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September 6, 2017

Terry L. Walker, Town Clerk
Town of Monterey
P.O. Box 277
Monterey, MA 01245

**Re: Monterey Annual Town Meeting of May 6, 2017 -- Case # 8501
Warrant Articles # 32, 33, 34, 35, and 36 (Zoning)**

Dear Ms. Walker:

Articles 32, 33, 34, 35, and 36 - We approve Articles 32, 33, 34, 35, and 36 adopted at the Monterey May 6, 2017, Annual Town Meeting. Our comments on Article 36 are provided below.

Article 36 - Article 36 amends Section 6.2, "Signs" of the Town's zoning by-laws by amending subsection 6.2.7, "Signs Not Requiring Permits to provide as follows [~~deleted text in strikethrough~~ and new text in **bold**]:

4. Signs announcing public events sponsored by civic or social organizations to be displayed for not more than fourteen (14) ~~thirty~~ (30) days prior to the event. The Select Board may grant size waivers for these temporary signs.

We approve subsection 6.2.7 (4) as amended. However, the Town should be aware of the Supreme Court decision in Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015), which held that the Town's content-based sign regulation was unconstitutional because it was not narrowly tailored to serve a compelling state interest.

The Town of Gilbert, Arizona adopted a comprehensive sign ordinance that required a sign permit for outdoor signs. The sign ordinance exempted 23 types of signs from the permit requirement, including three types of signs that were the focus of the Court's decision: (1) ideological signs; (2) political signs; and (3) temporary directional signs relating to a qualifying event.¹ However, such signs were subject to specific restrictions, including durational and size limitations.

¹ "Qualifying event" was defined in the ordinance as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other

The Petitioners in Reed were the Good News Community Church and its pastor, who placed 15 to 20 signs around the Town informing the public of its worship services. The Petitioners were cited twice for violating the Town's temporary directional sign restrictions. Specifically, the Petitioners were cited for (1) displaying the signs past the time limit required under the ordinance and (2) for omitting the date of the event on the signs. After failing to resolve the matter with the Town, the Petitioners filed a complaint alleging that the sign ordinance violated their free speech rights guaranteed under the First and Fourteenth Amendments to the U.S. Constitution. The Ninth Circuit Court of Appeals held that the sign ordinance's provisions were content-neutral and did not violate the First Amendment. The United State Supreme Court granted certiorari and reversed the Ninth Circuit's decision.

The Supreme Court focused on three categories of signs that, in the Town's ordinance, were exempt from the sign permit requirement but subject to specific durational and size limitations: (1) ideological signs; (2) political signs; and (3) temporary directional signs relating to a qualifying event. First, the Court reiterated that the First Amendment prohibits local governments from restricting expression because of the message, idea, subject matter, or content. Id. at 2226. A regulation is content-based if it applies to a particular speech because of the topic discussed or the idea or message expressed. "This commonsense meaning of the phrase 'content-based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Id. at 2227. Content-based laws are subject to strict scrutiny and are presumptively unconstitutional. Strict scrutiny requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. Id. at 2227.

The Supreme Court held that Gilbert's sign ordinance was content-based on its face because the restrictions placed on signs were based entirely on the communicative content of the sign. For example, the sign ordinance defined an ideological sign as a sign that communicates a message or idea that does not fit within another category in the sign ordinance. The ordinance defined a political sign as a sign that is designed to influence the outcome of an election. Finally, a temporary directional sign was defined as a sign that directs the public to church or some other qualifying event. Each of these signs was then subject to different size and durational limitations. Because the sign ordinance was content-based, the Court analyzed it using strict scrutiny.

Strict scrutiny requires the Court to determine whether: (1) the municipality demonstrated a compelling governmental interest and (2) whether the restriction is narrowly tailored to achieve that governmental interest. The Town of Gilbert offered two governmental interests for adopting its sign ordinance: (1) preserving the Town's aesthetic appeal; and (2) traffic safety. Reed, 135 S.Ct. at 2231. The Court assumed for the sake of argument that those were compelling governmental interests, but found that the sign ordinance's distinctions were under-inclusive. The sign ordinance was under-inclusive because temporary directional signs are "no greater [an] eyesore" than ideological or political signs, yet, the ordinance allowed unlimited ideological signs while imposing greater restrictions on temporary directional signs. As to traffic safety, the Court found that temporary directional signs did not pose a greater threat to traffic safety than

similar non-profit organization." Id. at 2225.

ideological or political signs.² Id. at 2231-32. Because of this under-inclusiveness, the ordinance was not narrowly tailored to further a compelling governmental interest and therefore failed strict scrutiny review. Id. at 2232.

In holding that the Town's sign ordinance was unconstitutional, the Court offered guidance on the types of sign regulations that may be adopted consistent with the First Amendment. The Court noted that the Town had ample content-neutral options to regulate signs. In a concurring opinion, Justice Alito offered specific examples of sign regulations that could be imposed so long as they are not content-based:

- Rules regulating size;
- Rules regulating location;
- Rules distinguishing between lighted and unlighted signs;
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change;
- Rules that distinguish between the placement of signs on commercial and residential property;
- Rules distinguishing between on premises and off-premises signs;
- Rules restricting the total number of signs allowed per mile of roadway; and
- Rules imposing time restrictions on signs advertising a time event.

Reed, 135 S.Ct. at 2233.

Within this framework, we review the subsection 6.2.7 (4) as amended.

Subsection 6.2.7 (4) could be considered content-based regulation. However, based on our standard of review, we cannot conclude that the amendments are content-based and thus subject to strict scrutiny. Moreover, we do not have the factual record necessary to determine whether the amendments are narrowly tailored to serve a compelling municipal interest.

If the sign by-law is challenged in court, it is the municipality's burden to demonstrate that the sign by-law is narrowly tailored to achieve a compelling government interest. Reed, 135 S.Ct. at 2231. A municipality usually attempts to meet that burden by citing to a statement of purpose or findings in the by-law itself. *See, e.g., Commonwealth v. Weston W.*, 455 Mass. 24, 27-28, 36 (2009) (ordinance included a series of findings made by the council followed by a statement of purpose, supporting the trial court judge's finding that the council adopted the ordinance only 'after months of planning, debating, and researching models from other cities'). Only after the community demonstrates the legitimate goals of the by-law can the court determine whether the by-law is narrowly tailored to achieve those goals.

The documents submitted to this Office related to subsection 6.2.7 (4) do not include all of the facts necessary for a determination whether the by-law is narrowly tailored to achieve a legitimate and compelling governmental interest. The determination of these issues must be left for a court, which would be better equipped to find the facts on a full record and determine whether the by-law is valid. Additionally, we do not opine whether subsection 6.2.7 (4) (or the

² In fact, the Court observed that a "sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting." Id. at 2232.

existing sign by-law) would be upheld by a court after review on a fuller factual record, or whether a court would determine that the Town's sign regulations impermissibly restrict freedom of speech. Therefore, there is no basis upon which we may disapprove the subsection 6.2.7 (4), as amended. However, we strongly suggest that the Town discuss the Reed decision with Town Counsel.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
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cc: Town Counsel Jeremia Pollard