

**MEMORANDUM**

TO: Shane Corbin, City Manager

FROM: Brenna Durden, City Attorney *BMD*

DATE: May 6, 2020

SUBJECT: Sign Code – United States Flag Exception

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You have requested that I draft a short memorandum describing how the City Commission may properly address flags in the proposed update to the City's sign code, set forth in Chapter 17 of the Code of Ordinances. It is well known and understood that the U.S. Supreme Court pronounced very clearly in Reed v. Town of Gilbert, Ariz., 135 S.Ct. 2218 (2015), that sign code provisions which distinguish requirements and regulations based on content are unconstitutional. For example, requirements applicable to a real estate sign or to a political sign or to a garage sale sign were improper as one was required to read the sign to know which provisions applied. As a result of the Reed decision, many government entities throughout the country have had to determine to some degree whether their present sign code provisions met or did not meet the holding in Reed.

As you know, in the summer of 2016, shortly after I became City Attorney, I advised the City Manager, Planning Director and City Commission that numerous provisions regarding temporary signs in our Code did not comply with Reed and I recommended that the City Commission adopt by Resolution a formal policy to suspend enforcement of those code provisions related to temporary non-commercial signs until such time that the City Manager would direct staff to proceed with an update. As a result, Resolution 16-04 was adopted in August 2016. The adoption of a formal policy to suspend enforcement of those unconstitutional provisions would create a defense, if needed, in the event a suit were brought against the City. The suspension also gave "breathing room" to City staff to draft updated provisions for public comment, review and discussion, and eventual adoption by the Commission.

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For the past year or more, City staff have been working on a revision to Chapter 17. Beginning earlier this year, several workshops, public hearings and other citizen outreach have occurred. In the last several weeks, several citizens have voiced a desire to exempt the United States flag from any regulation or application of the sign code. To set this in context, the current sign code contains the following provision regarding flags, and the United States flag in particular, which was added to the sign code in 2013 (Ordinance 60-13-18):

Section 17-26(b)14

Not more than two (2) flags per development parcel, but if there are two (2) flags, then one (1) must be the flag of the United States of America. A development parcel with more than one (1) principal structure may have two (2) flags for each principal structure with more than five thousand (5,000) square feet of fully enclosed floor area. Each flag shall not exceed twenty four (24) square feet in an area; however, this size limitation shall not apply to the United States of America flag at public buildings and parks.

The draft language currently contained in the pending update provides:

Section 17-34. – Flags.

Flags may be permitted in any zoning district in addition to other signs in accordance with the following provisions.

- (a) Maximum number allowed per parcel: three (3) flags.
- (b) Maximum sign face area forty (40) square feet with the total combined sign face areas for all flags displayed at any one point in time not to exceed eighty (80) square feet.

The draft language is designed to comply with the content neutrality required by Reed. I have reviewed cases suggested as grounds to support a distinction in the sign code between the United States flag and any other flags, including without limitation, Texas v. Johnson, 491 U.S. 397 (1989); Spence v. State of Wash., 418 U.S. 405 (1974); U.S. v. Eichman, 496 U.S. 310 (1990), as well as other federal and state laws. I have also consulted with other local government attorneys on this important question. Following my

careful review, it is my opinion that a regulation which treats the United States flag differently than all other flags in our sign code would violate the content neutrality principle set forth in Reed.

I have advised you that should the Commission desire to find a way to not regulate the flag of the United States, an option for the Commission to consider would be for the City's sign code to be silent as to all flags, eliminating the draft section 17-34. This can be a double-edged sword, as the City would have no enforcement mechanism to control the number, placement or size (time, place, manner) of any flags within the City. However, I believe it would pass the constitutional muster of Reed and address citizens' concerns. And, of course, if problems did arise in the future, the public and Commission could always consider appropriate measures to address any new issues.

Please let me know if you have any questions. Thank you.