

# DORSEY & SEMRAU

FRED SEMRAU  
DAWN M. SULLIVAN\*  
JOSEPH E. BOCK, JR.  
SUSAN C. SHARPE  
\*SENIOR ASSOCIATE

ATTORNEYS AT LAW  
714 MAIN STREET  
P.O. BOX 228  
BOONTON, NJ 07005  
973-334-1900  
FACSIMILE 973-334-3408

OF COUNSEL:  
JOHN H. DORSEY, RET.  
JOHN P. JANSEN  
ANNE MARIE RIZZUTO

## Memorandum Privileged and Confidential

**To:** MEL Management Committee

**CC:** Dave Grubb, Executive Director

**From:** Fred Semrau, Esq.

**Date:** April 17, 2017

**Re:** LIABILITY ALERT - Update to Municipal Sign Ordinances

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The purpose of this memorandum is to alert the Committee to an area of grave liability concern arising from outdated municipal sign ordinances, and to recommend that the MEL retain special counsel to draft an updated model ordinance for distribution to members to mitigate future claims.

By way of background, in 2015 the U.S. Supreme Court in Reed v. Town of Gilbert, Arizona, 135 S.Ct. 2218 (2015) struck down a municipal sign ordinance as unconstitutional regulation of free speech. In the underlying case, an Arizona church filed suit in District Court to challenge the Town of Gilbert's sign regulations, which categorized signs (including temporary direction and political signs) based on content and imposed upon those categories differing restrictions. See id. at 2224. The church sued after it was cited for displaying temporary signs outside of the prescribed time limits and without a specific event date. Id. at 2225. The District Court denied the church's motion for preliminary injunction, as affirmed by the Ninth Circuit Court of Appeals. Id. at 2226. On remand, the District Court granted Summary Judgment in favor of the town, which the Court of Appeals affirmed. Ibid.

Ultimately, the Supreme Court concluded that because “the restrictions in the Sign Code that apply to any given sign . . . depend entirely on the communication content of the sign,” the restrictions were content based on their face and thus subject to strict scrutiny analysis. Id. at 2227. Furthermore, the Court found that the town failed to adequately demonstrate “that the restriction furthers a compelling governmental interest and is narrowly tailored to that end.” Id. at 2231. That being said, the Court noted that its decision does “not prevent governments from enacting effective sign laws.” Id. at 2232. Justice Alito, in a concurring opinion joined by two other Justices, offered examples of non-content based regulations, including size, location, lighting, digital messages, placement on different types of property, number, and duration for one-time events. Id. at 2233 (Alito, J., concurring).

### **What this Decision Means**

This decision has had far-reaching effects, including invalidating parts of existing sign ordinances throughout country. As a result, our members have been left open to significant legal exposure and therefore, need to adopt new sign ordinances that will withstand legal challenges. As you are aware, a favorite strategy of sign companies is to challenge the sign ordinances of strategically chosen municipalities, many of which lack the financial resources to mount an adequate defense, in order to gain permission to erect static billboards, and eventually digital billboards. Alternatively, Civil Rights activists will challenge local sign regulations. Most of these ordinances were put in place well before the Reed decision. With all the demands placed upon our members, updates to sign ordinances have typically fallen to the bottom of their priority list, until faced with litigation that could have been prevented.

### **Proposal to Address the Reed Decision**

Rather than attempt to surgically amend each member’s ordinance in a piecemeal fashion, I recommend that we take a more global approach. I have reached out to renowned sign expert Bill Brinton, Esq., of Jacksonville, Florida, who you may remember assisted the MEL in the defense of the lawsuit by Coastal Outdoor Advertising in 2008. Bill has been instrumental in drafting model sign ordinances used throughout the country and has most recently instructed a number of organizations on the implications of Reed to municipalities. Bill has advised me that he can provide a

model ordinance and memorandum that addresses the recent Supreme Court decision and in particular, the Court's rulings on political signs, at a cost of \$10,000.00. The cost is a fraction of what one Civil Rights case could cost our members. Based on the urgent need of our members to update their ordinances, and our positive experience with Bill in the past, I recommend that we again make use of his vast expertise in this area.

If you have any questions, please do not hesitate to contact me.

FCS:sdj