**CITY OF WEST CARROLLTON**

**PLANNING COMMISSION**

**STAFF REPORT**

**DATE:** April 28, 2023

**CASE NUMBER:** PC-23-1

Amendments toChapter 153: Signs

**APPLICANT:** City of West Carrollton

**SUMMARY OF**

**REQUEST:** Proposal for amendments to Chapter 153: Signs to meet the requirements of the U.S. Supreme Court decision in *Reed v. Town of Gilbert, Ariz., --U.S.--, 135 S.Ct. 2218 (2015)* and in *City of Austin v. Reagan Nat’l Advert. Of Austin, LLC, 142 S. Ct. 1464 (2022)* and to bring Chapter 153: Signs into compliance with evolving federal and state case law.

**BACKGROUND**

In September of 2021 the City asked attorney Steve McHugh with the law firm Coolidge Wall to conduct a legal review of the city’s Sign Code, and recommend amendments where necessary to comply with the requirements of recent U.S. and Ohio Supreme Court decisions and evolving case law regarding sign regulations. A moratorium was adopted by City Council on October 26, 2021 and subsequently extended on the enforcement of non-commercial Sign Code violations, to allow time for the Law Director and staff to work with Mr. McHugh on this update. A second moratorium was adopted by City Council on June 28, 2022 and subsequently extended on the issuance of permits for off-premise signs, pending the update.

Since that time the Law Director and staff have worked with Mr. McHugh and his colleague attorney Sarah Sparks on the proposed amendments. Work sessions on this proposal were held with City Council and Planning Commission on September 13, 2022, October 11, 2022, December 13, 2022, and March 14, 2023. The recommendations of Mr. McHugh, the Law Director, and staff are reflected in the enclosed proposal as described below.

**PROPOSAL**

Mr. McHugh, the Law Director and staff recommend amendments to Chapter 153: Signs as reflected in the enclosed Resolution SC-23-1 and Exhibit A. The amendments to Chapter 153: Signs in Exhibit A is presented in a format specified by Section 5.02 of the City Charter: *“…and if necessary for further clarification, shall indicate matter to be omitted by enclosing it in brackets or by strikeout type or shall indicate new matter by underscoring or by italics”.*

A description of the legal basis for the proposed amendments is contained in the enclosed letter from Mr. McHugh dated February 24, 2023. Following is an overview of the proposed changes.

§153.01 PURPOSES

Take out the words “use” and “design.” Content-neutral regulations are confined to time, manner, and place. The regulations of use and design gets into the area of regulating the content of signs, even if that is not the intent. “It is common ground that governments may regulate the **physical characteristics** of signs.” (emphasis added) *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). “[C]ontent-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate.” *City of Ladue v. Gilleo*, 512 U.S. 43, 60, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (O’Connor concurring).

* Remove and replace language which conflicts with viewpoint neutrality and creates a presumption that the City opposes signs as a policy. Signs are not in and of themselves a nuisance.
* Delete language which makes a presumption about what the people value.

Simplify language which is redundant.

Add language reinforcing the City’s existing prohibition of off-premise signage.

§153.02 VIEWPOINT NEUTRALITY.

Remove current section 153.02 Findings, in the absence of actual findings that were conducted by the City.

Add new section, Viewpoint Neutrality, with language stating that the City will not limit signage based on the viewpoint or content of the message contained on the sign, or favor commercial over non-commercial speech, and that the restriction on off-premise signage applies only to commercial signs.

§ 153.03 SUBSTITUTION OF NON-COMMERCIAL MESSAGE FOR COMMERCIAL MESSAGE.

This new provision states that any sign erected in compliance with the Sign Code may contain a non-commercial message in lieu of a commercial message in whole or in part at any time, provided there is no change in the size, height, setback or spacing criteria.

§ 153.04 CONSENT OF LEGAL OWNER OF PROPERTY.

This new provision states that no sign may be displayed without the consent of the legal owner of the property on which the sign is located.

§ 153.05 DEFINITIONS.

* Removal of the definition of a Digital Gateway Sign. Under *City of* A*ustin v. Reagan Natl. Advertising of Austin, LLC*, 142 S.Ct. 1464, 212 L.Ed.2d 418 (2022), cities may ban off-premise signs. Allowing the Digital gateway signs opens the doors to allowing billboards.
* Update the definition of an Obscene Sign with the current definition from *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).
* The definition of a Public Sign is redundant with the definition of a Government Sign.
* The change to the definition of a Sign is explained below.

§ 153.11 SUPPLEMENTAL REQUIREMENTS FOR FREESTANDING SIGNS.

* (d) Digital Gateway Signs. Remove the Digital Gateway Signs section as this is a content-based regulation because the City is determining/controlling the type of message. This means that no additional billboards such as the Key-Ads billboard on I-75 will be permitted in the city.

§ 153.12 SPORTS FACILITY SPONSORSHIP SIGNS.

This new provision addresses City Council’s concern about the Sign Code’s existing prohibition on off-premise signage impacting youth sports organizations’ sponsorship opportunities. The language is adapted from the sign code in St. Paul, MN, and permits “Sports Facility Sponsorship Signs” in all zoning districts as accessory uses at sports facilities, as long as they are oriented toward the field of play, do not exceed 24 square feet in area, are not illuminated, and are maintained in good condition.

§ 153.13 TEMPORARY SIGNS.

* Differentiate between commercial and non-commercial signs.
* Specify requirements for temporary non-commercial signs: do not require a permit; must be set back at least 10 feet from a public right-of-way line or side lot line; shall meet the size requirements in Appendix D.
* Eliminate the limit on the number of political signs. Several cases hold that limiting the number of political signs is unconstitutional. “The two-sign limit provisions impermissibly infringed on the Political Parties' First Amendment guarantee of freedom of speech.” *Arlington Cty. Republican Commt. v. Arlington Cty.*, 983 F.2d 587, 589 (4th Cir.1993). "The two-sign limit infringes on this speech by preventing homeowners from expressing support for more than two candidates when there are numerous contested elections. *Id*. Also, if two voters living within the same household support opposing candidates, the two-sign limit significantly restricts their ability to express support through sign posting. *Id*. *See also Dimas v. City of Warren*, 939 F.Supp. 554, 557 (E.D.Mich.1996) (“Defendant's one election sign per candidate, per issue, and per opinion limitation "severely infringes on speech by preventing homeowners from expressing [their] support for more than one candidate when there [may be] numerous contested elections.”).
* Amend language to ensure that the code does not favor one type of speech (commercial) over another type of speech (noncommercial).

§ 153.14 SIGNS EXEMPT OR PARTIALLY EXEMPT FROM REGULATION.

* Eliminate language exempting certain types of temporary signs such as works of art, seasonal or holiday displays, grave markers, and flags. Add language to the definition of a Sign that states that a Sign does not include those types of temporary signs. In *Marin v. Town of Southeast*, 136 F. Supp. 3d 548, 553 (S.D.N.Y.2015), the Town’s zoning code had several restrictions for temporary signs. However, certain temporary signs were exempt from these restrictions such as contractor and construction signs, portable business signs, "for sale" signs, holiday decorations, and road signs advertising agricultural produce. The court held that this was unconstitutional. The court held that the restrictions were content-based and the Town did not have a compelling reason to justify the distinctions. The distinction between signs that were subject to the restrictions and signs that were exempt was clearly based on the content of the sign. *Id*. at 567.

§ 153.15 PROHIBITED SIGNS.

* Remove the exemption for Digital Gateway Signs. Under *City of* A*ustin v. Reagan Natl. Advertising of Austin, LLC*, 142 S.Ct. 1464, 212 L.Ed.2d 418 (2022), cities may ban off-premise signs. Allowing the Digital Gateway Signs opens the doors to allowing billboards. Retain the long-standing prohibition on off-premises signs.

§ 153.17 MAINTENANCE.

* Add language clarifying the meaning of “emergency” allowing the Zoning Enforcement Officer to remove a dangerous or defective sign.

§ 153.17 ADMINISTRATIVE PROCEDURES.

* (b) Signs Not Requiring Permit. (5) Having “*Temporary yard signs*” listed here creates confusion, since “*Yard signs bearing no commercial message*” is listed under Section 153.10 as being exempt or partially exempt. Change this provision to “*Temporary signs bearing a non-commercial message*”.
* (c) Special Sign Programs. No changes to this section are currently proposed, but Special Sign Programs seem very much like variances, which has its own process under the zoning code. Having Special Sign Programs opens the City up to creating more exceptions. At a minimum, this could be its own separate section.

This section was originally drafted by staff to make the sign code more flexible and business-friendly, and to keep the applicant from having to go to another board for approval. However, section 154.14.01(C)(1)(d) allows the Planning Commission to consider a variance and/or conditional use request as part of a site plan application as long as all applicable hearing and notice requirements are met, so perhaps the Special Sign Programs section is not needed. This topic is open to discussion.

* (e) Review and Approval. The “undue hardship” language must be changed to “practical difficulty”. In *Kisil v. Sandusky*, 12 Ohio St.3d 30, 465 N.E.2d 848 (1984), the standard for granting a variance that related solely to area requirements was a showing of practical difficulties, not unnecessary hardship as required for variances that related to use.
* (g) Removal of signs outside of the right-of way by the Zoning Enforcement Officer.

(3) The current code provides that if the costs to the City of removing an illegal sign is not paid within 30 days of the mailing of the notice, the cost shall be assessed to the property along with an additional 10 percent “*penalty*”. The City can collect costs, but not fines. The “penalty” acts as a fine. This language is proposed to be changed from “…*together with an additional 10 percent penalty for collection*…” to “…*together with an additional 10 percent assessed for collection*…”

§ 153.19 REGULATIONS FOR NON-CONFORMING SIGNS.

* (c) Alteration and Removal of Nonconforming Signs. Remove paragraph (1) in this section which states “The regulation or amendment to this Chapter which made a commercial sign non-conforming has been in effect for ten (10) years or more.” This change was requested at the March 14, 2023 City Council work session.

§ 153.25 SIGNS ALLOWED IN THE RIGHT-OF-WAY AND ON PUBLIC PROPERTY.

Cities have a right to prohibit signs from the right of way so long as they prohibit all signs from the right of way. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). As such, only government signs bearing no commercial message may be placed in the right-of-way. All other signage currently permitted in this section must be removed, including street banners; signs in parks; and signs which may contain either commercial or non-commercial messages as part of a logo/directional sign program through which space is made available to users.

**ANALYSIS**

**Conformance with Comprehensive Plan**

The City’s Sign Code, which is one of the mechanisms used to implement the vision of the Comprehensive Plan, states in part that the purposes of the Sign Code regulations are to: *“(a) Enhance and protect the physical appearance of the community (b) Promote and maintain attractive, high value residential, retail, commercial, and industrial districts, and preserve the scenic and natural beauty of designated areas (c) Provide necessary, yet reasonable and appropriate, signage for all residential, institutional and business uses in the community.”* The proposed Sign Code amendments would accomplish these purposes by enabling the proper enforcement of the city’s sign regulations by correcting errors and conflicts and articulating clear standards for the use of commercial and non-commercial signs.

**PUBLIC NOTICE**

As reflected in the enclosed Proof of Publication, the public hearing for this proposal was advertised in the Miamisburg-West Carrollton News on April 13, 2023. The proposal was also posted on the City website.

**RECOMMENDATION**

Based on the foregoing analysis, Mr. McHugh, the Law Director, and staff recommend approval of the proposed amendments to the Sign Code as reflected in the enclosed Resolution SC-23-1 and Exhibit A. Following the Planning Commission’s decision, the resolution will be transmitted to City Council for final action on the proposed amendments.

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