Florida Association of County Attorneys
2015 Midyear CLE Seminar Program
November 19, 2015
Omni Amelia Island Plantation
Nassau County
(4 CLE Hours)

10:00 a.m. to 12:30 p.m.	**Meeting of the Florida Association of County Attorneys Board of Directors – Working Lunch**
1:00 p.m.	**Opening Remarks and Welcome** Bryant Applegate, Seminole County FACA President
1:00 p.m. to 1:50 p.m.	**Attack of the Drones** Brant C. Hadaway, Esq. Diaz, Reus & Targ, LLP Miami, Florida
1:50 p.m. to 2:45 p.m.	**A Journey Through Transportation Network Companies** Annika E. Ashton, Esq. Assistant County Attorney Broward County, Florida
2:45 p.m. to 3:00 p.m.	**Refreshment Break**
3:00 p.m. to 3:50 p.m.	**A Look Ahead 2016 Legislative Session** Virginia "Ginger" Delegal, Esq., General Counsel Florida Association of County Attorneys Tallahassee, Florida
3:50 p.m. to 4:45 p.m.	**Reed v. Town of Gilbert – Sign Code** William D. Brinton, Esq. Towers Rogers, PA Jacksonville, Florida
4:45 p.m. to 5:00 p.m.	**Closing Remarks** Bryant Applegate, Seminole County Attorney FACA President

Send Lawyers, Drones, and Money

What Is a “Drone”?

An unmanned aircraft:

- Unmanned Aircraft System (“UAS”)
- Small Unmanned Aircraft System (“sUAS”)
- Unmanned Aerial Vehicle (“UAV”)

What is an "Aircraft"?

Any contrivance made for flight in the air.

What are drones good for?

- Crop surveys improve yields and efficient land use.
- Safer inspections of pipelines, bridges, buildings, and other infrastructure.
- Construction site surveys improve efficiency.
- Public agencies can effectively monitor fires, accidents, and other emergencies.
- Make disaster responses more effective.

Who Regulates Drones?

The Feds (FAA):

- Regulates navigable airspace.
- In charge of the National Airspace System ("NAS")
- Promulgates regulations for safety and certification of pilots and aircraft.

The States:

- Use of drones by public agencies & licensed professionals.
- Privacy.
- Use of evidence.
- Torts.
- Public safety (this part gets a little tricky).

Airspace Categories

Figure 8-3. *Class G airspace extends from the surface to the base of controlled airspace (Class B, C, D, and E).*

FEDERAL DRONE REGULATIONS: WHERE ARE WE?

The FAA Modernization and Reform Act of 2012 (“FMRA”)

Mandated that the FAA safely integrate drones into the NAS by no later than September 30, 2015.

Rules for sUAS *might* be finalized by June, 2016

No proposed rules yet for “big” drones.

The FAA's Proposed Rules for Commercial sUAS (below 500 ft AGL, less than 55 lbs.)

The Good News:

- No pilot license required
- No requirement for airworthiness certification
- No required coordination with ATC in Class G airspace (unless within 5 miles of an airport)

But:

- Restricted to visual line-of-sight (operator or spotter), no night flights
- One operator per flight – no autonomous flights
- Operator certification requirements, TSA background check somewhat burdensome

FAA Considering Comments On:

- Beyond VLOS
- Air Carriers
- Special Micro-Drone Rule
- Sense and Avoid
- Autonomous Drones Still a Long Way Off

IN THE MEANTIME….

Section 333 Exemption Petition Must

Identify the regulations from which you seek relief,

Extent and reasons for relief,

Benefit to the public interest,

How you plan to achieve equivalent safety.

After receiving exemption, Petitioner must also:

- Apply for a COA for the operation;
- Register the aircraft

A Successful Section 333 Exemption Request

(Why so complicated?)

FAA Claims No Ability Under § 333 to Waive:

- Requirements for Airman Certification;
- Security Vetting;
- Aircraft Marking;
- Registration Requirements.

Model Aircraft Rules

FMRA Special Rule for Model Aircraft

Bars FAA from regulating model aircraft, defined as:

- Flown strictly for hobby/recreation;
- Operated according to community-based guidelines;
- Not more than 55 lbs., unless certified by community-based organization;
- Does not interfere with manned aircraft;
- Notify ATC if less than 5 miles from airport.

BUT!

Nothing limits the authority of the FAA to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system.

KEY DIFFERENCES

Model Aircraft Rules

- No operator certificate required, but follow community-based standards
- Strict VLOS – no FPV or other visual aids
- Below 400 ft AGL
- No registration required

Proposed Commercial Rules

- Need operator certificate, pass aeronautical knowledge test
- VLOS satisfied IF operator *capable*
  - Visual observer
- Below 500 ft AGL/Class G
  - Class B, C, D or E ok with ATC authorization
- Aircraft must be registered

Does this make any sense?

Hobbyist:

No License, Registration

Professional:

Licensed, Registered

Whoops! Did we say that model aircraft won’t have to be registered?

New Registration Requirement

On October 19, 2015, DOT announced it will require registration of consumer drones, subject to certain parameters. Details still being worked out.

Doesn’t this conflict with Congress’ Special Rule for Model Aircraft?

FAA says it’s consistent with authority to enforce safety.

What About Private (non-Recreational) Use?

Can You Use a Drone To:

- *Inspect the roof on your house?*
- *Survey private, non-commercial land?*
- *Make an aerial video to sell your family home?*

The FMRA & FAA Are Silent

Public Entities

- Governmental agencies – state, local, and federal – must obtain a COA.
- Must be for a governmental purpose.
- Applications evaluated on an individual basis.
- Proposed sUAS Rules give public entities option of declaring themselves commercial operations and complying with new Section 107

State Regulations

Field Preemption vs. Filling in the Gaps

As Long As It Doesn't Interfere With Federal Regulations…

A State Can (probably):

- Regulate use by state & local law enforcement;
- Regulate use of evidence in state courts;
- Address invasions of privacy;
- Hear tort, contract, and insurance claims;
- Encourage investment.

A State Cannot:

- License operators;
- Certify aircraft or service facilities;
- Grant immunity for damaging a UAS;
- Regulate use of navigable airspace.

Self-Help Against Drones

Federal Law Says, "No."

18 U.S.C. § 32 makes it a federal crime to damage or destroy an aircraft.

According to the FAA, drones are "aircraft."

BUT… the Feds have taken a hands-off approach to enforcing the statute, vis a vis drones. At least, so far.

Can a drone be armed?

FAR § 91.13 prohibits the reckless operation of an aircraft.

FAR § 91.15 prohibits dropping objects from an aircraft.

But both regulations apply only where the activity poses a danger to life or property.

State firearms law may need to fill the gap.

Florida's Freedom From Unwanted Surveillance Act

Creates private right of action for drone surveillance of persons on private property.

Bars drone surveillance by private investigators.

Attorney's fees & costs.

Creates a "drone exception" to *Florida v. Riley*, 488 U.S. 445 (1989)

Riley:

- Property owner had no reasonable expectation of privacy from a manned police aircraft flying 400 ft. over property.

FUSA:

- You have a reasonable expectation of privacy from drone surveillance if you can't be observed on private property from ground level.

Does singling out drones make sense?

Thanks, and Safe Flying!

www.diazreus.com

2016 Legislative Preview

FACA Mid Year CLE Seminar

November 2015

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

Florida County's Legal Perspective

Annika E. Ashton
Assistant County Attorney, Broward County, FL

FACA-November 19, 2015

- **Broward County's Journey**
  - Timeline
  - Regulatory Scheme
    - Prior
    - Revised

- **County Legal Issues**
  - Insurance
  - Preemption
  - Definition

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

Transportation Network Company Timeline

2014
The Key is turned
State Legislation

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

2014 Florida Legislative Session- Proposed “Uber” Bill

FLORIDA NEEDS UBER

Florida, it's the final stretch - and we need your help to cross the finish line. The Florida State Legislature will decide this week whether they support bringing you more choices for transportation and support expanding economic opportunities for thousands of residents across the Sunshine State.

2014 Florida Legislative Session – Bill Died in Committee

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

Transportation Network Company Timeline

February 2014
The Key is turned
State Legislation

April 2014
Engine Warms
Broward County
Commission
Begins Review

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

County Commission Review

April 8, 2014

Board of County Commissioners directed staff to:

- Research Transportation Network Companies (TNC)
- Seek stakeholder input
- Bring information back to the Board for consideration

Transportation Network Company Timeline

February 2014
The Key is turned
State Legislation

August 2014
And We're Off
TNCs Launch

April 2014
Engines Rev
Broward County
Commission
Begins Review

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

TNCs Launch

August 2014- Uber (1 day notice)

September 2014- Lyft (No notice)

UBER IS HEATING UP SOUTH FLORIDA!

The Uber Florida family is growing – today, uberX is rolling into Ft. Lauderdale and West Palm Beach!

Transportation Network Company Timeline

February 2014
The Key is turned
State Legislation

August 2014
And We're Off
TNCs Launch

April 2014
Engines Rev
Broward County
Commission
Begins Review

October 2014
Picking Up Speed
Staff Provides
Feedback

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

County Staff Recommendations

October 2014

Recommendations

- Accommodate unlimited TNC
- Maintain County responsibility to ensure public safety of TNC:
  - County supervised vehicle inspections
  - County conducted criminal background checks and licensing of TNC drivers
  - County verified liability insurance coverage

Transportation Network Company Timeline

February 2014
The Key is turned
State Legislation

August 2014
And We're Off
TNCs Launch

December 2014
Curb Up Ahead
Cease & Desist

April 2014
Engines Rev
Broward County
Commission
Begins Review

October 2014
Picking Up Speed
Staff Provides
Feedback

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

Next Steps…

2014

- County Commission Directs County Attorney to issue Cease and Desist Letter
- Cease and Desist Letter issued in Late November
- Uber and Lyft Continue to Operate in December
- Board Workshop Planned for January 2015

Broward's Transportation Network Company Timeline

February 2014
The Key is turned
State Legislation

August 2014
And We're Off
TNCs Launch

December 2014
Curb Up Ahead
Cease & Desist

April 2014
Engines Rev
Broward County Commission Begins Review

October 2014
Picking Up Speed
Staff Provides Feedback

January 2015
Caution Flag
Injunction v. Regulation

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

Regulation v. Injunction

January 2014

- Injunction
  - Pros
  - Cons

- Regulation
  - Pros
  - Cons

Broward's Transportation Network Company Timeline

February 2014
The Key is turned
State Legislation

August 2014
And We're Off
TNCs Launch

December 2014
Curb Up Ahead
Cease & Desist

April 2015
Green Flag
New Regulation

April 2014
Engines Rev
Broward County Commission Begins Review

October 2014
Picking Up Speed
Staff Provides Feedback

January 2015
Caution Flag
Injunction v. Regulation

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

Proposed Broward Regulations:
Five Categories

Taxicab (1:2000)
- On demand

Luxury Sedan (1:4500)
- Prearranged

Limousine (Unlimited)
- Prearranged

Van (Unlimited)
- Prearranged; on demand during certain times at the Seaport

TNC (Unlimited)
- Private vehicle
- Prearranged through an app

Five Key Areas – April 2015 Regulations

1. Fare controls - Taxi Only
2. Entry restrictions - Two of the ~~four~~ five categories
3. Licensing requirements – All Categories
   - Separate categories
   - Each provides service in a different way
4. Minimum level of service – All Categories
5. Public safety requirements – All Categories
   - Vehicle inspections by ~~County~~ Private Mechanics with reports to the County
   - Level ~~1~~ 2 Background checks for drivers by County
   - Proof of state minimum liability insurance coverage

BROWARD COUNTY FLORIDA

Uber's View of the Regulations

Broward's Transportation Network Company Timeline

February 2014
The Key is turned
State Legislation

August 2014
And We're Off
TNCs Launch

December 2014
Curb Up Ahead
Cease & Desist

April 2015
Green Flag
New Regulation

April 2014
Engines Rev
Broward County Commission Begins Review

October 2014
Picking Up Speed
Staff Provides Feedback

January 2015
Caution Flag
Injunction v. Regulation

July 2015
Red Flag
Injunction/TNCs Shut Down

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

Post-April 2015 Regulations

- Uber/Lyft continue to operate without complying with County Regulations
- No agreement to pay fees owed at the Port and Airport

- June 23, 2015 – Commission Authorizes the County Attorney to take appropriate legal action with respect to the operations of TNCs.
- Early July 2015 – Uber and Lyft announce they will cease operations in Broward County on July 31.
- July 31 – Uber and Lyft shut down in Broward County.

BROWARD COUNTY FLORIDA

Broward's Transportation Network Company Timeline

February 2014
The Key is turned
State Legislation

August 2014
And We're Off
TNCs Launch

December 2014
Curb Up Ahead
Cease & Desist

April 2015
Green Flag
New Regulation

October 2015
White Flag?
Revised
Regulation

April 2014
Engines Rev
Broward County
Commission
Begins Review

October 2014
Picking Up Speed
Staff Provides
Feedback

January 2015
Caution Flag
Injunction v.
Regulation

July 2015
Red Flag
Injunction/TNCs
Shut Down

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

BROWARD COUNTY FLORIDA

Revised Regulations

- ✓ August 1 – October 15, 2015 Uber/Lyft not available for Pick-ups in Broward County
- **Regulations Revised**
  - Adopted **October 13, 2015**, Enacted **October 23, 2015**
  - TNCs responsible for driver background checks
    - Checks are "Level 1"
    - 7 year look-back for most crimes
  - TNCs responsible for vehicle inspection – no reporting to the County
  - County audits compliance with the Ordinance
  - TNCs enter into agreement for Port and Airport fees

Legal Issues

1. Ordinance definitions: What do you regulate?
2. Insurance: Chapter 324, Florida Statutes
3. County v. Municipal Regulation/Preemption

.

BROWARD COUNTY FLORIDA

Legal Issues

Ordinance definition – What do you regulate?

Chapter 22½-1, Broward County Code of Ordinances

Motor *carrier* means an individual, partnership, association, corporation, or other entity **that owns, controls, operates, exercises dominion over, or manages any motor vehicle**, as defined in this Chapter, **and which holds itself out as engaged in any part of the business of providing passenger, for-hire ground transportation services to the public, or private clients, for compensation**, including transportation network companies and any other individual or entity that receives payment for arranging or providing for-hire ground transportation services.

BROWARD COUNTY FLORIDA

Legal Issues

Insurance: Chapter 324, Florida Statutes

Sec. 324.031, Florida Statutes

Manner of proving financial responsibility.—The owner or operator of a taxicab, limousine, jitney, or any other **for-hire passenger transportation vehicle** may prove financial responsibility by providing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021(8) or s. 324.151, which policy is issued by an insurance carrier which is a member of the **Florida Insurance Guaranty Association**.

Legal Issues

Insurance

Legal Issues

County v. Municipal Regulation/Preemption

- Which entity ordinarily preempts in a conflict in a Charter?
- Is there an exception in the for-hire transportation area?
  - Broward
  - Hillsborough
  - Miami-Dade
  - Palm Beach

A JOURNEY THROUGH TRANSPORTATION NETWORK COMPANIES

Florida County's Legal Perspective

Annika E. Ashton
Assistant County Attorney, Broward County, FL

954-357-7600

aashton@broward.org

FACA-November 19, 2015

Legislative Preview

- Florida
  - Finance, Tax, Admin
  - Growth, Environmental, Ag
  - HHS
  - Public Safety and Courts
- Federal
  - Water Resources
  - Transportation & Infrastructure
  - Energy, Environment & Agriculture
  - Tax Reform
  - Entitlements, Appropriations
  - Health & Human Services

FAC FLORIDA ASSOCIATION OF COUNTIES All About Florida

2016 Florida Legislature

- 120 House Members
  - Speaker Steve Crisafulli (Brevard, R)
- 40 Senators
  - Sen Andy Gardiner, President (Orange, R)
- Party split
  - House: 81 R; 39 D
  - Senate: 26 R; 14 D

2016 Legislative Schedule

- Six weeks of committee meetings all Fall
- Redistricting special sessions
  - Congressional maps
  - State Senate maps
- Session begins, Tuesday, January 12, 2016
- Sine die on Friday, March 1, 2016

FAC FLORIDA ASSOCIATION OF COUNTIES All About Florida

Watching for ….

- Preemptions
  - Debt recovery
  - Constitutional officers
- Unfunded Mandates
  - FEMA deobligation revenue share clawback
- Medicaid Billing Reform
- Expansion of Medical Marijuana
- Governor's Tax Package (Part III)

FAC FLORIDA ASSOCIATION OF COUNTIES All About Florida

Finance and Tax

- Communications Services Tax
- Local Discretionary Revenue Flexibility
- Property Taxes – Eliminate Recapture Provision
- Sales Tax Exemption on Commercial Leases

General Governmental (Administrative)

- Regulation of Transportation Network Companies

Growth, Economic Development

- State and Local Enconomic Development Partnerships
- Film/TV Entertainment Production Tax Incentives
- Utility Relocation

Environmental, Ag, Utilities

- Amendment 1 Implementation
- Payment in Lieu of Taxes (PILT)
- Beach Renourishment
- Utility Relocation
- Water Supply
- Water Quality

Health & Human Services

- Behavioral Health Services
- Behavioral Health Funding
- Homelessness

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All About Florida

Public Safety and Courts

- Juvenile Justice
- Firearm Preemption
- Judicial System
- General Public Safety

Federal Watch

- 114th Congress; began in January 2015
- Senate: R=54/D=44/I=2
- House: R=246/D188/I=1

Federal Watch

- Waters of the United States (WOTUS)
- National Flood Insurance Program (NFIP) Program
- MAP-21 Reauthorization
- FEMA Mapping Procedures
- Oil Pollution Act of 1990 (OPA)
- Disaster Recovery Assistance

FAC FLORIDA ASSOCIATION OF COUNTIES All About Florida

Federal Watch

- Tax Exempt Status of Municipal Bonds
- Marketplace Fairness Act
- Immigration
- Health Care
- Veterans' Health

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FLORIDA ASSOCIATION OF COUNTIES
All About Florida

Questions?

FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

AMELIA ISLAND, FLORIDA
NOVEMBER 17, 2015

REED v. TOWN OF GILBERT
THE BLOCKBUSTER DECISION

Presenter:

William D. Brinton

Rogers Towers, P.A.

1301 Riverplace Blvd., Suite 1500

Jacksonville, FL 32207

wbrinton@rtlaw.com

904-346-5537

Before turning to the aftermath of Reed v. Gilbert

An important observation on the Supreme Court's decision (5 opinions) in *Metromedia v. San Diego*.

Before *Metromedia*, there was *Suffolk Outdoor*.

In 1978, the United States Supreme Court denied Suffolk Outdoor's petition for review "due to the want of a substantial federal question."

In doing so, the Supreme Court made a "merits decision" on the First Amendment question framed by the petitioner's jurisdictional statement.

The Town of Southampton, New York had adopted a total ban on billboards. Billboards were non-accessory signs.

The signs were off-site commercial signs. They were not accessory signs.

This was a locational distinction. The Town's definition was significant.

In the *Suffolk Outdoor* case, there were no misleading stipulated facts or facts that had not been thoroughly vetted or thought through, unlike the *Metromedia* case where the City of San Diego entered into stipulations that were incorrect or misleading to the city's detriment by the time the case reached the Supreme Court.

Metromedia Plurality:

"*Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978), involved a municipal ordinance that distinguished between **offsite** and **onsite billboard advertising**, **prohibiting the former** and permitting the latter."

Metromedia Plurality:

"We summarily dismissed as not presenting a substantial federal question an appeal from a judgment sustaining the [Town of Southampton] ordinance, **thereby rejecting the submission**, repeated in this case, **that prohibiting offsite commercial advertising violates the First Amendment.**"

Metromedia Plurality:

"This Court has repeatedly stated that although **summary dispositions are decisions on the merits**, the decisions extend only to "**the precise issues presented and necessarily decided by those actions**."

Note: There is no doubt that the precise issue presented in 1978 on the merits (7-2) in *Suffolk Outdoor* was: the constitutionality of a total prohibition of offsite commercial advertising.

In 1981 and thereafter the *Metromedia* decision was viewed as one that upheld the right of local governments to adopt bans on offsite commercial signs, most commonly known or referred to as billboards.

However, the first such decision was *Suffolk Outdoor* in 1978.

The onsite vs. offsite distinction was not viewed as a content-based distinction by the United States Supreme Court either in 1978 (*Suffolk Outdoor*) or in 1981 (*Metromedia*).

The 2-page Alito concurrence in *Reed v. Town of Gilbert* (June 18, 2015) did nothing more than reconfirm the constitutionality of distinguishing between on-premises and off-premises signs

Alito, joined by Kennedy and Sotomayor, confirmed that the following rules would not be content-based:

Rules <u>distinguishing</u> between on-premises and off-premises signs.

Now Turning Directly to the Blockbuster Decision in *Reed v. Town of Gilbert* (June 18, 2015).

WHAT HAPPENED AND WHAT WAS THE CASE ALL ABOUT?

As depicted by Reed's attorney in the briefs:

I SEE NO REASON WHY SUCH AN EASY CASE CALLS FOR US TO CAST A CONSTITUTIONAL PALL ON REASONABLE REGULATIONS.

~ JUSTICE ELENA KAGAN – JUNE 18, 2015 ~

There is no need to decide in this case whether Strict Scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable," and as the challenges to them mount, **courts will have to invalidate one after the other.**

This court may soon find itself a veritable supreme board of sign review.

And courts will strike down those democratically enacted local laws even though no one–certainly not the majority–has ever explained why the vindication of first amendment values requires that result.

“A CALL FROM A COLLEAGUE.”

Randal Morrison, Esquire
San Diego, California

Prolific writer on matters involving Sign Control and the First Amendment and one of the most experienced litigators and appellate lawyers in the United States in this field.

DANGER
WILL
ROBINSON!!

A citation in September 2005.

Pastor Clyde Reed posing with a temporary directional sign.

There were 17 temporary directional signs placed for a Church service.

Ok, what is wrong with that?

The placement was on a Saturday morning for a service one day later, on a Sunday morning.

This was approximately 24 hours before the event and at 17 locations near the Church.

WEDNESDAY, MARCH 7, 2007:

Verified Complaint for Injunctive and Declaratory Relief on behalf of Pastor Clyde Reed and the Good News Presbyterian Church filed against the Town of Gilbert, AZ.

Filed in Federal Court in Phoenix, AZ, the next day, March 8, 2007. And so it began . . .

Sandra Day O’Connor Federal Courthouse

Town amends its Sign Code in 2008.

● 1-hour duration before an event changed to 12-hour duration before an event.

● Original exemption was for “religious assembly temporary directional signs.” Town of Gilbert broadened the exemption and renamed it “temporary directional signs relating to a qualifying event” – which was broadly defined.

Town amends its Sign Code in 2008.

Pastor Reed then filed an Amended Complaint and a Second Motion for Injunctive Relief. 12 hours were not enough, and other assertions including differences between different types of noncommercial signs.

SEPTEMBER 30, 2008.

Round 1 of 5: TOWN WINS.

Judge Bolton enters Order denying Motion for Injunctive Relief.

JUDGE SUSAN BOLTON

Pastor Reed and Good News Community Church then file an appeal to U.S. Ninth Circuit Court of Appeals, San Francisco, CA, to be heard by a three-judge Panel.

JAMES R. BROWNING FEDERAL COURTHOUSE, SAN FRANCISCO, CA

THE U.S. NINTH CIRCUIT COURT OF APPEALS HANDLES 20% OF ALL APPEALS IN THE UNITED STATES

NOVEMBER 20, 2009.

ROUND 2 OF 5: TOWN WINS AGAIN.

The U.S. Ninth Circuit Court of Appeals, in a decision written by Judge Consuelo Callahan, holds that the Town's Sign Code was not a content-based regulation and was a reasonable time, place and manner restriction.

JUDGE CONSUELO CALLAHAN

However, the case was not over.

The Ninth Circuit remanded the case back to the District Court "to consider the First Amendment and equal protection claims that the Sign Code is unconstitutional in **favoring some noncommercial speech over other noncommercial speech**."

So back to the U.S. District Court in Phoenix, AZ in late 2009 . . .

SANDRA DAY O'CONNOR FEDERAL COURTHOUSE

AND THEN TWO YEARS LATER.....

FEBRUARY 11, 2011

ROUND 3 OF 5: TOWN WINS AGAIN.

U.S. District Court rules in favor of The Town of Gilbert.

JUDGE SUSAN BOLTON: **Not a content-based regulation. "If applied without common sense, this principle [the "officer must read it" test] would mean that every sign, except a blank sign, would be content-based."**

Then back to the U.S. Ninth Circuit In San Francisco, CA . . .

Ping Pong Table

FEBRUARY 8, 2013

ROUND 4 OF 5: TOWN WINS AGAIN.

The U.S. Ninth Circuit Court of Appeals, in a 2-1 Opinion authored by Judge Margaret McKeown, affirms Judge Bolton's Summary Judgment in favor of Town.

JUDGE MARGARET McKEOWN

The U.S. Ninth Circuit held that the Town’s Sign Code was not a content-based regulation and was a reasonable time, place and manner restriction.

This was the Town's 4th victory after nearly seven years of litigation (2007-2013).

What about that lawyer Randal Morrison out in California?

What was he so worried about back in 2007-2008?

So . . . what’s next?

PASTOR REED AND THE GOOD NEWS COMMUNITY CHURCH SEEK REVIEW AT THE U.S. SUPREME COURT BY WAY OF A PETITION FOR CERTIORARI (A DISCRETIONARY REVIEW PROCEDURE).

ONLY 1% OF CERT PETITIONS ARE GRANTED EACH YEAR.

UNITED STATES SUPREME COURT

TIMELINE:

JULY 28, 2014: U.S SUPREME COURT GRANTS REVIEW. EXTENSIVE BRIEFING FOLLOWS.

JANUARY 12, 2015: ORAL ARGUMENTS BEFORE THE SUPREME COURT.

FOLLOWING THE ORAL ARGUMENTS, CHIEF JUSTICE JOHN ROBERTS ASSIGNS TO JUSTICE CLARENCE THOMAS THE IMPORTANT TASK OF WRITING THE MAJORITY OPINION.

CHIEF JUSTICE JOHN ROBERTS

JUSTICE CLARENCE THOMAS

ASSIGNED THE TASK OF
WRITING THE MAJORITY OPINION

June 18, 2015: Decision is released by U.S. Supreme Court.

Round 5 Of 5. Final Round. Town loses 9-0.

3 of 9 Justices concur in result only.

Nearly 10 years after the initial 2005 citation.

After 8 years of litigation.

4 Opinions were written.

U.S. SUPREME COURT

Majority Opinion, written by Justice Clarence Thomas, and joined by Justices Scalia, Roberts, **Alito, Kennedy and Sotomayer**. Decision garners headlines such as: "**Under-The-Radar** Supreme Court Freedom of Speech **Case Sends Shockwaves** Through Courts and Legislatures."

JUSTICE CLARENCE THOMAS

Concurring 2-page Opinion written by Justice Samuel Alito and joined in by Justices Kennedy and Sotomayer, providing clarification that "**properly understood**, today's decision **will not prevent cities from regulating signs** in a way that fully protects public safety and serves legitimate esthetic objectives."

JUSTICE SAMUEL ALITO

Concurring Opinion in result only written by Justice Kagan and joined in by Justices Breyer and Ginsburg, **warning of consequences of the decision for local governments**.

JUSTICE ELENA KAGAN

It bears repeating. Kagan: **Courts will discover that <u>thousands of towns have entirely reasonable ordinances</u> and as the challenges to them mount, <u>courts will have to invalidate one after the other</u>.**

JUSTICE ELENA KAGAN

Concurring Opinion in result only written by Justice Stephen Breyer and joined in by Justice Kagan, noting the **far-reaching impact of the decision on all manner of laws and regulations**.

JUSTICE STEPHEN BREYER

Justice Breyer expressed how the heightened scrutiny might impact governmental regulations of securities, conservation labeling-practices, labeling of prescription drugs, doctor-patient confidentiality, income tax statements, commercial airplane briefings, required signs at petting zoos, as just several examples.

Example: *Dana's Railroad Supply v. Attorney General, State of Florida*

Second-degree misdemeanor for imposition of a surcharge for using a credit card. Section 501.0117, Florida Statutes, struck down as an abridgement of free speech. 2-1 decision.

Dissent: "[w]e have a Greek tragedy consisting of a state statute being struck down for no good reason."

A problem for Arizona: ELECTION SIGNS.

Arizona's State Legislature expressly allows election signs in the public right-of-way. The Town of Gilbert changed its ordinance to allow temporary directional signs to be in the right-of-way.

TOWN OF GILBERT, ARIZONA – PUBLIC RIGHT-OF-WAY

SO NOW WHAT?

Another consideration when it comes to the public property and the public right-of-way:

Hate speech in the right-of-way.
Westboro Baptist Church protest signs.

What if these handheld signs were placed in the ground as temporary signs?

GOD
KILLED
YOUR
SONS
PRAY
FOR
MORE
DEAD
SOLDIERS

Sometimes you cannot anticipate what type of mischief may occur in a community. Take the Town of Cary, NC:

SO HERE IS THE PROBLEM WITH TEMPORARY SIGNS FOLLOWING REED:

WHAT IS THE SOLUTION?

WHAT OTHER CONSEQUENCES MAY LURK OUT THERE FOR LOCAL GOVERNMENTS?

RE-EMERGENCE OF THE BILLBOARD SHAKEDOWN SCHEME

BUT WITH A CRITICAL DIFFERENCE.

A Word About
CUSTOMARY USE
[CUSTOMARY USAGE]
and
SIGN CONTAINING
CHANGING ILLUMINATION

THE GOOD NEWS IN THE *GOOD NEWS* DECISION

WHAT IS "CONTENT NEUTRAL" GOING FORWARD IF REED IS "PROPERLY UNDERSTOOD"

ALITO:

I join the opinion of the Court but add a few words of further explanation.

ALITO:

This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations.

ALITO:

I will not attempt to provide anything like a comprehensive list, **but here are some rules that would not be content-based**

ALITO:

[1] Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

ALITO:

[2] Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding signs and those attached to buildings.

ALITO:

[3] Rules distinguishing between lighted and unlighted signs.

ALITO:

[4] Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

ALITO:

[5] Rules that distinguish between the placement of signs on private and public property.

ALITO:

[6] Rules distinguishing between the placement of signs on commercial and residential property.

ALITO:

[7] **Rules distinguishing between on-premises and off-premises signs.**

[Billboards = off-premises signs]

ALITO:

[8] Rules restricting the total number of signs allowed per mile of roadway.

ALITO:

[9] Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature . . . are akin to rules restricting the times within which oral speech or music is allowed.

ALITO:

[10] In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech.

ALITO:

[10 continued.]
They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

ALITO:

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

DR. SEUSS

“Signs of Civilization”

1956

SIGNS
OF
CIVIL-
-IZ-
ATION!
By Dr. Seuss
La Jolla Town Council, Inc.

There once was a guy
And his name was Guss
Who invented a product
Called Guss-ma-Tuss.
(I forget what it did,
But the product was good.)
So he whapped out a sign
As he darned well should.

Then along came a guy, and his name was Zaxx
Who invented a product called Zaxx-ma-Taxx.
And he said:
"I shall show this bush-leaguer Guss
"I can double out-sell his Guss-ma-Tuss!"
And, so, Board Chairman Zaxx of Zaxx-ma-Taxx
Whapped out a much bigger sign with his axe.

That's how it all started.
THEN good old Guss
Put a bigger pitch in
For Guss-ma-Tuss!

Of course, you know how Zaxx re-acted.
(Just about like you expacted.)
Ten-ton signs around his door!
THEN Guss . . .
HE re-reacted more!
And, thus between them, with impunity
They loused up the entire community.

Sign after sign, after sign, until
Their property values slumped to nil.
And even the dinosaurs moved away
From that messed-up spot in the U.S.A.

Which is why
our business men never shall
Allow such to happen
in La Jolla, Cal.

The business people of the La Jolla Town Council believe in advertising. In fact, we live on advertising! But at a certain point, good taste comes into the picture. We are *not* going to go the way of most of the rest of California. ***We are not going to let our town be blighted by the uncontrolled clutter of unsightly signs.***

The San Diego City Council, in cooperation with the La Jolla Town Council, passed the La Jolla Commercial and Industrial Sign Control District Ordinance to supplement the City-wide Sign Regulations. These laws include the following:

1. A permit is required for every business sign. (With limited exceptions)
2. There shall be no commercial bill boards in La Jolla.
3. There shall be no projecting signs within the coastal zone.
4. Signs shall be limited proportionally to the street frontage of the building.
5. Rotating signs, flashing signs, roof and high-rise building identification signs are all prohibited.
6. No banner signs are permitted except those announcing the opening of a new business (maximum of 60 days).
7. No sandwich board signs are allowed.

For information regarding rules regulating signs for your business call 236-6490 (Zoning Department) and for information on required sign permits call 236-6027 (Sign Code Administration).

Good taste, we've discovered, means Better Business

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La Jolla, California

A Word About PHOTO COMPARISONS

BEFORE AND AFTER PHOTOS

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REED v. TOWN OF GILBERT

William D. Brinton
Rogers Towers, P.A.
1301 Riverplace Blvd., Suite 1500
Jacksonville, Florida 32207-1811
Direct Line: 904-346-5537
wbrinton@rtlaw.com

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I. *Pastor Clyde Reed and the Good News Community Church v. Town of Gilbert,* ----S. Ct.---- (June 18, 2015); or How Sign Law in America Just Changed Forever.

On June 18, 2015, the U.S. Supreme Court decided *Reed v. Town of Gilbert, Arizona*, ----S. Ct.---- (2015). The majority opinion, authored by Justice Thomas, was joined by Chief Justice Roberts and Justices Scalia, Sotomayor, Kennedy, and Alito. A separate concurring opinion was authored by Justice Alito, joined by Justices Kennedy and Sotomayor. Another concurring opinion was authored by Justice Kagan, joined in by Justices Breyer and Ginsburg, concurring in the result only. Another concurring opinion was authored by Justice Breyer, joined in by Justice Kagan, concurring in the result only.

The decision has been described as a shockwave and a blockbuster. The decision will reach far beyond just sign regulations. Insofar as sign regulations are concerned, there is no question that the decision impacts the temporary noncommercial sign regulations typically found in sign ordinances across the United States. Inasmuch as the action was based upon a Section 1983 claim, there is now a pending claim for attorneys' fees in excess of $1 million.

The fallout from the *Reed* decision is starting to ramp up, not only in published decisions but in new litigation-some of it reminiscent of the sign code shakedown schemes of a decade ago. My comments and observations on the decision will be covered in my oral presentation, my power point, and in the Q and A that is sure to follow.

II. The Significance of the 2-Page Concurrence by Justice Alito, joined in by Justices Kennedy and Sotomayor.

Justice Alito's two page concurring opinion is critical to understanding the holding in *Reed* and to how the decision impacts the country's sign regulations. Indeed, Justice Alito, with Justices Kennedy and Sotomayor, used the term "properly understood" to frame the decision vis a vis what survives as content neutral regulations going forward. For local governments, it should come as a relief and a far different outcome than how the *Reed* decision impacts noncommercial temporary signs - traditionally regulated in part by different categories or classifications, and functions or purposes.

The Alito concurrence is notable for its emphasis on what rules will remain content neutral and essentially a 'safe harbor' for local governments to regulate signage to advance esthetic interests. Those esthetic interests remain substantial governmental interests subject to intermediate scrutiny review, but they fail strict scrutiny review inasmuch as they are not recognized as compelling governmental interests.

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n of N.Y.,* 447 U. S. 530, 537 (1980).

* * *

This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, **but here are some rules that would not be content-based:**

[1] Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

[2] Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding signs and those attached to buildings.

[3] Rules distinguishing between lighted and unlighted signs.

[4] Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

[5] Rules that distinguish between the placement of signs on private and public property.

[6] Rules distinguishing between the placement of signs on commercial and residential property.

[7] Rules distinguishing between on-premises and off-premises signs.

[8] Rules restricting the total number of signs allowed per mile of roadway.

[9] Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed. [Footnote omitted.]

[10] In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467-469 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

> **Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.**
>
> (Brackets and emphasis in bold added.)

It is a mistake to believe that a concurring opinion in the context of *Reed* can have no impact in light of the majority opinion. Here, the majority is a combination of two groups of three Justices. Generally speaking, when there is a majority opinion, concurring opinions are supposed to be given no weight by lower courts. That is the law in theory, but there are circumstances where lower courts give concurring opinions weight.

There are at least three circumstances where concurring opinions in situations similar to *Reed* have significance. In the sections below, those circumstances are identified as follows: (1) when the concurring opinion is written by a swing vote Justice, (2) when the concurring opinion is narrower than the majority opinion, and (3) when the concurring opinion is clearer than the majority opinion. For each circumstance, a Supreme Court opinion is highlighted. They ultimately explain why Justice Alito's concurrence, with Justices Kennedy and Sotomayor joining, should be given precedential value.

1. <u>The "Swing Vote" Concurrence.</u>

The swing vote concurrence might just be the most popular concurrence that gains precedential value. As Ryan Moore explains, "where the emphatic concurrence agrees with the majority's reasoning and the Justice writing the emphatic concurrence is necessary to provide a majority, the precedential value of that concurrence may be elevated… if the particular Justice writing the emphatic concurrence was necessary for such a majority, a future court might do well to take notice of the particular points the concurring Justice emphasized in his individual opinion." Ryan Moore, Note, *I Concur! Do I Matter?: Developing a Framework for*

Determining the Precedential Influence of Concurring Opinions, 84 TEMP. L. REV. 743, 759 (2012).

There are plenty of cases in which a swing vote concurrence later became influential. Three are highlighted here. The first is the famous case of *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). There, Justice Powell's sole concurring opinion was more authoritative than the majority's partly because Justice Powell formed the fifth swing vote for the majority. *See, e.g.*, *Uzzel v. Friday*, 591 F. 2d 997, 999 (4th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284, 1292-93 (5tth Cir. 1978); Igor Kirman, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2084 n.7 (1995). Another case is *National League of Cities v. Usery*, 426 U.S. 833 (1976), where the majority of the Court most likely adopted a categorical approach to interpreting the Tenth Amendment and whether the Fair Labor Standards Act violated it. However, lower courts, like *United Transportation Union v. Long Island R.R.*, 634 F.2d 19 (2d Cir. 1980), adopted Justice Blackmun's balancing test from his concurrence for determining whether the act in question violated the Tenth Amendment. The reason the Second Circuit did so was because Justice Blackmun was the fifth swing vote for the majority opinion. *Id.* at 25. *See also* Kirman at 2093. One last example where the swing vote concurrence won out over the majority opinion is the famous First Amendment case of *Branzburg v. Hayes*, 408 U.S. 665 (1972). There, part of the reason the lower courts adopted Justice Powell's concurrence is because his vote formed the majority. *See United States v. Liddy*, 478 F.2d 586, 586 (D.C. Cir. 1972) ("[T]he *Branzburg* decision is controlled in the last analysis by the concurring opinion of Justice Powell…*as the fifth Justice of the majority*.") (emphasis added).

In *Reed*, Justices Alito, Kennedy and Sotomayor's votes were all swing votes that were necessary in order to make a majority. As such, there were three swing votes (as opposed to just one) and their concurring opinion should be given *even greater* precedential value than a concurring opinion by one Justice. Lower courts should heed what these Justices categorize as content neutral restrictions because the majority opinion implicitly does—if the other three Justices of the majority opinion did not agree with Justices Alito, Kennedy and Sotomayor on what constitutes a content neutral restriction, the three latter Justices would not have signed on to the majority. Lower courts should indeed recognize this.

2. <u>The "Narrowest Grounds" Concurrence.</u>

In some cases, lower courts decide to give precedential value to the concurring opinion that has a narrower, more specific rationale than the majority's. This "narrowest grounds" approach actually stems from *Marks v. United States*, 430 U.S. 193 (1977). There the Court explained, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of the five justices, '*the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.*'" *Id.* at 193 (emphasis added). In other words, the opinion with the narrowest, most specific rationale explaining the holding is given precedential weight.

Although the *Marks* Court adopted the narrowest grounds approach in the context of plurality opinions, lower courts have applied the doctrine to cases with majority opinions. There are various examples. Perhaps, the most famous one is *United States v. Container Corp. of America*, 393 U.S. 333 (1969). There, lower courts gave Justice Fortas's concurring opinion precedential value because his opinion was more specific than the six-Justice majority's. At issue was whether the opinion of the Court adopted a rule of reason or *per se* rule of liability regarding

a system in which companies exchanged price information. Lower courts looked to Justice Fortas's concurrence because it provided the answer, opining that the Court adopted a rule of reason. *See, e.g., Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 208 (9th Cir. 1974).

In *Reed*, Justice Alito's concurrence is narrower than the majority's opinion when discussing the topic of content neutral restrictions. Since the majority does not spend a lot of time on what constitutes a content neutral restriction (see Section IV of the majority opinion for the Court's brief paragraph explanation of content neutral restrictions), but the Alito concurrence does, the latter opinion is narrower and should be given more precedential value by lower courts.

3. <u>The "Clarifying" Concurrence.</u>

Another popular reason why a concurring opinion may get more precedential value than a majority one is because the majority opinion is not clear. Often, majority opinions are the product of compromise among the Justices. Thus, they might not always make perfect sense. When this happens, lower courts naturally look to the concurring opinion to clear the air. Indeed, Judge Kozinski of the Ninth Circuit recognizes this phenomenon. In such cases of confusion, he says, lower courts wisely look for guidance to the concurrence opinion. Judge Kozinski explains: "one clearly expressed view is better than many unclear views." Telephone Interview with the Honorable Alex Kozinski, U.S. Court of Appeals of the 9th Circuit (Apr. 15, 1995) (cited in Kirman at 2084 (1995)).

One example of this phenomenon has already been mentioned: *Container Corp. of America*. There, not only was Justice Fortas's concurrence more specific, it was also clearer. Since the majority opinion was muddied, lower courts looked to the concurrence for guidance. For more, *see* Kirman at 2091 ("Thus, by 'clarifying' the majority opinion, Justice Fortas's

simple concurrence has achieved some influence in lower courts, in spite of the fact that it was written by a single Justice and the fact that it represented the sixth, and numerically unnecessary, vote of the majority.")

Of the three circumstances, Justice Alito's concurrence best fits this one. Justice Alito directly stated that he hoped to clarify the majority opinion. He said, "*Properly understood*, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives." *Reed v. Town of Gilbert, Arizona*, ----S. Ct.---- (2015) (emphasis added). Justice Alito wanted to ensure that lower courts reading the majority opinion would read that opinion the same way he, Kennedy, and Sotomayor did. He hoped to provide the lower courts with correct guidance for what constitutes a content neutral restriction.

"Properly understood" and "a few words of further explanation" comprise the specific guidance of three Justices for clearly understanding the majority opinion in which they joined. While they did not provide a comprehensive list, they were emphatic as to a list of nine "rules that would not be content based." One such rule was the distinction between onsite signs and offsite signs, a traditional demarcation for the regulation of billboards. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Local governments and supporters of preserving and enhancing community character should be thankful for the thoughtful concurrence of Justices Alito, Kennedy and Sotomayor.

II. The Importance of Preambles.

I have often heard or observed jurists inquire as to what was the purpose behind this provision or that provision of a sign ordinance. There is often a simple and logical response, but the problem for counsel is that there is nothing in the record to provide context for choices made by a local government in their effort to address aesthetics, traffic safety, pedestrian safety, property values, community character, and the like. The failure to provide an explanation can be fatal to an argument, whether in a written brief or the opportunity at oral argument to educate one judge, a panel of three judges, or a panel of nine justices.

It has been my practice over the past decade to pay extraordinary attention to the preambles that accompany the adoption of sign regulations or later amendments. Careful and thorough consideration of the reasons for the regulations proposed for adoption should be set forth in a set of preambles. Do not wait to explain to a trial or appellate court to question the reasons underlying the purpose(s) for the adoption of those regulations. Do not plan on relying upon hearsay or expert witnesses whose testimony may be disallowed. Put these reasons into the adopting document. The importance of the preambles is in addition to setting forth the stated purposes within and as part of the sign regulations themselves.

It has also been my practice in recent years to set forth the state of the law at the time of consideration of the adoption of sign regulations, and it may be wise to readopt the entirety of sign regulations today with those preambles forming a part of the process. I would add that the case law to be incorporated into the preambles may be changing to such a degree that it would be time to consider refreshing the preambles. Certainly the *Reed v. Gilbert* decision should be taken into account in the preambles and the Alito concurrence.

For those jurisdictions that prohibit or constrain certain sign types, such as billboards, it may be appropriate to note how many governments across this nation prohibit new billboards

outright, unless there are constraints in the state constitution or in state legislation. There are four states (Hawaii, Alaska, Maine, and Vermont) that have a prohibition on new billboards. It may be appropriate to even go back to recommendations from planning professionals over the years as to certain disfavored sign types, such as scrolling signs, blinking signs, rotating signs, moving signs, and the like. It may be appropriate to consider reference to statutory provisions that require the adoption of sign regulations, and reference to provisions in adopted comprehensive plans. This exercise may reveal the wisdom of updating the comprehensive plan to address aesthetics, community appearance, scenic values, and other considerations that would benefit from inclusion or more specificity in the comprehensive plan. Indeed, there are few if any comprehensive plans that could not be improved in this area so as to provide an even better foundation for the adopted sign regulations. This should not be an afterthought.

III. The Importance of Making the Record.

It is critical to make a complete and compelling record at the federal district court or state trial court. A careful review of appellate decisions rendered over the past forty years confirms that those cases with a strong record, including photographs and visual aids, may tip the balance when dealing with aesthetic issues such as sign control. Photo simulations clearly demonstrating the scale of the land development issues have aided recent cases. It gives meaning to the old adage, "A picture is worth a thousand words."

Making this record can begin even earlier than the litigation itself, photographs and visual aids may be of assistance in connection with the process of adopting or amending sign regulations. Municipal planners, as well as outside planners, may be of invaluable assistance in this endeavor.

As a recent example, the *Reed* case demonstrated the power of visual aids. In this instance it was visual aids that framed the issue with great effect.

IV. Mootness, Severence, Standing, and Attorneys' Fees.

One question that has been posed to me over the years has been whether or not a local government should amend its sign regulations once a legal challenge has been mounted. Some views are that a local government should await a judicial decision as to whether portions of its sign regulations are unconstitutional before proceeding with amendments or revisions, and some views are that doing so may signal an implied acknowledgment that the challenged regulations were indeed flawed and unconstitutional as claimed.

My response over the years and still today is: **NO!** In fact my response today is even stronger than just a bolded "NO" followed by an explanation point.

Sign regulations, even when not unconstitutional, can always be improved. The regulations and their accompanying preambles may be an opportunity to set forth the rationale for certain regulatory provisions even if they are not the ones directly challenged. There are a number of decisions that have been poor outcomes for local governments for a variety of reasons. In nearly each case, and perhaps in all cases, the bad outcome was predictable from the outset. There were countless opportunities to undertake a fix or an adjustment to remedy what may have appeared to others to be problematic. If the sign regulations can be improved, then do not wait. **Just do it!**

I have had many opportunities to assist in the crafting of updated sign regulations while sign litigation was pending. Some of those cases involved issues of a plaintiff's standing in the first place to bring the action, and the presence of a severability clause was often in play. The issue of mootness can become relevant upon the adoption of sign code improvements that were not sham actions, and the issue of attorneys' fees may come into play as well. Decisions of the

United States District Courts for the Northern and Middle Districts of Florida are instructive. In both cases, while litigation was pending or threatened, there were sign code amendments.

In *Granite State Outdoor Advert., Inc. v. City of St. Pete Beach, Fla.*, 322 F.Supp.2d 1335 (M.D.Fla. 2004), *appeal dismissed* (11th Cir. April 5, 2004) (No. 04-10691), the district court ruled as follows:

> **I. BACKGROUND**
>
> This is the third case in a trilogy of First Amendment billboard cases brought in this Court by the Plaintiff, Granite State Outdoor Advertising, Inc. ("Granite State"), against cities in the Tampa Bay area. [FN2] Granite State is a Georgia corporation that is in the business of acquiring billboard permits and erecting and leasing advertising space on its billboards. In this case, Granite State signed lease agreements authorizing it to construct and operate one trivision [FN3] billboard sign on five different parcels of real property within the City of St. Pete Beach (the "City"). The City is a political subdivision of the State of Florida located on the west coast of Florida with beaches on the Gulf of Mexico.
>
> > FN2. The two previous cases have been ruled on by the Eleventh Circuit. In *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, the Eleventh Circuit affirmed in part and reversed in part this Court's rulings on cross motions for summary judgment. 348 F.3d 1278 (11th Cir. 2003) ("*Granite State I*"). Similarly in *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, the Eleventh Circuit also affirmed in part and reversed in part this Court's rulings on cross motions for summary judgment and Granite State's motion for injunctive relief and remanded the case back to this Court. 351 F.3d 1112 (11th Cir. 2003) ("*Granite State II*").
> >
> > FN3. Trivision refers to a series of three sided prisms grouped together that rotate approximately every ten seconds allowing an outdoor advertiser to have in effect three billboards at one location.
>
> **A. GRANITE STATE'S APPLICATIONS FOR SIGN PERMITS**
>
> On February 13, 2002, two Granite State representatives went to the City offices where sign permits are issued. According to Granite State's version of the facts, the representatives presented completed applications with attachments to Lisa Giddens, an Administrative Services Assistant for the City, who receives all submitted sign permit applications. In its applications, Granite State proposed erecting five sixty-five foot tall billboards with signage areas of 378 to 672 square

feet. Giddens indicated to Granite State that the City did not allow off-site signs. Granite State requested that Giddens issue a written denial. On February 15, 2002, Giddens sent a letter to Granite State indicating that the City did not allow off-site signs except in two limited circumstances, neither of which applied to Granite State.

According to the City's version of events, two Granite State representatives went to the City offices where sign permits are issued. The two representatives talked to Giddens about obtaining sign permits, but did not file or submit any applications. During this conversation, Giddens advised them about the off-site sign ban. The two representatives requested her advice in writing, and the letter that Granite State received was her advice in writing about the off-site sign ban.

On February 22, 2002, Granite State filed a twelve count complaint. The City moved to dismiss on the basis of lack of standing, arguing that Granite State never had its applications denied because the applications were never filed or submitted. [FN4] On March 27, 2002, Granite State re-applied for five sign permits filing identical applications to those presented in February. [FN5] On June 18, 2002, the City denied the new applications [FN6] because the proposed signs were off-site signs and, even if the signs were not off-site signs, the signs exceeded height and area limits. [FN7]

> FN4. This Court subsequently denied the City's motion without prejudice.
>
> FN5. Granite State never filed an amended complaint alleging that the denial of the second applications violated its constitutional rights. Even if it had, this Court's analysis would not change. *The only additional section of the ordinance that Granite State would have standing to challenge would be the lack of time limits for approving permits. Because this Court concludes that the ordinance in question is content neutral, the lack of time limits does not constitute a constitutional violation or necessitate the invalidation of the entire ordinance. See Granite State I,* 348 F.3d at 1282.
>
> FN6. *Granite State never appealed either denial.*
>
> FN7. After conducting discovery, the City now indicates that the proposed signs would also violate its prohibition against animated signs. *See* St. Pete Beach Code § 122.4(e); *also* St. Pete Beach Amended Code § 26.4(d).

B. THE SIGN ORDINANCE

The City's then existing sign ordinance (the "sign ordinance") was enacted in November 1998. The purposes in enacting the sign ordinance were the promotion of aesthetics and traffic safety. *See* St. Pete Beach Code §§ 122.2, 122.4(b). [FN8] Section 122.4(h) states that "[o]ff-site signs are prohibited, except as expressly provided in section 122-12 and article III of this chapter." *Id.* § 122.4(h). An off-site sign is further defined as "any sign relating in its subject matter to commodities, accommodations, services or activities on a premises other than premises on which the sign is located." *Id.* § 122.1(16). The St. Pete Beach Code contains two exceptions to the general prohibition against off-site signs: (1) subdivision signs; [FN9] and (2) off-site signs advertising for a major attraction. [FN10]

FN8. Section 1.13 contains a severability clause. Section 1.13 states:

> The sections, paragraphs, sentences, clauses and phrases of this Code are severable, and if any phrase, clause, sentence, paragraph or section of this Code shall be declared unconstitutional by the valid judgment decree of a court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Code.

St. Pete Beach Code § 1.13

FN9. Section 122.12 allows for up to two off-site subdivision signs to be placed within the public right-of-way. *See id.* § 122.12. Such signs in most areas seem to be further limited to 24 square feet in area and a maximum height of six feet. *See id.* §§ 122.232, 122.267, 122.302. In no area can such signs exceed 44 square feet in area and a maximum height of twelve feet. *See id.* §§ 122.337, 122.372.

FN10. Section 122.468(11) allows for a single off-site sign advertising a major attraction in C-3 commercial zones. *See id.* § 122.468(11). Major attraction is not defined within the sign ordinance. The types of off-site signs allowed include ground or wall mounted marquees, projecting or window signs, and roof-mounted signs. *See id.* A major attraction would be covered by Section 122.468(11), which would limit the height and area of the sign. *See id.* § 122.468(11).

The only evidence in the record indicates that since the sign ordinance was enacted in 1998 the City has not issued such a permit and no application had been received to place a "major attraction" off-site sign. Indeed, only one such sign exists in the

> City and that sign was erected approximately forty years ago before the City had a sign ordinance.

Granite State's proposed signs were to be located on property zoned either C-2 Tourist Residential or C-3 General Commercial. In either a C-2 or C-3 zoned area in the City, freestanding signs can only have a maximum area of one hundred thirty five square feet and a height of thirty five feet. *See* St. Pete Beach Code §§ 122.438(1)(b), (c), 122.468(1)(b), (c). Additionally, Section 122.8 states that all signs must be "designed, constructed, and maintained in accordance with the applicable provisions of the construction codes and city ordinances...." [FN11] *See id.* § 122.8.

> FN11. Similarly, Section 122.72 allows the City to request from a sign permit applicant information to demonstrate compliance with "all other city laws and ordinances." *Id.* § 122.72. First to the extent that the height limits contained in chapter 122 would not apply, the City's zoning code would bar construction of a sixty five foot sign. *See* St. Pete Beach Code §§ 134.876, 134.984. Second, Granite State presented no evidence that it ever applied for or was in compliance with the applicable building codes.

C. THE AMENDED ORDINANCE

On June 4, 2003, after both parties moved for summary judgment, the City repealed its sign ordinance, enacted a new sign ordinance (the "amended ordinance"), and filed a suggestion of mootness. The amended ordinance accompanied a new land development code and apparently removed many of the sections of the sign ordinance about which Granite State complained. The amended ordinance prohibits and defines an off-site sign exactly the same as under the prior sign ordinance, except it adds a cross reference "See also *Billboard*." *See* St. Pete Beach (Amended) Code §§ 26.4(a), 26.1 (emphasis in original). The term "Billboard," which was not previously defined, is defined as "a sign structure and/or sign utilized for advertising an establishment, an activity, a product, service or entertainment, which is sold, produced, available or furnished at a place other than on the property on which said sign structure and/or sign is located." *Id.* § 26.1. The amended ordinance does not contain either a major attraction or an off-site subdivision sign exception. Additionally, Section 26.9 of the amended ordinance makes clear that noncommercial messages not related to the business located on a premises are allowed, as long as the size, height, setback, and other dimensional criteria are met. *See id.* § 26.9.

II. SUMMARY JUDGMENT STANDARD

Motions for summary judgment should only be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). The substantive law applicable to the claimed causes of action will identify which facts are material. *See id.* Throughout this analysis, the district court must examine the evidence in the light most favorable to the non-movant and draw all justifiable inferences in its favor. *See id.* at 255, 106 S.Ct. 2505.

III. DISCUSSION

A. STANDING

After briefing was completed in this case, the Eleventh Circuit decided *Granite State II*, affirming in part and reversing in part this Court's ruling in a factually similar case. 351 F.3d 1112 (11th Cir. 2003). In *Granite State II*, the Eleventh Circuit reversed this Court's conclusion that *Granite State* had standing to challenge the overbreadth of the City of Clearwater's entire sign ordinance. *See id.* at 1116-17. Instead, the Eleventh Circuit held that *Granite State* had standing to challenge, as applied or under the overbreadth doctrine, only the section of Clearwater's sign ordinance under which its application was denied. [FN12] *See id.* at 1117. The court reasoned that the height and area limitation was the only section of the ordinance under which Granite State suffered an injury in fact. See *id.*

> FN12. In that case, Granite State's application was denied under height and area restrictions contained in Clearwater's sign ordinance. *See id.* The Court concluded that regulation constitutional as applied and not overbroad. *See id.*

In this case, Granite State similarly argues that it has standing to challenge the entirety of the City's sign ordinance. This Court concludes that Granite State lacks standing to challenge any section of the City's sign ordinance other than Section 122.4(h) because Granite State has failed to show that it personally suffered actual or threatened injury from any other section of the sign ordinance. [FN13]

> FN13. This Court also concludes that Granite State has standing to challenge the two exceptions to the off-site sign prohibition. *However, Granite State lacks standing to challenge the City's permitting procedures because, accepting Granite State's version of events as true, the City denied its application on the same day as it applied. Even if Granite State had standing to challenge the lack*

> *of time limits in the permitting process, this Court would conclude that the sign ordinance is content neutral and that the lack of time limits is constitutionally acceptable and not a prior restraint. See Granite State I,* 348 F.3d at 1282-83.

B. MOOTNESS

This Court next turns to whether Granite State's constitutional challenge to Section 122.4(h) became moot when the City amended its development code and sign ordinance. First, this Court must determine whether any constitutional issue exists under Section 122.4(h). Previously, the Eleventh Circuit concluded that a similar prohibition on the construction of billboards and off-site premises signs was constitutional. *See Southlake Property Assocs., Ltd. v. City of Morrow*, 112 F.3d 1114 (11th Cir. 1997).

In Southlake, the City of Morrow's ordinance prohibited billboards and off-site signs. In that case, the ordinance defined a billboard as a "sign which advertises a commodity, product, service, activity or any other person, place, or thing, which is not located, found or sold on the premises upon which such sign is located." *Id.* at 1117. The Eleventh Circuit concluded that such a ban met the Central Hudson test and did not impermissibly burden commercial speech. *See id.* The court also concluded that such a ban did not regulate noncommercial speech because noncommercial speech always occurs at the site where it is expressed. *See id.* at 1118-19. In reaching this conclusion, the Eleventh Circuit found that the ordinance in question was ambiguous as to whether it applied to noncommercial speech and interpreted the ordinance to avoid the constitutional problem of preferring commercial over noncommercial speech. *See id.* at 1119.

In this case, the definition of off-site sign is identical to that contained in Southlake. However, the prohibition against off-site signs in this case contains two exceptions that were not present in Southlake. One of those exceptions, the subdivision sign exception, seemingly implies that the off-site sign prohibition in this case includes a prohibition on at least some noncommercial speech, which would run afoul of the Supreme Court's holding in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). [FN14] Because this Court concludes that a constitutional issue is raised by Section 122.4(h), this Court must determine if that issue became moot when the City repealed its sign ordinance and enacted an amended ordinance that does not contain such an exception.

> FN14. Other provisions in the sign ordinance suggest an intent by the City to [exclude] noncommercial speech within Section 122.4(h)'s prohibition. This Court does not resolve whether Section 122.4(h) was facially unconstitutional.

A case becomes moot when a superseding event after the commencement of a case removes a challenged feature of a statute or ordinance so that a court can no longer give meaningful relief. *See Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). However, the Eleventh Circuit has repeatedly held that voluntary cessation of a challenged practice alone does not render a case moot. *See Jews for Jesus, Inc. v. Hillsborough County Aviation Authority*, 162 F.3d 627, 629 (11th Cir. 1998); *National Advertising Co. v. City of Fort Lauderdale*, 934 F.2d 283, 286 (11th Cir. 1991). Instead, the Eleventh Circuit has held that a challenge becomes moot when the challenged policy was repealed by the governmental authority and there was no reasonable expectation that the governmental authority would return to the prior policy. *See Jews for Jesus*, 162 F.3d at 629 (involving a First Amendment challenge). In Jews for Jesus, the Eleventh Circuit relied on a district court's findings that the change in policy was the result of "substantial deliberation" and had been "consistently applied" for three years to hold that a return to the prior policy was remote. *Id.*

In this case, this Court concludes that Granite State's facial challenge to Section 122.4(h) is moot. [FN15] First, it is undisputed that the City enacted the amended ordinance around the same time as it enacted a new comprehensive land development code. The new land development code necessitated, at least in part, the adoption of the amended ordinance. Second, the amended ordinance and the land development code appear to be the product of substantial deliberation. The record contains two rather lengthy ordinances and also indicates that multiple public hearings were held before either was passed. Additionally, the amended ordinance resolves any constitutional issue that existed under Section 122.4(h). Finally, there is no evidence and no reason to think that the City will change its policy at the conclusion of this case.

> FN15. Granite State has sought damages for the application of the unconstitutional sign ordinance to its applications. Therefore, this Court's conclusion that the amended ordinance moots Granite State's facial constitutional challenge does not affect Granite State's as applied challenge in so far as it seeks damages. *See Granite State II*, 351 F.3d at 1119.

C. SEVERANCE

Even if this Court were to reach the constitutionality issue and hold Section 122.4(h) unconstitutional, this Court would conclude that Section 122.4(h) is severable because the intent of City's sign ordinance is preserved and speech is not more restricted after severance. After severing Section 122.4(h), Granite State still would not be entitled to a sign permit for its proposed billboards because the billboards violate the City's height and area restrictions and such restrictions are constitutional. *See Granite State II*, 351 F.3d at 1117.

Severability of a local ordinance is a question of state law. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Under Florida law, the test for severability is as follows: "[w]hen a part of a statute is declared unconstitutional, the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and bad features are not so inseparable in substance that it can be said that the legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken." *Waldrup v. Dugger*, 562 So.2d 687, 693 (Fla. 1990). The Florida Supreme Court in another recent severability opinion simply explained that: "[t]he severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent." *Ray v. Mortham*, 742 So.2d 1276, 1280 (Fla.1999) (citations omitted). The burden of proving that a provision of an ordinance is not severable lies on the party challenging an ordinance. *See id.* at 1281.

In this case, Section 122.4(h) is severable from the remaining portions of the prior sign ordinance. First, Section 122.4(h) contains a prohibition against one type of signs, off-site signs, that can be separated from the rest of the sign ordinance. Second, the purpose of the entire sign ordinance can be accomplished independently of the off-site sign prohibition. In this case, the purposes supporting the sign ordinance are traffic safety and aesthetics. While these purposes may be accomplished more fully with a ban on off-site signs, the remaining provisions of the sign ordinance limit the number, height, and size of signs, which also promote traffic safety and aesthetics. Third, the only evidence presented indicates that the City would have passed the sign ordinance even if it did not include a ban on off-site signs. Fourth, the sign ordinance after Section 122.4(h) is stricken remains complete with additional prohibitions and a permitting regime in place. Finally, the remaining ordinance is not more restrictive of speech because it allows off-site signs, which were previously not allowed under the City's sign ordinance, as long as they comply with height, area, and setback requirements.

D. OTHER ALLEGED CONSTITUTIONAL VIOLATIONS

Both parties have briefly addressed two additional constitutional claims contained in Granite State's complaint: (1) a takings claim (count IX, XII); and (2) an equal protection claim (count X). To the extent that such claims are not moot, this Court concludes that Granite State's taking claims are not ripe and summary judgment is appropriate in favor of the City on Granite State's equal protection challenge.

1. Granite State's Taking Claims are not ripe.

While it is not clear from the complaint or the briefs, it appears that Granite State asserts both a due process takings claim and a just compensation claim. However, the Eleventh Circuit abandoned the distinction between the two claims and held that the takings clause subsumes a substantive due process takings claim and only one cause of action exists. *See Villas of Lake Jackson Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072-75 (11th Cir. 1996).

Cases involving constitutional issues must be ripe in order for a federal court to have subject matter jurisdiction. *See Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 (11th Cir. 1989). In order to be ripe, a takings claim requires completion of two hurdles: (a) the final decision hurdle; and (b) the just compensation hurdle. *See Villas of Lake Jackson, Ltd.*, 121 F.3d at 614; *Reahard v. Lee County*, 30 F.3d 1412, 1415 (11th Cir. 1994). In order to meet the final decision hurdle, an aggrieved party must appeal an administrative decision when the ordinance explicitly contains an appeal process. *See Reahard* 30 F.3d at 1416 n. 10. To meet the just compensation hurdle, all state procedures for just compensation must be utilized. *See id.* at 1416. Florida allows for an aggrieved party to pursue an inverse or reverse condemnation action so that a party may recover just compensation for a taking. *See id.* at 1417.

The record in this case indicates that Granite State neither appealed any denial of a sign permit nor pursued any state procedure to receive just compensation. Accordingly, this Court lacks subject matter jurisdiction over counts (IX and XII) because such claims are not ripe. [FN16]

> FN16. Even if such claims were ripe and not moot, this Court would conclude that Section 122-4(h) does not constitute a taking because Section 122.4(h) was not unconstitutional and destruction of one property right (or use) does not constitute a taking. *See Villas of Lake Jackson*, 121 F.3d at 614.

2. Section 122-4(h) is rationally related to a legitimate governmental objective.

This Court concludes that summary judgment is appropriate on Granite State's equal protection claim. Granite State argues that the major attraction exception to the off-site sign prohibition violates its right to equal protection because the City prefers major attraction off-site signs to other off-site signs. Granite State asserts this Court must apply strict scrutiny to the City's distinction between two types of commercial off-site signs because the distinction impinges on a fundamental right, the right to freedom of speech.

First, Granite State's assertion that strict scrutiny applies is not well taken. *See Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 344 n. 9, 106 S.Ct.

2968, 92 L.Ed.2d 266 (1986); *Don's Park Signing v. City of Clearwater*, 829 F.2d 1051, 1054 n. 10 (11th Cir. 1987). For a distinction between two types of commercial speech, the City need only meet the rational basis standard of review. *See Posadas de Puerto Rico*, 478 U.S. at 344 n. 9, 106 S.Ct. 2968. Second, this Court concludes that differentiating between signs advertising a major tourist attraction in an area whose economy is based on tourism is rationally related to legitimate governmental interests. Indeed, the Supreme Court in Metromedia dealt with a similar distinction when it decided that San Diego could prefer on-site signs to off-site signs. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). The plurality stated that:

> the city could reasonably conclude that a commercial enterprise--as well as the interested public--has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere.

Id.

Such a justification and conclusion equally apply in this case. This Court concludes that Section 122.4(h) does not violate Granite State's right to equal protection.

E. DAMAGES

Next, this Court's conclusion that Granite State's claims were moot did not moot Granite State's claim, if it has asserted any, for damages resulting from an unconstitutional application of Section 122.4(h) to its permit applications. But, even if this Court concluded that Section 122.4(h) was unconstitutionally applied to Granite State, Granite State would not be entitled to damages. Granite State's permit applications would have been rejected anyway for failing to meet other constitutional requirements contained in the sign ordinance, including height and area limitations as well as the prohibition against animated signs. Granite State cannot show any injury caused by any allegedly unconstitutional restriction in the sign ordinance. Accordingly, this Court grants summary judgment on Granite State's claims for damages.

F. ATTORNEYS' FEES

Finally, this Court concludes that Granite State is not a prevailing party under 42 U.S.C. § 1988 and not entitled to its attorneys' fees. The relationship between Granite State and the City is unaltered as the result of this suit and Granite State is no closer to being permitted to erect its proposed billboards as a result of its challenge. *See Granite State II*, 351 F.3d at 1119; *Granite State I*, 348 F.3d at 1283-84. Even if Granite State were successful on its claims regarding Section

> 122.4(h), Granite State is not a prevailing party because "'[a] favorable judicial statement of law in the course of litigation that results in a judgment against the plaintiff does not suffice to render him [the plaintiff] a "prevailing party."'" *See Granite State II*, 351 F.3d at 1119 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)).

Id. at 1336-1344 (emphasis supplied).

In *Seay Outdoor Advertising, Inc. v. City of Mary Esther, Florida*, 397 F.3d 943 (11th Cir. 2005), the Eleventh Circuit addressed the severance issue as follows:

> 'Severability of a local ordinance is a question of state law.' *Id.* (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772, 108 S.Ct. 2138, 2152, 100 L.Ed.2d 771 (1988)). Under Florida law, the test for severability is as follows:
>
> > When part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.
>
> *Id.* at 1348 (citing *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987). 'According to Florida law, then, the unconstitutional part of a challenged statute should be excised, leaving the rest intact and in force, when doing so does not defeat the purpose of the statute and leaves in place a law that is complete.' *Id.*
>
> Further bolstering the severability of the New Sign Ordinance is Mary Esther's express, codified legislative desire to keep as much of its Sign Ordinance as possible:
>
> > *Severability:* If any section, subsection, paragraph, subparagraph, division, subdivision, clause, sentence, word, or provision of this ordinance shall be adjudged by a court of competent jurisdiction to be invalid or unconstitutional, such portion shall be deemed a separate, distant, and independent provision and such judgment shall not affect, impair, invalidate, or nullify the remainder of this ordinance.
>
> New Sign Ordinance, Section Two. Moreover, Florida law states that '[a]lbeit not binding, a legislatively expressed preference for the severability of voided

provisions is persuasive.' *City of Sunrise*, 371 F.3d at 1349 (citing *Moreau v. Lewis*, 648 So.2d 124, 127 (Fa. 1995) (citation omitted)). To rule that the challenged provisions were not severable from the remainder of the New Sign Ordinance 'would seriously infringe on the notion of legislative autonomy and ignore Florida's doctrine of severability.' *Id.*

The denial of Seay's permit applications was based solely on the provision of the Repealed Sign Ordinance prohibiting billboards. To the extent that any purportedly unconstitutional provisions of the Repealed Sign Ordinance were retained in the New Sign Ordinance, we find that the ban on billboards, which is never challenged by Seay, continues to further the purpose of the New Sign Ordinance in the absence of the challenged provisions. [FN5.] The regulatory purpose of the undisputed sections of the Repealed Sign Ordinance - avoiding eyesores and traffic disruption-would not be destroyed by the elimination of the suspect content regulations.

> FN5. For example, City Ordinance 2001-12, enacting the New Sign Ordinance, states that 'the City Council of the City of Mary Esther finds and determines that the regulation of billboards as set forth herein will improve the beauty of the City of Mary Esther, foster overall improvement to the aesthetic and visual appearance of the city, preserve and open up areas for beautification on public property adjoining the public roadways, increase the visibility, readability and/or effectiveness of on-site signs by reducing and/or diminishing the visual clutter of off-site signs, enhance the City of Mary Esther as an attractive place to live and work, reduce blighting influences, and improve traffic safety by reducing driver distractions.'

Therefore, we find that any portions of the Repealed Sign Ordinance retained by the New Sign Ordinance that arguably may be unconstitutional are fully severable from the rest of the law, particularly the ban on billboards, which was the provision that lead to the rejection of Seay's permit applications. Therefore, we need not-and do not-evaluate whether other portions of the New Sign Ordinance may be unconstitutional because any decision on the merits can have no bearing on the case before us. *See id.* 'Indeed, if we were to evaluate the validity of certain provisions of the [New Sign Ordinance], knowing that the result of this inquiry could have no effect on the result in this case, our pronouncements would be essentially advisory in nature.' *Id.*

Id. at 949-951.

V. Severence – Additional Observations.

In 2002, I was asked to consider submitting an amicus brief in a U.S. Ninth Circuit case on behalf of scenic organizations in support of Riverside County, California. The appeal then pending involved the constitutionality of county sign regulations. The amicus brief focused on the issue of severability. Amicus briefs submitted by other entities focused on different issues. In 2003 the U.S. Ninth Circuit Court of Appeals ruled in favor of Riverside County. The key issue in that victory was the legal issue of severability. *See Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111 (9th Cir. 2003), *cert. denied*, 540 U.S. 1111 (2004).

In the years that have followed, as noted in the two Florida cases discussed above, severability continues to play a critical role. It is important that severability be included wherever possible, even in the adopting legislation, to ensure that the legislative body's intent is carried out.

A severability clause is a legislative body's way of expressing its intent that each part of its enactment stand or fall on its own merits. Considerable weight is given to such a clause. *McQuillen, Municipal Corporations, Validity and Construction of Ordinances, §20.65–Severability or savings clause*. A severability provision creates a presumption that each part of the ordinance is severable and furnishes the assurance that the legislative body would have enacted the unaffected portions of the ordinance without the provisions found to be invalid. *Id.* Only when the void portion of the law is "so interrelated and connected" with the valid portion that it cannot be separated without "destroying the legislature's intention" in enacting the law, will the whole law be held to be invalid. *Id.* The question is one of interpretation and of legislative intention. *Id.*

The presumption created by the presence of a severance provision under Florida law was addressed in *Granite State Outdoor Adver. Co. v. City of Clearwater, Fla.*, 213 F.Supp.2d 1312 (M.D.Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 125 S.Ct. 48 (2004), where the district court rejected a billboard company's attempt to strike down another city's entire ordinance as part of a plan to erect billboards. The district court noted that the preference for severance was particularly strong in cases where there was a severability clause, and utilized the severance remedy to sever portions of the ordinance while sustaining portions that prohibited the erection of the billboards sought by the plaintiff. The court stated:

> Courts have noted that the existence of a severability clause carries with it a "presumption" that the legislative authority would have enacted the remaining provisions and that the preference for severance is "particularly strong in cases containing a severability clause." *See Major Media of Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, 1454 (E.D.N.C. 1985) (upholding severability clause). *Cf National Advertising v. Town of Niagara*, 942 F.2d 145, 148 (2nd Cir. 1991) (finding severance improper despite existence of severability clause); *United States v. Jackson*, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (the ultimate determination of severability rarely turns on the presence or absence of a severability clause). Of course, in construing an ordinance for purposes of a facial challenge, the Court must construe any ambiguities in the ordinance as a whole in a manner which avoids any constitutional problems, if possible. *See Southlake Property Ass., Ltd. v. City of Morrow, Ga.*, 112 F.3d 1114, 1119 (11th Cir. 1997).

In *Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446 (E.D.N.C. 1985), *affirmed*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987), the district court faced a constitutional challenge to the City of Raleigh's entire sign ordinance. In addressing aesthetics and the regulation of billboards in general, the district court noted Justice White's opinion in *Metromedia* as perhaps most appropriate, to wit: "It is not speculative to recognize that billboards by their very nature, wherever located and howsoever constructed, can be perceived as an 'esthetic harm.'" *Id.* at 1451. The district court upheld the billboard

provisions, concluding that the city would have prohibited off-site signs (billboards) *even if no other sign provisions were adopted, citing the ordinance's severability clause, and held that there was no constitutional prohibition against regulating off-premise signs while failing to regulate on-premise signs*. *Id.* at 1454. The district court reasoned as follows:

> To determine whether a portion of an enactment is severable from other portions, the court must determine first whether the remaining portion is valid and enforceable on its own and second, whether there is a legislative intent to enforce the remainder. *Cavanaugh v. Brock*, 577. 176, 181 (E.D.N.C. 1983). With respect to the second determination, it is clear that the Raleigh City Council intended to enforce all valid sections of the sign code because they included severance clauses in both Section 10-2065 and Section 10-2066. Ordinance No. (1983) 210 TC 198, § 23; Ordinance No. (1979) 982 TC 96, § 48. Those clauses state that if any portion of the ordinance is held to be invalid, such invalidity will not affect other valid provisions which can be given separate effect.
>
> *Plaintiff argues that despite this language, defendant would never have enacted an ordinance relating only to off-premise signs. However, such a severability clause carries the presumption that the legislative authority would have enacted the remaining provisions. Champlin Refining Company v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932). For example, in *Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969), the North Carolina Supreme Court held that a virtually identical provision in a Guilford County ordinance did reflect the legislative intent of the Board.
>
> When the statute, or ordinance, could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone. Here, the legislative body, the Board of County Commissioners, has expressly declared in the ordinance that it would have done so. 275 N.C. at 168, 166 S.E.2d at 87 (citation omitted). As with that case, it is clear that the Raleigh City Council intended that all valid provisions of its sign ordinance should continue to remain in effect even if other portions are declared invalid.
>
> *With respect to the first question, it is also clear that Section 10-2066 is valid and enforceable on its own*. *Metromedia* only prohibits a municipality giving preference to commercial speech over non-commercial speech. It does not prohibit the regulation of certain types of commercial speech while not regulating others. Even if Raleigh's on-premise sign ordinance was unconstitutional prior to December, 1984, *there is no constitutional prohibition against regulating off-premise signs while failing to regulate on-premise signs.*

Id. at 1454 (emphasis added).

In addition to the reported decisions in *Granite State* and *Major Media*, severance principles have been applied to uphold billboard prohibitions in several notable state court decisions (in Virginia and California), where the severance clause has been given great weight by the court. In *Town of New Market v. Battlefield Enterprises, Inc.*, 8 Va. Cir. 96, 1984 WL 276226 (Va. Cir. Ct. 1984), a billboard company made a constitutional challenge to the Town of New Market's entire sign ordinance. The Town successfully argued that the invalid provisions could be severed and the restrictions on off-site signs (i.e., billboards) could remain. Significantly, the court noted that the prohibition of billboards in all districts "demonstrates not only a clear intent *but a provision which could be executed independent of the other sections*, if invalid." 1984 WL 276226, at *7, n.6. (emphasis added). The Virginia court also observed:

> Whether there is or is not a severability provision, 'the determination, in the end, is reached by applying the same test - namely, What was the intent of the lawmakers?' 169 Va. at 571, 194 S.E. at 813. . . .
>
> * * *
>
> I believe a successful severance can be made of the invalid portion dealing solely with on-premise signs. *I believe the Town Council would have taken the "half a loaf" of the prohibition of off-premise signs* if it could not have its "whole loaf" of all those signs and on-premise signs with narrow restrictions as to commercial and non-commercial on-premise signs.

1984 WL 276226, pp. 5, 7 (emphasis added).

In *Tahoe Regional Planning Authority Agency v. King*, 233 Cal.App.3d 1365, 285 Cal. Rptr. 335 (Cal.App.3rd Dist. 1991), in applying the severance principle to uphold the Tahoe Regional Planning Authority's restrictions on billboards, the California appellate court stated, "[T]he limitation of the ordinance to commercial activity does no more than formalize TRPA's original intent and its current practice." 233 Cal.App.3d at 1408, 285 Cal. Rptr. at 361. The court added that it was clear that TRPA would prefer limitation of its ordinance over its total

invalidation, citing to the ordinance's severability provisions. 233 Cal.App.3d at 1408-1409, 285. at 362.

The governing principle with regard to severance – what sensible legislators would do – was expressed long ago. In *Schacht v. City of New York*, 40 Misc.2d 303, 243 N.Y.S.2d 272 (Sup.Ct. N.Y. County 1963), the court upheld the severability of certain sections of an ordinance and noted the "classic statement" of the governing principles made in *Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 129 N.E. 202 (1920), *cert. denied*, 256 U.S. 702 (1921):

> The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the valid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots. (230 N.Y. p 60, 129 N.E. p. 207). . . . Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert. *When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as judges to what we must perceive as men*.

40 Misc.2d at 312-313, 243 N.Y.S.2d at 282-283 (emphasis added).

VI. The "Substitution Clause."

Following the U.S. Supreme Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)(five opinions), the Southern Environmental Law Center and others recommended that local governments adopt or incorporate substitution clauses into their sign regulations, and eliminate any possibility that a billboard company could claim that an ordinance favored commercial speech over noncommercial speech. While there are several ways that a substitution clause may be worded, the essence of such a provision is that noncommercial copy may be substituted in place of commercial copy on any lawful sign.

In other words, if Joe operates a restaurant and has an onsite sign that carries the commercial message "Eat at Joe's," he is free to substitute "Save the Whales" in place of "Eat at Joe's" or switch the message back to the onsite message "Eat at Joe's." In fact, in actual practice in jurisdictions throughout the country, noncommercial messages are substituted for commercial messages without any specific provision in a sign ordinance specifically allowing the same, and this commonly occurs during elections or during times of political or ideological debate.

The adoption of substitution clauses is usually simply the codification of actual practice. Nevertheless, in the absence of a substitution clause, billboard developers will argue that the entire sign ordinance must be struck down as unconstitutional under their interpretation of *Metromedia*. In *Florida Outdoor Advertising, LLC v. City of Boca Raton*, 266 F. Supp. 2d 1376 (S.D. Fla. 2003), the Court observed:

> This vulnerability to challenge exists because the sign ordinances in many Florida municipalities until recently prohibited off-premise noncommercial advertising with certain limited exceptions. Such ordinances, theoretically at least, favored commercial speech and therefore constituted content-based discrimination in violation of the First Amendment. *See Metromedia, Inc. v. City of San Diego, 453 U.S.490, 101, S.Ct. 2882, 69 L.Ed.2d 800 (1981). I say "theoretically" because there seems to be no history of Florida cities applying these ordinances to ban noncommercial speech* and the reality is that most billboard advertising is commercial.

Id. at 1379 (emphasis supplied.)

For the city or county that lacks a substitution clause, the focus should be on actual practice and whether noncommercial speech is truly prohibited in the way envisioned in the *Metromedia* decision or whether the billboard company is playing a game of semantics that does not reflect actual practice. No municipality or county in Florida should lack a substitution clause in their sign regulations!