

MEMO

To: Shelburne Planning Commission

From: PlaceSense

Date: 25 August 2023

Re: Regulation of Signs

The legal framework for regulating signs in the United States establishes two broad categories – ‘commercial speech’ and ‘protected speech’. Commercial speech is advertising. The US Supreme Court has defined commercial speech as speech that proposes a transaction (Central Hudson Gas and Electric v. Public Service Commission, 1980). The US Court of Appeals Ninth Circuit provided more detail when it defined commercial speech as expression related solely to the economic interests of the speaker and its audience (Coastal Abstract Service Inc v First American Title Insurance Company). Noncommercial speech is protected speech.

Protected Speech and Signs

Local governments must respect these two categories of speech when crafting sign regulations and must take care not to infringe upon constitutionally protected, noncommercial speech. Any local government regulation of protected speech must be ‘narrowly tailored’ to achieve a ‘compelling governmental interest’. Signs are a form of speech and thus noncommercial signs enjoy the protections of the First Amendment. This standard imposed by the US Supreme Court requires governments to demonstrate they have written laws precisely to use the least restrictive method to achieve their purpose. In land use law, a ‘compelling interest’ is one directly linked to protecting public health and safety.

US Supreme Court decisions affirm the ability of local governments to impose reasonable ‘time, place and manner’ restrictions on signs. Rules controlling size, illumination, location and manner of postings (size) can meet constitutional tests, irrespective of whether the sign is commercial or protected speech. The US Supreme Court has held that time, place and manner restrictions of First Amendment protected free speech will be upheld if the regulations:

- Are justified without reference to the content of the signs subject to the law (i.e., content neutral);
- Are narrowly tailored to serve a significant governmental interest; and
- Leave open ample alternative channels for communication of the information.

Sign regulations may not define the content of a noncommercial sign. Content-based restrictions are ones where the sign law is triggered by the message conveyed, by the identity of the speaker or by the particular point of view. The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. First Amendment protections encompass not only content-based *prohibitions* on speech, but also content-based *restrictions* on speech.

Typical sign regulations which have been found to interfere with free speech are those which allow only commercial signs on business premises; those which distinguish between political and other temporary signs; and those which create exemptions or differing requirements (i.e., permits or fees) for certain content-based categories of signs.

Commercial Speech

Commercial speech (advertising) is afforded less protection under the First Amendment. *Central Hudson Gas and Electric v. Public Service Commission* established a less demanding test (substantial governmental interest) for local regulations as they apply to commercial speech. Communities can justify some restrictions such as banning commercial signs off premise, operation of vehicles solely for displaying commercial advertisements, controlling visual clutter and ensuring road safety standards.

However, anywhere a municipality restricts commercial speech it must allow for noncommercial (protected) speech. A local government cannot favor commercial speech over noncommercial speech. To address this legal requirement, we are proposing Shelburne include a 'substitution clause' within the sign regulations (see Paragraph 4802.A(1)).

Shelburne Sign Controls

Shelburne's adopted signs standards do not pass the current legal test for applying 'content neutral' standards as it applies different standards to different types of noncommercial signs. Shelburne's adopted regulations allow signs or bulletin boards incidental to places of worship, schools, libraries, or public buildings (§ 1970.2 D., page XIX-72). The regulations contain provisions that permit the Community Farmers Market to place signs on public property for a certain number of days between June 1 and October 31. There are also standards specific to political campaign signs.

The Community Farmers Market signs are a form of protected (noncommercial) speech and are the only recognized form of communication permitted on the Parade Ground or other town properties (except for the ball fields, which allow for sponsorship signs under other provisions of the regulations).

To better meet the constitutional tests outlined above the town has two choices:

1. Prohibit signs on the Parade Ground and/or other municipal properties of any kind or;
2. Allow for all noncommercial signs to the same extent (the proposed draft recommends this approach as provided for in Paragraph 4803.A(4) to allow public event signs to be posted on town property).

The town can impose reasonable time, place and manner limitations (using the strict scrutiny standard) to permit noncommercial signs on town property. In making this choice however, adherence to a content neutral standard means that any speech protected by the First Amendment must be permitted. This could include viewpoints that Shelburne residents find offensive. In a series of cases through the 1990s the US Supreme Court reasserted a very narrow definition of hate speech.

The discussion above makes clear that signs with protected speech messages can be held to narrowly tailored time, place and manner limitations. As a property owner, the town needs to make an administrative policy decision as to whether it will allow noncommercial speech signs on its property. If the town elects to permit noncommercial signs on town property such signs should be subject to the general provisions of this chapter.

Currently the town receives income for commercial speech (advertising) signs at two ball fields. Any additional specifications for those signs that are not applied outside the recreational sponsorship program should be dealt with as an administrative policy where advertisers agree to the specifications for signs they are paying to place at the ball fields or other town properties. Here the town is selling advertising rights and as the facility owner can impose additional requirements through contract..