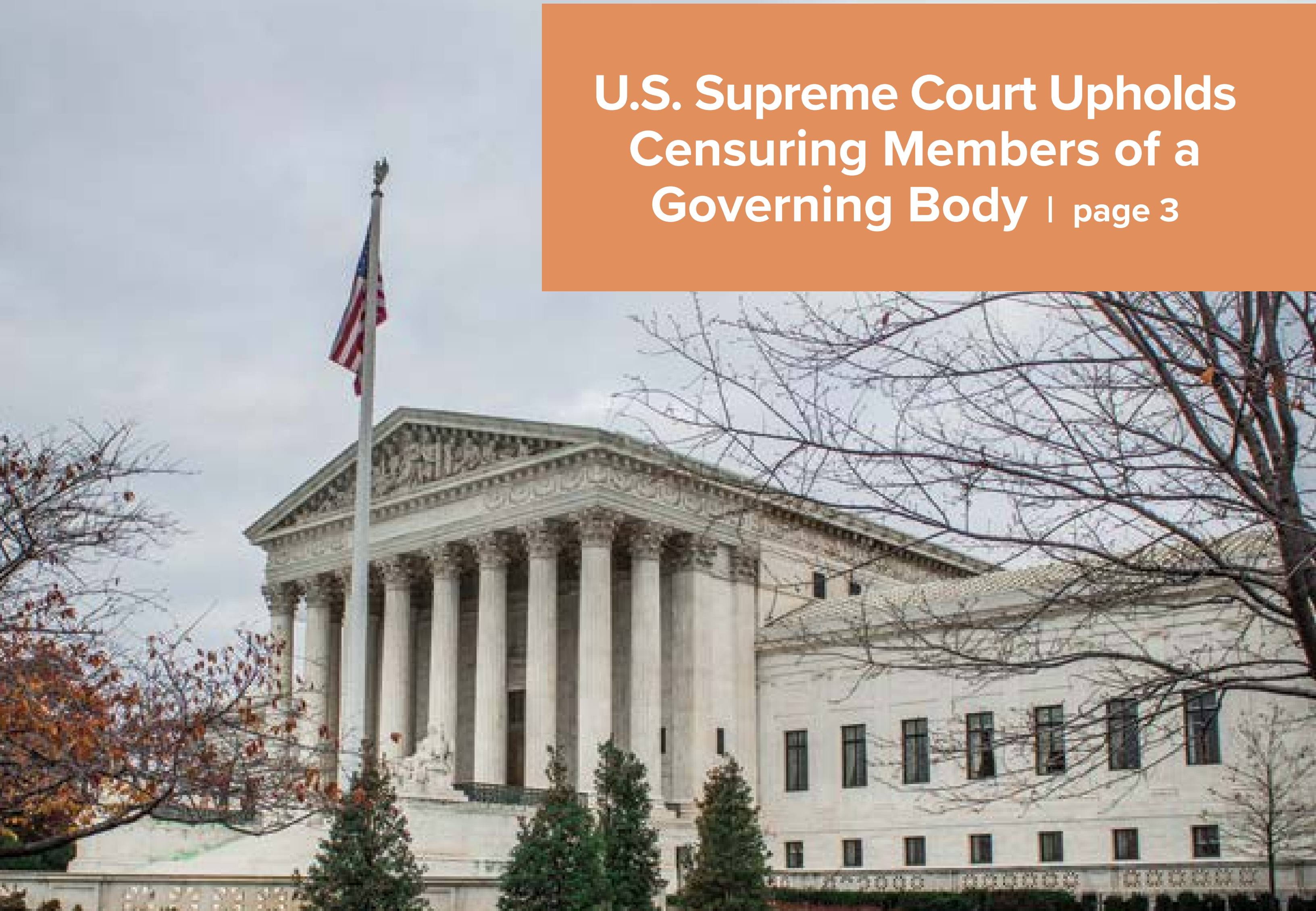
Municipal Research and Services Center of Washington FALL 2022

Municipal Research News

LOCAL GOVERNMENT SUCCESS

U.S. Supreme Court Upholds Censuring Members of a Governing Body

| page 3



ALSO INSIDE THIS ISSUE

1 About MRSC
Washington Trivia Question

2 MRSC Highlights
MRSC Expands Contracting-Related Resources

5 Ask MRSC
Acts Taken by Governing Bodies

7 Saying Yes to Responsive and Responsible Bids

9 Read the Signs

MRSC

About MRSC

Municipal Research and Services Center (MRSC) is a nonprofit organization dedicated to proactively supporting the success of local governments through one-on-one consultation, research tools, online and in-person training, and timely, unbiased information on issues impacting all aspects of local governments.

For more than 80 years, local governments in Washington State have turned to MRSC for assistance. Our trusted staff attorneys, policy consultants, and finance experts have decades of experience and provide personalized guidance through Ask MRSC and our extensive online resources. Every year we help thousands of staff and elected officials research policies, comply with state and federal laws, and improve day-to-day operations through best practices.

Municipal Research News is published quarterly to inform, engage, and educate readers about ongoing and emerging issues. In print and online at the MRSC Insight blog, we cover such major topics as the Growth Management Act, the legalization of recreational marijuana, and the ever-evolving complexities of the Public Records Act, to name a few. When the legal landscape changes, we are here to clarify the issues and help local government leaders make the right decisions for their communities.

Washington Trivia Question

In which Washington county lies the deepest river gorge in North America at 7,913 feet deep? (Bonus points for the name of the canyon.)

Answer on page 10

Your ideas and comments are appreciated. If you have news you would like to share or if you would like to write a short feature article, please contact the editor, Leah LaCivita, at llacivita@mrsc.org

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MRSC HIGHLIGHTS

MRSC Expands Contracting-Related Resources

Thanks in part to state funding, MRSC has been building its suite of resources available on local government procurement and contracting. While some items are still being developed, we are excited to offer new training, local contractor outreach opportunities, and a pilot electronic bidding service.

Over the next few months, MRSC is bringing both in-person and online training to local government staff as well as local contractors interested in public works contracting.

Digging Into Public Works

This past August, MRSC and the Washington Procurement Technical Assistance Center (PTAC) launched the Digging Into Public Works project with the goal of helping local government public works department build and diversify their contracting networks and have the resources necessary to train and develop new and existing public works staff.

From October 2022—April 2024, MRSC and PTAC will host seven in-person regional forums across the state, including Spokane, north Puget Sound, Tri-Cities, Vancouver, Tacoma, Bellingham, and Port Angeles. These forums will feature free, foundational training for local government public works staff, covering such topics as:

- How to start, refresh, and/or maintain your public works program,
- How to develop and grow relationships with the contracting community, and
- How to get more bids, better prices, and broader participation.

The forums will also feature outreach sessions for private local contractors, pairing them with local governments seeking to expand their contracting network. Both the training and the outreach sessions are free to attend but registration is required. Interested agencies and contractors should visit our Digging Into Public Works webpage for more information.

Electronic Bidding Service

MRSC is also piloting an electronic bidding service with a small group of local governments, including counties and special purpose districts. E-bidding can significantly reduce the administrative effort involved in public bidding, increase bidder participation and satisfaction, and provide valuable reporting capabilities.

The new bidding service is expected to open in January 2023, but local governments can get a sneak preview of how the service will work by attending our free MRSC Rosters Electronic Bidding webinar on October 11 from 1-2 PM. The webinar will demonstrate the e-bidding software and feature testimonial from current pilot participants on how the service has helped them. For more information, visit mrsc.org/training.

What to Expect Next

MRSC and PTAC are also creating new resources for local governments, including:

- A Public Works Resource Guide that covers all aspects of contracting and project delivery, with a focus on providing best practices in areas where there is no statutory guidance.
- An Equity Toolkit for Public Works featuring approaches and practices used in public works contracting to sustain equitable and inclusive procurement programs.

We invite you to visit our Digging Into Public Works webpage to check out our current offerings and learn more about future projects!

U.S. SUPREME COURT UPHOLDS CENSURING MEMBERS OF A GOVERNING BODY

BY STEVE GROSS, MRSC LEGAL CONSULTANT

The Court concluded that the longstanding practice of a governing body censuring one of its members does not violate the First Amendment.

One of the recurring questions we get here at MRSC is how to deal with a "rogue" member of a governing body. (Author's note: perspective matters here. One person's "rogue" colleague is another person's champion, loyal opposition, honest broker, voice of the minority, or just someone that doesn't agree with you). But at some point, the conduct of a member of a governing body can reach the point where it unreasonably obstructs the operation of the governing body or the organization. At that point, the other members of the governing body can (and arguably should) act.

This article looks at a recent U.S. Supreme Court case (*Houston Community College System v. Wilson*) about the balance between the free speech rights of the elected official and the right of a governing body to, well, govern itself.

SUMMARY OF THE CASE

In *Houston*, the board of trustees of a community college took two separate actions in response to the conduct of one of its members, David Wilson. The first action was a reprimand. When that did not have desired effect, the board took a second action disqualifying Mr. Wilson from serving as an officer of the board and from travel at the board's expense. Mr. Wilson sued, claiming these actions violated the member's First Amendment right to free speech.

The trial court agreed with the board that there was no First Amendment claim, but that decision was reversed by the Fifth Circuit Court of Appeals. The case went to the U.S. Supreme Court (Court), which agreed with the trial court that there was no claim. First, the Court said that a censure by a governing body of one of its members which does not prevent that member from exercising the core responsibility of the office is not "materially adverse" to the censured member. Second (and to me more interesting), the court said that a censure is itself the collective speech of the other members of the governing body. So, to the extent that one member's exercise of their free speech rights results in the other members exercising their free speech right by issuing a censure, there is no constitutional violation.

A DETAILED ANALYSIS

The Court made it clear that they were only addressing this narrow question: "Does Mr. Wilson possess an actionable First Amendment claim arising from the Board's purely verbal censure?"

It first considered the historical test:

> When faced with a dispute about the Constitution's meaning or application, "[l]ong settled and established practice is a consideration of great weight." The Pocket Veto Case, 279 U. S. 655, 689 (1929).

The Court noted that neither of the parties "has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment."

After reviewing the history of governing bodies issuing censures from colonial times to the present, the Court concluded that the longstanding practice of a governing body censuring one of its members does not violate the First Amendment.

The Court then considered its own precedents and restated the test:

> [A] plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an "adverse action" in response to his speech that "would not have been taken absent the retaliatory motive." Nieves, 587 U. S., at ___ (slip op., at 5).

The Court said that the adverse action must be "material." It must chill a person of ordinary firmness from engaging in future First Amendment activity, and it must consider the relationship between the speaker and retaliator, and the nature of the government action in question.

In this case the Court noted that Mr. Wilson was an elected official, as were the board members who voted to sanction Mr. Wilson. And as mentioned earlier, the Court emphasized that the censure was itself a form of speech. The Court said:

> Second, the only adverse action at issue before us is itself a form of speech from Mr. Wilson's colleagues that concerns the conduct of public office. The First Amendment surely promises an elected representative like Mr. Wilson the right to speak freely on questions of government policy. But just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same. The right to "examin[e] public characters and measures" through "free communication" may be no less than the "guardian of every other right." Madison's Report on the Virginia Resolutions (Jan. 7, 1800), in 17 Papers of James Madison 345 (D. Mattern, J. Stagg, J. Cross, & S. Perdue eds. 1991). And the role that elected officials play in that process "'makes it all the more imperative that they be allowed to freely express themselves.'" *Republican Party of Minn. v. White*, 536 U. S. 765, 781 (2002).
>
> Given these features of Mr. Wilson's case, we do not see how the Board's censure could qualify as a materially adverse action consistent with our case law. The censure at issue before us was a form of speech by elected representatives. It concerned the public conduct of another elected representative. Everyone involved was an equal member of the same deliberative body. As it comes to us, too, the censure did not prevent Mr. Wilson from doing his job, it did not deny him any privilege of office, and Mr. Wilson does not allege it was defamatory. At least in these circumstances, we do not see how the Board's censure could have materially deterred an elected official like Mr. Wilson from exercising his own right to speak.

Because everyone involved was an equal member, a verbal censure was not an adverse action in this case. But the Court cautioned that verbal reprimands could give rise to a First Amendment retaliation claim, saying, "It may be, for example, that government officials who reprimand or censure students, employees, or licensees may in some circumstances materially impair First Amendment freedoms."

The Court also emphasized that the purely verbal censure and other actions did not exclude the plaintiff from performing the essential functions of their elected position, indicating that it would be possible for the board to go too far if the action interfered with the member's essential functions.

HOW DOES THIS AFFECT LOCAL GOVERNMENTS?

For those of you that have read so far (or skipped over the detailed report), the practical application is simple in theory and incredibly hard in practice. Your council or board rules should have some kind of investigatory and discipline process that applies to the members. Having a process in place is easier than trying to agree on one when faced with a specific complaint that needs to be dealt with quickly. This process must provide due process to the member being disciplined, there should be a clear statement of the issue, and the member should be given a meaningful opportunity to respond. Talk to your agency attorney about whether you (and the accused member) want to discuss the charge in executive session or in an open session as allowed by RCW 42.30.110(1)(f).

Any discipline imposed by a governing body on one of its members must be imposed in an open session. The discipline may not have the practical effect of excluding that member from performing the essential functions of the position — for example, a member could be removed from leadership or committee positions, or funding for official travel or per diem (not required by statute) can be withdrawn — but the governing body cannot exclude a member from attending a meeting (unless they are actively creating a disturbance, but that's another blog), from meeting with constituents, or from voting.

More challenging is the question of whether the governing body "should" discipline one of its members. Consider this: other than a recall by the voters, often the only way an elected official can be disciplined is by the other members of the governing body. (Some agencies adopt a "code of ethics" that can lead to discipline, but the ultimate decision to impose it eventually rests with the governing body). Also, consider the effect that member's actions are having on the operation of the governing body or agency, and talk to your attorney or risk pool about whether those actions create liability for the agency.

Steve Gross, Legal Consultant, joined MRSC in January 2020 after working in municipal law and government for over 20 years as an Assistant City Attorney for Lynnwood, Seattle, Tacoma, and Auburn, and as the City Attorney for Port Townsend and Auburn. He also has been a legal policy advisor for the Pierce County Council and has worked in contract administration.
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ASK MRSC Questions related to acts taken by governing bodies

Every month, Ask MRSC receives hundreds of inquiries from Washington cities, towns, counties, and certain special purpose districts. The following is a sample of these inquiries and the answers provided by our skilled legal and policy consultants.

What is the difference between setting fee schedules by resolution versus ordinance?

We have a publication entitled Local Ordinances for Washington Cities and Counties that addresses the difference between ordinances and resolutions. Here is an excerpt (there is additional discussion in the publication):

- **When should an ordinance be used instead of a resolution?** Obviously, if a state statute requires one form be used instead of the other, that requirement must be followed. If no particular form is specified, either a resolution or ordinance may be used. Ministerial and administrative acts may be exercised by resolution. Legislative acts, however, it has been suggested, should be made by ordinance.
- **What is "legislative"?** The general guiding principle is that "[a]ctions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative." [emphasis added, footnotes omitted]

Cities and counties commonly use resolutions for fee schedules. It is easier to adopt an updated fee schedule by resolution than by ordinance. If fees are set forth by ordinance in a city or county code, then the code must be amended each time the city or county wants to change the fees. Setting fees is generally to be considered ministerial or administrative instead of legislative. A city or county could set fees by ordinance but doing so by resolution is generally considered to be more convenient. Fees would only need to be set by ordinance if there is a specific statute that specifies an ordinance.

Does a resolution by a city council adopting findings require review and approval by legal counsel?

State law doesn't require the city attorney to review or approve ordinances or resolutions. Local city policies often require their city attorney to approve ordinances and resolutions "as to form," but, again, this is not a requirement under state law. In contrast, the city clerk is required to authenticate all ordinances and resolutions by their signature (RCW 35A.12.150).

Have a Question? Ask MRSC. Call us at (206) 625-1300 or (800) 933-6772 or submit your question online at mrsc.org

Ask MRSC

Must our governing body post minutes if there is audio posted of a meeting?

State law requires that minutes be maintained and made available for public inspection. RCW 42.30.035 states:

> The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.

State law does not require audio or video recordings of meetings. For some issues, such as quasi-judicial hearings, it is necessary to provide a court with a verbatim transcript of the hearing and audio recordings are helpful in this regard.

So, in the interest of complying with the requirement to make the minutes available, we recommend that local government agencies post the minutes along with the audio recordings of their meetings. While we think that you could comply with RCW 42.30.035 without posting the minutes to your website, it would be an easy and efficient way to make them available for public inspection.

What are the statutory guidelines for adopting an ordinance? Is reading it twice or three times a requirement?

There are no statutory requirements to have multiple readings of an ordinance prior to adoption, however some cities have adopted such procedures. You will need to refer to your city's municipal code to determine whether there are any local procedural requirements. For a good overview of the ordinance initiation and adoption process, see our Local Ordinances publication starting at p. 20. For mayor-council code cities, see RCW 35A.12.130 and RCW 35A.12.150 regarding state law requirements for enacting ordinances.

Can a resolution be passed in executive session?

The short answer is no. RCW 42.30.060 states, in relevant part:

> No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.

The Open Public Meetings Act allows for executive sessions only in certain circumstances as set forth at RCW 42.30.110. You'll see that the governing body may do such things as 'consider', 'discuss', and 'evaluate'. Final action, such as adopting a resolution, must be done in an open public meeting.

SAYING YES TO RESPONSIVE AND RESPONSIBLE BIDS

BY JOSH KLIKA, MRSC PROCUREMENT & CONTRACTING CONSULTANT

When evaluating and reviewing bids, what types of information confirm that a bid is responsive, and the bidder is responsible? This article will look at one approach to separate and identify the concepts of responsive and responsible criteria for local government agencies.

GUIDANCE IN STATUTE

Despite not having its own statutory definition, the phrase "responsive bid" always seems to be paired with other bid requirements for local government agencies in statute; one being RCW 35.23.352 regarding publishing notice, and another, a guest appearance in the definition of "award" in RCW 39.04.010.

A "responsible bidder," as defined in RCW 39.04.010 and 39.04.350 for public works projects, is one who must meet a number of mandatory criteria. For state agencies, a responsible bidder, as defined in RCW 39.26.160 for goods and services, must meet different criteria, although that criteria is also sometimes adopted by local government agencies.

Considering if a bid is responsive or a bidder is responsible are unique concepts that are analyzed and occur in a competitive bid process separately. To better understand the terms, let's look at these definitions:

> "Responsive" applies to bids, while "responsible" applies to bidders.

Responsive bid: A bid response that is consistent with the specifications and fully conforms to the mandatory submittal requirements.

Non-responsive bid: A bid response that is not consistent with the specifications and does not fully conform to the mandatory submittal requirements.

Responsible bidder: A bidder with the capability and reliability as well as documented financial and technical capacity to perform the requirements of the solicitation and subsequent contract.

Not a responsible bidder: A bidder without the capability and reliability or without documented financial and technical expertise to perform the requirements of the solicitation and subsequent contract.

In other words, "responsive" applies to bids, while "responsible" applies to bidders. With the definitions in mind, let's look at how/when the concepts of responsive and responsible exist separately both for the bid and the bidder.

HOW/WHEN RESPONSIVE BID AND RESPONSIBLE BIDDER EXIST

Determining if a bid is responsive occurs first. As the initial step to determine a responsive bid, I verify that the bid is sealed and submitted on time before the deadline. Next, the bid should meet the characteristics that were required as part of the bid submittal, including:

- Bid guarantee is in correct amount in the form of bond, check, or money order;
- Unit, lump, and total prices are listed in all spaces on the bid form;
- Bidder has verified attendance at pre-bid meeting (if mandatory);
- Amendments/addenda have been acknowledged;
- Non-collusion affidavit has been completed; and
- Bidder responsibility questionnaire has been completed.

If any of the items make me say "No" during the bid review, I need to decide whether the error or irregularity in the application gives the applicant a substantial advantage or benefit not enjoyed by other applicants and, if so, should the bid be deemed non-responsive? For instance, when the bid document has a specific bid bond amount and the bid guarantee submitted was a lower amount, this can be seen as an advantage over other bidders and this irregularity should not be waived: I should deem it a *non-responsive bid*, and the bid should be rejected.

Here is my final step in determining a responsive bid: Right after the bid opening, I make sure I have received the following for public works projects (if required):

- A list of all subcontractors for HVAC, plumbing, or electrical work (RCW 39.30.060): This must be included within one hour after the bid opening or at the time the bid is submitted for projects that cost an estimated $1 million or more; and
- A complete supplemental bidder responsibility criteria questionnaire: This must be submitted within 72 hours after bid opening by the apparent low bidder and the next two lowest bidders.

With a "Yes" to all the elements of my bid review and receipt of all required bid submittal documents, I have a responsive bid and can move to determining whether the apparent low bidder is a responsible bidder that can meet the requirements of the specific job or project.

To determine whether I have a *responsible bidder*, I must confirm that the bidder meets mandatory criteria as defined in RCW 39.04.010 and 39.04.350 for a public works project, or the mandatory criteria adopted from RCW 39.26.160 for goods and services.

If I say "No" it would be because the bidder failed to supply information requested concerning mandatory criteria for responsible bidder within the time and manner specified in the bid. I then consider the bidder not responsible, as noted in 39.04.350. Once I determine the applicant is not responsible, I will need to follow the process of written notice outlined in 39.04.350 (3)(d) before moving forward on a contract with a different bidder.

However, when I have determined that I have a responsible bidder, I have answered "Yes" to each separate concept in the competitive bid process: I have both a *responsive bid* and a *responsible bidder* and can now move forward and award the contract to the low bidder!

Josh Klika, Procurement & Contracting Consultant, has a broad public procurement background with over 20 years in state and local governments. In addition to holding roles in procurement at multiple agencies at the State of Washington, most recently Josh worked as Contracts and Procurement Program Manager for the City of Olympia. Josh writes about procurement and contracting for public agencies.
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READ THE SIGNS

New Ruling Clarifies On-/Off-Premises Sign Regulation

BY JILL DVORKIN, MRSC LEGAL CONSULTANT

In April 2022, the United States Supreme Court (Court) ruled in favor of the City of Austin, Texas, in a challenge to the city's off-premises sign regulations in the case *City of Austin v. Reagan National Advertising (Austin).*

The decision clarified a question that local governments had been grappling with since the 2015 *Reed v. Town of Gilbert* case: Whether on-/off-premises sign regulations (i.e., regulations that regulate off-premises signs such as billboards differently than on-premises signs) are "content-based" and therefore presumptively unconstitutional.

The Court held that the city's on-/off-premises sign regulations were not subject to the "strict scrutiny" standard of review that applies to content-based restrictions, but instead that the regulations were content neutral and therefore subject to the "intermediate scrutiny" standard of review — a much lower burden for a regulation to pass muster under the First Amendment.

FACTS OF THE CASE

The plaintiffs, owners of two billboard companies, applied for permits to digitize some of their existing billboards. Austin had a regulation prohibiting new billboards but allowing existing billboards to remain. Owners of existing billboards could change the face of the sign but could not increase the degree of nonconformity, including changing the method or technology used to convey a message. Based on this regulation, the city denied the permits. The city's regulations did allow digitization of on-premises signs in some circumstances.

The billboard companies filed a lawsuit, arguing that the on-/off-premises distinctions were content based and therefore unconstitutional pursuant to *Reed*. The plaintiffs relied on the implication in *Reed* that "if you have to read the sign to regulate it," a regulation is content based. In other words, you would have to read the sign in order to know whether it is to be located on the same premises as the person, place, or thing being discussed. The district court upheld the city's permit decision, but the Fifth Circuit Court of Appeals reversed, holding that the off-premises sign regulation was content based, failed the "strict scrutiny" test, and therefore violated the First Amendment.

ANALYSIS

In reversing the Court of Appeals decision, U.S. Supreme Court Justice Sonia Sotomayor wrote for the majority:

> The Court of Appeals interpreted *Reed* to mean that if "[a] reader must ask: who is the speaker and what is the speaker saying" to apply a regulation, then the regulation is automatically content based... This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent. Unlike the regulations at issue in *Reed*, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny. (See *Austin* at 6.)

The Court distinguished on-/off-premises sign regulations from the type of regulations at issue in *Reed*. In *Reed*, the Town of Gilbert's sign code included 23 categories of signs, with signs subject to different limitations based on the subject matter of the sign — such as ideological, political, or directional. The *Reed* Court had reasoned that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." (See *Reed* at 169.)

In distinguishing the current case from *Reed*, the Court wrote:

> Unlike the sign code at issue in *Reed*, however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation. (See *Austin* at 8.)

Justice Sotomayor emphasized this country's long history of regulating signs based on the on-/off-premises distinction, including the federal Highway Beautification Act of 1965, state laws, and thousands of local codes throughout the country. The Court also cited several of its own decisions upholding off-premises sign regulations and location-based rules.

The Court remanded the case back to the Court of Appeals to determine whether the regulations could meet the intermediate scrutiny test for content-neutral regulations.

WHAT DOES THIS MEAN FOR LOCAL GOVERNMENTS?

Local governments have been scrambling since *Reed* to scrub their sign codes of content-based regulations, including regulations that apply based on the specific subject matter of a sign (a practice that had been typical in comprehensive sign codes prior to *Reed*). Many have struggled with whether to maintain on-/off-premises distinctions in their codes since *Reed's* formalistic test seemed to call this into question. After *Austin*, local governments can feel confident in retaining (or reinstating) reasonable on-/off-premises sign regulations.

Jill Dvorkin, Legal Consultant, worked as a civil deputy prosecuting attorney for Skagit County. She writes on permit processing and appeals, Growth Management Act compliance, code enforcement, SEPA, and land use case law. Jill earned a B.A. in Environmental Policy and Planning from Western Washington University and a J.D. from the University of Washington School of Law.
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Community Engagement Strategies that Build Public Trust
Wednesday, October 19, 11:00am–12:00pm | Online | Credits: CM

FREE: Digging Into Public Works Contracts
Monday, October 24, 8:30am–3:00pm | Airway Heights
Wednesday, October 26, 8:00am–1:30pm | Lynnwood
Thursday, November 17, 8:00am–2:00pm | Tri-Cities
We are hosting similar events at additional locations in 2023

Learn more and register at mrsc.org/training

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