn (City Attorney)