



Hello Ohio!

(from at least two native Michiganders)



Shurtleff v. City of Boston

- Flag poles at City Hall Plaza
- First Amendment's Free Speech Clause – government speech, or a public forum
- Unanimous(!) decision by the Supreme Court

Displays on Public Property

- 3 part test:
 1. History
 2. Public's view of the "speech"
 3. How much the city controlled the message

Displays on Public Property (Contd.)

- Result? Public forum -- not government speech
- Allowed all other groups to raise flags during prior 12 years (250+ requests; ~50 flags)
- City didn't select flags
- No evidence or policy tying flags to city's official messaging

Displays on Public Property (Contd.)

- Takeaways for displays on public property
 - Adopt a policy
 - Establish content parameters
 - Enforce meaningful application review procedures
 - “Direct control,” “active review,” “meaningful involvement”

Wortham v. Village of Barrington Hills

- Short term rental (e.g., Airbnb) regulations
- Zoning code only allows “single-family uses” and certain commercial home occupations
- Home rented out 40+ times on VRBO

Short Term Rentals

- Not a permitted home occupation
 - No “full time occupant” conducting business
- Inconsistent with “intent and purpose” of residential zoning district regulations
 - Prevent harmful encroachment of incompatible uses
 - Made public aware of commercial nature by listing on VRBO

Short Term Rentals (Contd.)

- Takeaways for short term rentals:
 - A little luck?
 - Court relied in part on case interpreting a condominium declaration – not a zoning code
 - Interpretations of zoning district intent regulations vary
 - Legal tools exist (in many states)
 - Identify the community's goals
 - Understand the community's resources

Short Term Rentals (Contd.)

| <u>Goal</u> | <u>Regulation</u> |
|----------------------|---|
| Find the STRs | Make it Easy to Get a Permit Prohibit Advertising without Permit |
| Quality of Life | Trash & Parking Facilities Noise Limits Outdoor Curfew Require 24/7 Host/Renter Contact for STR Frequency Limits (Rentals per Year) Duration Limits (Days per Rental) Exterior Sign Limits Insurance |
| Safety | Reasonable Inspection Requirements Occupancy Limits (Day/Night) |
| Planning | Limit Number of STRs per Area Dispersal Requirements |
| Taxes | Require Hosting Platform to Collect Taxes Direct Staff to Monitor Compliance |
| Fair Housing | Require STR to acknowledge it is a Public Accommodation Prohibit Discrimination in STR Rentals |
| Affordable Housing | Limit STRs to Permanent Residents No STRs in Long-Term Rental Housing |
| Economic Development | Encourage STRs in Areas Underserved by Hotels |

Long Lake Twp. v. Maxon

2022 Mich. App. LEXIS 5544 (Sept. 15, 2022)

- Case topics: drones, evidence
- Facts:
 - Township brought zoning action against auto junkyard after the owner expanded the use in violation of a settlement of earlier litigation.
 - Township could not see into property, hired drone operator to conduct a “flyover” that showed expanded junkyard.
 - Township filed suit to abate the junkyard nuisance.
 - Junkyard owner counter-claimed arguing drone photographs were an unreasonable search under the 4th Amendment
- Decision:
 - the court found that the public interest in enforcing zoning regulations outweighed the property owner’s interest in excluding the junkyard photos.

Long Lake Twp. v. Maxon

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Why do we care?

- Consult with your local government attorney regarding the prospective use of drones and other new technologies in performing code enforcement duties.
- Evidence collected through these practices may be deemed admissible in civil lawsuits seeking to enforce zoning codes.
- Local governments, separately, may still be held liable for violating property owners' constitutional privacy rights.

New Harvest Christian Fellowship v. City of Salinas

29 F.4th 596 (9th Cir. 2022)

- Case topics: zoning, religious assembly uses, RLUIPA
- Facts:
 - City zoning code prohibited assembly uses from operating on ground floor of building on Main Street in Downtown, but made distinction between private and public assembly uses.
 - New Harvest purchased a two-story building on Main Street in Downtown, intending to hold religious worship on the building's ground floor.
 - New Harvest applied for a text amendment to remove prohibition and a CUP, both later denied by the City.
 - New Harvest sued on the theory that the Provision violated RLUIPA's "substantial burden" and "equal terms" provisions.
- Decision:
 - 9th Circuit found City did not violate RLUIPA's substantial burden test because New Harvest chose not to use other available sites from which it "was not precluded".
 - But, 9th Circuit found City violated RLUIPA's equal terms test because it had failed to demonstrate that its ordinance treated religious assembly uses equally as well as similarly situated nonreligious assembly uses such as theaters which were allowed on the ground floor.

New Harvest Christian Fellowship v. City of Salinas

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Why do we care?

- Zoning authorities may enact ordinances designed to prohibit specific uses in certain areas, buildings, or even floors of buildings.
- Zoning authorities may not enact ordinance provisions that facially allow similarly situated non-religious assembly uses, whether public or private, to operate.
- Zoning authorities must ensure equal treatment of similarly situated assembly uses, whether public or private.

Symes Dev. & Permitting LLC v. Town of Concord

2022 WL 95945 (D. Mass. Jan. 10, 2022)

- Case topics: conditional approvals, temporary takings
- Facts:
 - Town conditioned approval of an 18-lot subdivision on reservation for three-years of five lots for future public park and affordable housing sites, consistent with Town’s inclusionary zoning regulations.
 - Symes could not do anything with the lots during the reserve period without board approval, and the town could purchase the lots during the reserve period for just compensation.
 - Because Symes had no administrative remedies from the Town, it sued on 5th Amendment grounds claiming the conditioned approval was an unconstitutional temporary taking
- Decision:
 - The conditional approval amounted to an unconstitutional condition and was a compensable temporary taking under the 5th Amendment.
 - A person cannot be forced to give up a constitutional right for a discretionary benefit conferred by the government.
 - The fact that the reservation was temporary did not change the analysis under established exactions law, such as *Dolan*.

Symes Dev. & Permitting LLC v. Town of Concord

2022 WL 95945 (D. Mass. Jan. 10, 2022)

- Why do we care?:
 - Temporary land use reservations for future public uses, even with a compensation requirement, need to be carefully considered.
 - When conditioning discretionary approvals, it is a good idea to consider providing an administrative or legislative relief mechanism.

- *Pumilia v. City of Rockford*, 2021 IL App (2d) 200681-U (July 26, 2021)
- *Metal Green Inc. v. City of Philadelphia*, 266 A.3d 495 (Pa. 2021)
- *City of Austin, Tex., v. Reagan Nat'l Advert. of Austin, LLC, et. al.*, No. 20-1029 (S.Ct. 2022)

Free Speech & Sign Codes

Commercial Speech

*Central Hudson Gas & Electric Corp. v. Public Service
Comm'n of New York*
Metromedia, Inc. v. City of San Diego

Free Speech & Sign Codes

Content-Based Restrictions

Strict Scrutiny Applies

Law must be **narrowly tailored** to serve a **compelling** state interest

Government almost always loses

Content-Neutral Restrictions

Intermediate Scrutiny Applies

Law must be **substantially related** to an **important** government interest

Government wins some cases and loses others

“Need to Read” and *Reed v. Town of Gilbert*

City of Austin v. Reagan National Advertising

The Austin sign code provided that off-premise signs were nonconforming and could not be changed to increase their nonconformity.

- For example, off-premise signs could not be digitized if they were not digital at the time they were erected.

On-premise signs were not subject to the same restrictions.

City of Austin, Tex., v. Reagan Nat'l Advert. of Austin, LLC, et. al., No. 20-1029 (S.Ct. 2022)

City of Austin v. Reagan National Advertising

Off-Premise Sign:

“[A] sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site.” Austin, Tex., City Code

City of Austin, Tex., v. Reagan Nat’l Advert. of Austin, LLC, et. al., No. 20-1029 (S.Ct. 2022)

City of Austin



The *Austin* Decision

The Supreme Court decided that the distinction between off-premise and on-premise signs in Austin to be **content-neutral**.

6-3 DECISION FOR CITY OF AUSTIN
MAJORITY OPINION BY SONIA SOTOMAYOR

The City of Austin's on-/off-premises distinction is facially content-neutral under the First Amendment.



Roberts Kagan Alito Barrett

Sotomayor Breyer Kavanaugh Thomas Gorsuch

<https://www.oyez.org/cases/2021/20-1029>

What does this mean for local government?

After *Austin*, it appears that local governments' authority to regulate signs is stronger than it was after *Reed*.

However, exercising caution while drafting and enforcing sign codes is critically important.

Making it clear that the policies in place adequately address important government interests—such as traffic safety and community aesthetics—can help in surviving intermediate scrutiny.

Resources

APA Planning Webcast

Series: https://www.ohioplanning.org/aws/APAOH/pt/sp/webcast_home_page

Municipal Minute Blog: municipalminute.ancelglink.com

APA PLD Case Law

Digest: <https://www.planning.org/divisions/planningandlaw/case-law-digest/>