PLANNING COMMISSION MEETING

February 18, 2025 at 7:00 PM

Council Chambers – Town Municipal Center

AGENDA

CALL TO ORDER - *Mr. Tolbert*

INVOCATION - *Mr. Bowden*

PLEDGE OF ALLEGIANCE - *Mr. Tolbert*

ELECTION OF OFFICERS - *Mr. Tolbert*

PUBLIC PARTICIPATION - *Chair*

APPROVAL OF MINUTES - *Chair*

1. November 12 minutes

REVIEW SIGN AND MURAL ORDINANCE - *Chair*

2. Attorney Opinions
3. Sign Ordinance Enforcement Memo
4. Artwork Article American Bar Association
5. Morris v. City of New Orleans

REVIEW PUBLIC SEWER PROJECT ISSUES - *Chair*

6. Letter of Interest
7. Letter of Interest Response

REVIEW PUBLIC SEWER PROJECT ISSUES - *Chair*

8. Short Term Rental Registry

ANNOUNCEMENTS OR COMMENTS - *Chair*

ADJOURN

MINUTES OF THE
PLANNING COMMISSION MEETING
TOWN OF CHINCOTEAGUE, VIRGINIA
NOVEMBER 12, 2024 - 7:00 P.M. – Council Chambers

Commission Members Present:
Mr. Ray Rosenberger, Chairman
Mrs. Mollie Cherrix, Vice Chairperson
Mr. David Britton
Mr. Michael Dendler
Mr. Steve Katsetos
Mr. K. Savage, Councilman
Mr. Robert Shendock

Commission Members Absent:

Staff Present:
Mr. Michael T. Tolbert, P.E., Town Manager
Mr. Mark Bowden, Building Zoning Administrator

Call to Order
Vice Chairman Rosenberger called the meeting to order at 7:00 p.m.

Invocation
Councilman Savage offered the invocation.

Pledge of Allegiance
Chairman Rosenberger led in the Pledge of Allegiance.

Public Participation
Chairman Rosenberger opened the floor for public participation. There was none.

Adoption of Agenda Mr. Katsetos motioned, seconded by Mr. Briton to adopt the agenda as presented. Unanimously approved.

Approval of the Minutes
Mr. Savage motioned, seconded by Mr. Katetosto approve the minutes of the October 8th, 2024 meeting as presented. Unanimously approved.

Review of Subdivision Lot Requirements
Mr. Bowden explained the issue with subdivision of lots using flag lots and the fact that access to such lots is hampered by the practice of granting easements to all lot holders across all other lot holder's lots. Mr. Tolbert explained the issue with the inadequate width of flag lots being less than 10' to assign a 911 address since each 911 number changes on 10' intervals.

A discussion ensued as to the issues with flag lots which include the aforementioned inadequacies and the requirements for water line routing through the flag stems requiring access

by vehicles across installed water meters degrading water lines and increasing the risk of damage to water lines and thus costs to the town through water department repairs.

The commission directed Town Manager Tolbert to research and recommend proper routing of water lines through utility easements for subdivisions and also directed Administrator Bowden to research and recommend both the proper number of lots approved for subdivisions using flag lots and also to recommend the proper with of any access road to access these lots.

Announcements or Comments
Mr. Bob Shendock announced his resignation from the commission and expressed his thanks for the work of all commissioners. All commissioners expressed thanks to Mr. Shendock for his dedication and hard work on behalf of the commission.

Adjourn
Mr. Savage motioned, seconded by Mr. Britton to adjourn. Unanimously approved.

_____
Chairman, Ray Rosenberger

Town of Chincoteague, Inc.

TO: Members of the Planning Commission

FROM: Michael Tolbert, Town Manager

DATE: February 11, 2025

SUBJECT: Mural and Sign Ordinance

I recently proposed questions concerning our mural ordinance to our attorney Mike Sterling of Woods Rogers. The exchange is instructive and is copied below.

Questions posed to Town Attorney about Murals:

The Town recently issued a variance to the zoning code's sign ordinance which in effect permitted a large mural to be painted on the side of a commercial building in our downtown. We required the variance because our code does not have a definition for Mural and they are therefore not permitted by right. The mural that was proposed actually fit the definition of a sign but was too large, so we required the applicant to go to the BZA to obtain a variance to the sign ordinance. To rectify this round about approval process, we are proposing a mural ordinance to be added to the zoning code. The proposed ordinance provides a definition as well as requirements for any proposed mural.

As part of the ordinance, I want to make the approval of all murals only by a conditional use permit (CUP) which requires the review and approval of the planning commission as well as a final approval by the Council. This route will at least keep some structure to the entire process and prevent the town from being littered with cheap graffiti like pictures all over our buildings. My reading of the CUP language is that they are for uses not permitted by right and that the CUP must be granted within the scope of the comprehensive plan. Is there any reason that I cannot use the CUP process to approve murals?

Town of Chincoteague, Inc.

Answer provided by Town Attorney:

"Here are some comments and information for your review, and then we should discuss further. I don't see any reason why you can't use a CUP process, but there are other issues for you to consider. One quick note is that you need to include time limits for the review process to issue the CUP."

"I did not review the Town's sign ordinance, but if it has not been updated since 2015, it is probably unconstitutional. That is because of the decision of the US Supreme Court in Reed of Town of Gilbert. I have attached a memo from the Local Government Attorney Association (LGA) regarding that decision for your review."

"One of the concerns I have about your separate mural ordinance is that it may run afoul of Reed, since among other things you are treating murals differently than signs and is therefore arguably content related. This might invalidate both the sign ordinance and the mural ordinance. I have attached a case where the court invalidated a similar mural ordinance, Morris v. City of New Orleans."

"I have also attached an article by the American Bar Association (ABA) regarding regulation of artwork."

"This is a very complicated issue, and there is a cottage industry of plaintiffs challenging such ordinances as they can often recovery attorney fees and costs."

The articles provided by Mr. Sterling are attached here for your review.

To: LGA Members

From: Sign Ordinance Ad Hoc Committee

Subj.: U.S. Supreme Court Decision - Reed v. Town of Gilbert

Date: July 29, 2015

MEMORANDUM

On June 18, 2015, the United States Supreme Court decided the case of Reed v. Town of Gilbert Arizona, *et. al.*, wherein the Court examined whether or not a locality's sign ordinance that assigns different size and posting requirements based on the type of noncommercial speech displayed violates the First Amendment of the U.S. Constitution. This memorandum is intended to assist Virginia local government attorneys in the enforcement of your locality's sign ordinance in light of the decision in this case.

The traditional model sign ordinance, which is most often used to classify temporary signs, identifies different types of signs with monikers like "real estate sign," "political sign," "ideological sign," "directional sign," "construction site sign," and "garage sale sign." The model then sets out standards, which control quantity, placement, size, timing of display, and potentially other characteristics of each category of sign. In other words, the quantity, placement, size, timing of display, and other features of a sign are limited not on the basis of the structure of the sign itself, but instead entirely on the basis of the message the sign displays.

In the Reed decision, the U.S. Supreme Court ruled that where a local ordinance defines the categories of temporary, political, and ideological signs solely on the basis of their messages and then subjects each category to different restrictions, the ordinance is "content based" requiring strict scrutiny review. In other words the ordinance must further a "compelling governmental interest", be "narrowly tailored" to achieve that interest and must leave open "ample alternative channels of communication."

The Town of Gilbert's ordinance failed to survive strict scrutiny review; however, the Court stated that its decision will not prevent governments from enacting ordinances that are content neutral to "resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability." The decision further states that localities "may be able to forbid postings on public property, so long as it does so in an evenhanded, content neutral manner." The Court also suggested that an ordinance that is "narrowly tailored to the challenges of protecting the safety of pedestrians, drivers and passengers" (such as warning signs marking hazards on private property or signs directing traffic) might survive strict scrutiny.

In the wake of the Reed decision, it is important to note that:

- Content-based sign laws – those that differentiate speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests and leave open ample alternative channels of communication.

- Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed.

- Previously, the Fourth Circuit has used the following test for determining if a regulation is not content-based: "1) the regulation is not a regulation of speech, but rather a regulation of places where speech may occur; 2) the regulation was not adopted because of disagreement with the message the speech conveys; or 3) the government's interests in the regulation are unrelated to the content of the affected speech." Brown v. Town of Cary, 706 F. 3d 294 (4th Cir. 2013). The Fourth Circuit's test has been overruled by the Reed decision.

- An ordinance regulating temporary directional signs will be considered to be content-based to the extent that it differentiates what regulations apply based solely on the message that it conveys (*i.e.* conveying the message of directing the public to a church or some other "qualifying event").

- The locality will bear the burden of demonstrating that the Code's differentiation of signs based on content (*i.e.* between temporary directional signs and other types of signs, such as political signs and ideological signs) furthers a compelling governmental interest and is narrowly tailored to that end.

In the coming months, the Local Government Attorneys of Virginia hope to provide a Model Ordinance to address the issues raised by the Reed decision. Until that time, localities are encouraged to adhere to these guidelines for enforcing their current ordinance in light of the Court's ruling. In the context of the recommendations below, keep in mind that if your ordinance differentiates its sign restrictions in a manner that is not content-neutral, you can still enforce those restrictions if you can justify the differentiation under a strict scrutiny analysis; however, since that standard is a difficult one to reach, the advice below presumes that the portions of your ordinance that are not content-neutral will not be justifiable under a strict scrutiny standard.

1. Severability. Does your ordinance have a severability provision? If so, then you should consider reviewing your ordinance to enforce the provisions that are still enforceable, since the enforceable portions can be severed from the unenforceable portion. For example, limitations on banner size, materials, methods to affix and display period can be enforced, but you can no longer enforce a regulation that banners only be used to convey certain messages (such as "Now Hiring", "Community Event", "Grand Opening", etc.) or regulations that differentiate amongst banners based on the messages they convey.

2. Permissible Regulation. A concurring opinion in the Reed decision suggests that regulations can differentiate based on these categories: content-neutral size regulations, building-mounted versus free-standing, sign location and setbacks, illumination, fixed versus electronic messages, private versus public property, commercial versus residential property, on-premises versus off-premises, temporary versus permanent, and number of signs per street frontage/mile of roadway. To the extent your ordinance regulates these categories in a content-neutral manner, these portions of your sign ordinance can still be enforced.

3. Commercial vs. Noncommercial Speech. There is nothing in the Reed decision which overtly overrules the Court's long-standing jurisprudence that regulations can distinguish between commercial and noncommercial speech. Then again, the Reed decision involved sign regulation that made distinctions amongst types of noncommercial speech, so the Court had no reason to discuss the difference between commercial and noncommercial speech. Accordingly, while the distinction between the regulation of commercial and noncommercial speech still exist after Reed, the language and analysis of the unanimous Reed decision raises a doubt about the continuation of that distinction in the future.

4. Risk Assessment. In reviewing your ordinance for provisions that can still be enforced, your first review should be from a "grammar" perspective: what regulations are content-neutral and still enforceable? However, once you review the words of your ordinance, you need to also do a risk assessment. First Amendment rights receive strong protections from the courts and, once violated, they are impossible to remedy. If you think enforcement of part of your ordinance is a "gray area", then don't enforce it at this time. One example of a risk assessment is discussed in the following paragraph, about temporary signs.

5. Temporary Signs. The Supreme Court has long held that citizens' First Amendment rights require that they have the opportunity to express their noncommercial ideas or opinions through temporary signs. Of course, like in the Town of Gilbert, the temporary sign regulations are often content-based. When considering how much of your current ordinance to enforce, it is recommended that you allow as much as possible – or all – temporary signs up to the maximum number, size and location limits afforded under your current ordinance. Moreover, allowing more temporary signs is a decision with relatively low long-term risk, since these types of signs typically are not sufficiently permanent to become nonconforming uses that would be allowed to remain or continue after the adoption of a new ordinance.

6. Nonconforming use. Perhaps one of the biggest concerns about signs that are erected in this interim period between the issuance of Reed and your new sign ordinance is the possibility of a sign epidemic and thereafter all of those overly-large or unappealing signs being claimed as nonconforming uses. To become a nonconforming use, the use has to have been legal when erected. If your larger or more permanent signs have to go through a sign permit process, see the paragraph below.

7. Sign permits. If permanent signs in your locality have to go through a sign permit process, then the issuance of a sign permit will be a governmental act that may allow that sign to become legally nonconforming even after your new ordinance is adopted. So be careful about what permits you issue in the interim. If your sign permit process does not have a stated deadline for decision, consider using more review time than you have typically in the past to try to negotiate with the applicant, especially if you are trying to act quickly to adopt a new sign ordinance. Keep in mind, though, that even without a time frame identified in your ordinance, the time you take to analyze a sign permit application has to be reasonable, or else it could be considered an illegal prior restraint of speech.

8. Interim ordinance. There are typically a large number of stakeholders interested in a new sign ordinance – commercial businesses, developers, homeowners' associations and residents. It will take forever to get input and feedback from all of these groups on a new sign ordinance. Consider drafting an interim sign ordinance in which you revise existing regulations using only the content-neutral categories that were championed by the concurring opinion in Reed and get it adopted without (or with little) stakeholder input. Then, with a content-neutral ordinance in place and enforceable, you can take more time to revise and improve your sign ordinance and obtain feedback from the stakeholder groups. See the permissible regulation section, above, for the broad categories of regulation you could impose in a content-neutral manner in an interim ordinance.

9. Signs in Rights of Way. To the extent your locality works with VDOT, temporary signs placed in the roadway median or in the grassy right of way adjacent to VDOT roads are still illegal because the state law prohibiting such signs (Virginia Code § 33.2-1224) is content neutral. If your locality controls your own rights of way, check to see if your prohibition on signs in rights of way is content-neutral and, therefore, enforceable.

10. Regulation of signs through Zoning Conditions. Though the conditions of a zoning case or special use permit approved by your locality become amendments to your zoning ordinance, they can also be analyzed as a request by an applicant for approval of the signs that it seeks to use in its development. Analyzed in this manner, the conditions in a zoning case or special use permit should be able to be more specific than the general sign ordinance provisions. However, be mindful of your risks in analyzing zoning conditions regulating signs; Virginia Code § 15.2-2208.1 provides that any unconstitutional zoning condition can be declared void and further provides for the recovery of compensatory damages, costs and attorney fees.

January 02, 2017

Understanding the First Amendment Limitations on Government Regulation of Artwork

Share:

This article is adapted from portions of "Chapter 4: Government Regulation of Art and Architecture" in the forthcoming book Local Government, Land Use, and the First Amendment: Protecting Free Speech and Expression, *edited by Brian J. Connolly and published by ABA Publishing. The book will be released in 2017.*

Local government control of art[1] arises frequently: for example, in the regulation of murals as a form of outdoor signage or advertising, in graffiti abatement, or in government selection of artwork for display in public parks or public buildings. These controls present many familiar First Amendment concerns. Because art has been characterized by the courts as a form of First Amendment-protected speech, regulations pertaining to artwork must be content neutral, contain adequate procedural safeguards, and may not be unconstitutionally vague. Artwork differs from other forms of speech, however, particularly signage, in one critical respect: in the case of artwork, the medium is commonly the message. While a written message on a sign could theoretically be conveyed regardless of the height, size, location, color, materials, or brightness of the sign structure, artwork is different. In many cases, the size, orientation, color, or materials comprising the work are of critical importance to the piece's communicative intent. Thus, while local government aesthetic regulatory interests are implicated in the regulation or control of art, the appropriateness of aesthetic interests in regulating artwork is debatable under the First Amendment.

While the First Amendment broadly applies to artistic media, First Amendment concerns regarding the regulation of architecture are still in an antenatal state. Few court cases have considered First Amendment challenges to local design review requirements, building design mandates, or ordinances that restrict the extent to which buildings may look similar or different from one another. Because First Amendment protections have generally expanded since the Constitution was ratified, First Amendment challenges to architectural controls may increase in the coming years.

This article reviews First Amendment issues associated with regulation of artwork. The government practitioner, however, should review the First Amendment doctrines applicable to regulations of all forms of speech, such as content neutrality. The case law pertaining to local government controls of artwork and architecture is actually quite sparse. Cases generally applicable to speech regulation and, as discussed further herein, the government speech doctrine and public forum law, provide additional guidance in this area.

Forms of Local Government Regulation of Art and Architecture

Local governments regulate or control artwork in myriad ways. On private property, art regulation frequently arises via zoning codes, sign regulations, and nuisance abatement controls. Murals, paintings, and other two-dimensional works of art located on private property and that may be affixed to building walls, on signposts, or elsewhere are frequently regulated specially as "murals" or other forms of artwork, or as a form of signs under local sign regulations. Three-dimensional works of art located on private property, including sculptures or statuary, may be regulated by zoning regulations that restrict the placement or size of structures, or by building or fire codes. Additionally, artwork may be regulated by local governments pursuant to their general authority to regulate nuisances; for example, many local governments prohibit graffiti and other nontraditional forms of artwork under their nuisance control codes. In some circumstances, nuisance regulations such as those prohibiting the location of trash or junk cars on private property may

limit displays of artwork. Some local governments completely exempt works of art on private property from regulation under zoning or sign codes.

Similarly, local governments may have ordinances or other laws controlling private individuals' use and placement of objects, including artwork, within public property. Local governments may also control artwork on public property through procurement and selection processes for art displays in public buildings. Some local jurisdictions have additionally initiated programs that *require* public art, or cash payments into public art funds, in connection with private development applications. Some such ordinances require review of private developments' public art installations by local art committees. Additionally, recognizing the benefits of publicly-accessible art, many local governments have adopted "percent-for-art" ordinances, requiring that governmental expenditures on public works include public art.

First Amendment Application to and Protections for Art

Courts frequently err in favor of affording artists' subjective viewpoints significant latitude in determining the First Amendment's application to artwork.[2] Music, theater, film, and visual art—including paintings, prints, photographs, and sculpture—as well as several other forms of expressive conduct, including tattooing, have been found to merit First Amendment protection.[3] One court observed that "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection."[4] A particular work need not be immediately and obviously identifiable as a work of art, i.e., it could be fairly abstract, to be protected.[5]

The scope of First Amendment protection for artwork, while expansive, is not boundless. The same carve-outs from First Amendment protection applicable to other media of speech, including for obscenity, fighting words, and incitement, exist with respect to artwork. The First Amendment does not protect obscenity.[6] The Supreme Court has defined obscenity as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual

conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value," as determined by an "average person, applying contemporary community standards."[7] The foregoing test does not provide bright-line clarity as to what types of artwork are obscene for constitutional purposes. The Supreme Court has found "hard core" pornography[8] and child pornography[9] to be outside of the scope of First Amendment protection, but courts have struck down local ordinance limitations on speech and expressive conduct as they related to poetry with a sexual content,[10] pornography that may be understood as degrading toward women,[11] depictions of animal cruelty,[12] virtual depictions of child pornography,[13] films or artwork in which obscene images are paired with non-obscene material, and parody material.[14] Artwork that depicts nudity, violence, or thought-provoking portrayals containing sexual content is not likely to fall outside the scope of First Amendment protection. But, to the extent art exhibits material of a vulgar, pornographic nature, it may not enjoy First Amendment protections.

As with artwork of an obscene nature, artwork containing elements of "fighting words," incitement, or defamation also falls outside the umbrella of First Amendment protection. When a work of art is intended to counsel viewers toward criminal violence, it may lack First Amendment protection. But, when an artist does not intend for her work to provoke unlawful action, and when the risk of such unlawful action is not great, the work would presumably be constitutionally protected.[15]

An artist's free speech rights may be limited additionally by state common law limitations on "verbal torts," including defamation—slander or libel—as well as torts such as intentional infliction of emotional distress.[16] Specifically, when defamatory speech is on a matter of private concern and involves private individuals, the First Amendment generally does not protect the defendant speaker.[17] Conversely, when speech critical of another relates to a matter of public concern[18] or when such speech involves a public figure,[19] the speaker may have a First Amendment defense against a tort claim. Thus, artwork that criticizes a public figure or addresses a matter of public concern would likely

carry First Amendment protections that would be unavailable if the work criticized or parodied a private individual on a matter of private concern.

While the foregoing exceptions relate to all speech, another exception to First Amendment protection pertains specifically to artwork. In recent decades, courts have established boundaries between art meriting First Amendment protection and commercial merchandise that is not protected speech.[20] Many of these cases arise in the context of street vendors of clothing or other souvenirs that claim that local licensing requirements interfere with protected speech. Commercial merchandise lacking "a political, religious, philosophical or ideological message" falls outside the scope of the First Amendment's protections.[21]

However, artwork does not lose its First Amendment protection simply because it is commercial in nature.[22] Commercial speech receives First Amendment protection, albeit less than noncommercial speech.[23] Commercial speech has been defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience,"[24] or speech that otherwise proposes a commercial transaction.[25] Art in the form of commercial advertising, which bears the logo or trademark of a particular business or firm, or that otherwise proposes a commercial transaction, retains First Amendment protection.

First Amendment Limits on Regulation of Art

The First Amendment's application to specific works of art is based in large part on the ownership—public or private—of the underlying property where the artwork is being displayed. Regardless of whether artwork is displayed on public or private property, developing code definitions that meet First Amendment limitations is the most important and difficult task in regulating artwork. Many local regulations contain definitional distinctions between signage and artwork. Because it is almost impossible to distinguish between signage and artwork without reference to the content of the message, these

provisions defining artwork are likely content based and may be legally questionable following *Reed v. Town of Gilbert*.[26]

Art on Private Property

Artwork on private property that is subject to local regulation typically falls into two categories: two-dimensional artwork such as wall murals or signage displaying murals or paintings and three-dimensional artwork such as sculpture or statuary. Graffiti is another form of artwork that frequently occurs on private property.

The First Amendment doctrine relating to regulation of artwork located on private property mirrors the doctrine associated more generally with signage on private property. In reviewing local regulations applicable to art, courts will generally look first to whether a regulation of noncommercial artwork on private property is content and viewpoint neutral,[27] and if so, whether it is tailored to serve a significant governmental interest and whether ample alternative channels of communication are available.[28] If the regulation is content based, strict scrutiny applies, requiring a compelling governmental interest and least restrictive means of achieving that interest.[29] For commercial works, courts apply the *Central Hudson* test requiring such regulations to serve a substantial governmental interest, directly advance that regulatory purpose, and not restrict more speech than is necessary.[30]

Other concerns that might arise in the regulation of artwork on private property include whether the regulation effects an unconstitutional prior restraint,[31] or whether the regulation is vague[32] or overbroad.[33] If a local regulation is content based, the government has failed to establish a substantial regulatory interest, or the regulation is not appropriately tailored to the regulatory interest, it will most likely be invalidated.[34] Similarly, if the regulation does not provide adequate procedural safeguards, such as a concrete review timeframe, or if the regulation leaves administrative officers with unbridled discretion to approve or deny the display of certain artwork, the regulation may be an unconstitutional prior restraint.[35] Moreover, if the regulation is

vague or overbroad,[36] or if the regulation suppresses too much speech,[37] it may also be found unconstitutional.

Avoiding Content Bias: Definitions and Other Problems. Content concerns arise in many areas of art regulation, but the most common problems relate to definitions of "sign," "mural," "art," or "artwork." In *Neighborhood Enterprises, Inc. v. City of St. Louis*,[38] the owner of a mural protesting alleged eminent domain abuses by St. Louis, Missouri, challenged the city's enforcement of its sign ordinance against the mural. The Eighth Circuit held that the city's definition of "sign," which exempted from its definition all flags, civic crests, and similar objects, was content based because the code's application to the mural rested on the message of the mural.[39] A similar problem arose when the Norfolk, Virginia, sign ordinance exempted from regulation "works of art which in no way identify or specifically relate to a product or service."[40] The Fourth Circuit found, "On its face, the former sign code was content-based because it applied or did not apply as a result of content, that is, 'the topic discussed or the idea or message expressed.'"[41] The court went on to find that the city's differential regulation of works of art was not narrowly tailored, since artwork could have the same detrimental impact on community aesthetics or traffic safety that garish signage might have.[42]

Case law also provides an example of content neutral treatment of artwork. In *Peterson v. Village of Downers Grove*,[43] the court upheld a local government's ban on "painted wall signs." The court found the ban content neutral because it did not contain references to the message on a given sign.[44] *Peterson* is instructive for local governments regarding the need to establish code definitions that do not create content based distinctions, particularly in the arena of regulating artwork on private property. After *Reed*, it will be challenging for a local government to distinguish between, say, a "mural" and a "sign," or between a "sculpture" and a "structure," in a content neutral manner, although it may be possible to identify specific media of artwork in the same manner as was done in *Peterson*.

Content neutral regulations of artwork should focus on the non-communicative aspects of the artwork. Examples of content neutral regulation

of art include regulating the size, height, placement, or lighting of works of art.[45] Unlike with signage, however, regulating some of the locational aspects of art may give rise to claims of content discrimination, particularly when a particular work of art is alleged to be context- or location-specific.[46] Similarly, regulation of materials or color may be problematic, as the materials and colors used in the creation of a work of art are often central to the message of the particular work.[47] More broadly, regulating noncommercial artwork differently from other forms of noncommercial speech may violate the First Amendment. When a local sign code contains different size, height, or other display limitations on murals as compared with political signage, that code is at risk of being found to be content based.[48]

Analysis of Content Neutral Regulations of Artwork. Content neutral regulations must be supported by a substantial or significant regulatory interest, and the regulation must be narrowly tailored to that interest.[49] In the context of sign and visual display cases, the Supreme Court has found both aesthetic and traffic safety significant and/or substantial as they relate to sign regulation.[50] But there is scant case law on the governmental interests supporting regulation of artwork. While traffic safety may suffice as a governmental interest for purposes of regulating works of art, aesthetics is likely less sound given that the aesthetic concerns of a local government may be at odds with the message of a particular work of art. If the government is in the business of making the community beautiful, can the government prohibit "ugly" artwork whose ugliness is a critical part of its message? A local government's restriction on the size, height, or color of murals for aesthetic purposes may directly conflict with the central message of a muralist's work. Similarly, whereas many sign codes regulate the placement of signs within property and with respect to street right-of-ways in order to preserve a particular community character, an artist's placement of a sculpture or mural—if the artwork is site-specific—may help to articulate the message that the artist wishes to convey with his or her work.[51]

Furthermore, building safety, nuisance control, and other purposes underpinning zoning and building restrictions have not been widely reviewed for whether they are significant governmental interests in First Amendment

litigation. In *Kleinman v. City of San Marcos*,[52] a Texas city had an ordinance prohibiting property owners from keeping junked vehicles on their properties. A novelty store placed a wrecked Oldsmobile 88 in its front lawn, planted it with vegetation, and painted the car colorfully with the message "Make Love Not War." After ticketing the property owner and the commencement of litigation, the city stipulated to the fact that the car planter had some artistic expressive value. The Fifth Circuit found that the car's expressive value was secondary to its utility as a junked vehicle.[53] Applying the intermediate scrutiny test for expressive conduct, the court found that the junked vehicle ordinance was content neutral in purpose and narrowly tailored to serve the government's interest in preventing attractive nuisances to children, prevention of rodents and other pests, and reducing urban blight, vandalism, and depressed property values.[54] While the city's interests in blight prevention and preserving property values may have had some aesthetic component, the court did not analyze whether aesthetic interests alone could support prohibiting the creative car-planter as a form of artwork.

Narrow tailoring requires that the regulation in question directly advance the interest(s) asserted by the government. In the context of artwork, problems may arise where local codes treat murals differently from other forms of noncommercial speech, and where the regulatory interests at stake are not directly served by the differential treatment.

Distinguishing Between Non-Commercial and Commercial Artwork. When a municipal code requires a property owner to obtain a permit for a commercial wall sign, but does not require a permit for a non-commercial mural, how does one address artwork displayed on the wall of a building that contains images of products sold inside the building? Business owners often use blank wall space on the side of a building to advertise products sold inside the building, beautify the premises of their properties, or to convey non-commercial or political messages. Determining whether such images constitute commercial or non-commercial speech is rarely simple.[55]

Case law provides several illustrations of this problem. When a city attempted to prohibit a fuel station owner's mural depicting "the geography, indigenous

plants, and archaeology of Mexico, [the] social advancements of the Mexican people in contemporary society as well as reflections upon a colonial period of Mexican history," placed in an effort to beautify the property and to attract customers to the station, a California court found the mural to be noncommercial speech.[56] And when a shop that sold fishing equipment, including bait and tackle, displayed a painted wall mural depicting fish and other aquatic plant and animal species, the mural was determined to be noncommercial speech: "[A]s the evidence demonstrate[d] . . . it reflects a local artist's impression of the natural habitat and waterways surrounding [the subject shop], and also alerts viewers to threatened species of fish."[57]

Conversely, a mural in Ohio depicting a "mad scientist" outside of a shop that sold nitrous oxide for racing cars was found to constitute commercial speech.[58] In arriving at that conclusion, the court stated, "the crucial inquiry is whether the expression depicted in the appellants' mural either extends beyond proposing a commercial transaction or relates to something more than the economic interests of the appellants and their customers."[59] The court found that "[t]he sign plainly is intended to attract attention to [the racing shop], which directly relates to that company's economic interests."[60] In another case, a Virginia pet day-care owner displayed a mural depicting dogs playing on the side of the building, in plain view of a dog park. The Fourth Circuit concluded that the mural was commercial speech because the mural was intended to attract attention of potential customers, it depicted images relating to services provided on the premises, and the owner had an economic motivation for displaying the mural.[61]

Courts are generally more deferential to governmental regulations of commercial speech as compared with regulations of non-commercial speech, in part because the commercial speech doctrine does not require an initial determination regarding the content neutrality of the regulation in question. But local governments should take care to define the boundary between commercial and non-commercial speech, using distinctions found in case law applicable to the local government.

Special Considerations. An area that has been mostly unexplored in case law relates to local anti-graffiti ordinances. Many local governments have taken measures to prevent graffiti, based primarily on aesthetic concerns and an interest in preventing vandalism and property-related crime. In a 2007 case, a group of graffitists challenged New York City's prohibitions on the sale of aerosol paint cans and broad-tipped markers to persons under 21 years of age, and persons under 21 from possessing such objects in public places, which were intended to control unwanted graffiti in the city.[62] The Second Circuit upheld the district court's determination that regulation was content neutral, but also agreed with the conclusion that the ordinance provisions burdened more speech than was necessary to achieve the city's goals.[63] Earlier cases found similar restrictions to pass constitutional muster, although not on First Amendment grounds.[64] To the extent anti-graffiti ordinances regulate in a content neutral manner and do not burden more speech than necessary, they are likely to be upheld by courts. Local governments should beware, however, that many current anti-graffiti ordinances likely contain content based definitions of the term "graffiti." An example of a definition of "graffiti" that likely passes muster is one that references graffiti based on its unauthorized nature.[65]

Another area that has received little judicial attention relates to public art programs in private development projects. Some local governments require that private development projects include public art, require dedications of money or artwork in connection with private development projects, or undergo design review of artwork. The constitutionality of these arrangements has not been fully vetted. In a case originating in Washington state, a federal district court found that the city's requirement that signs be of a Bavarian style was not content based, did not constitute forced speech, and that a design review board charged with reviewing signs and architecture in the community did not constitute an unlawful prior restraint despite having "somewhat elastic" criteria for review.[66] Similarly, the Oregon Court of Appeals held that the City of Portland's design review process as applied to billboards did not constitute an overbroad regulation or unconstitutional prior restraint due to the narrow construction of the design review board's purview.[67]

Private Art on Public Property

The regulation of artwork on public property carries different considerations than artwork on private property. Two special problems arise in the regulation of artwork on public property: the sale or display of artwork on public property such as parks, sidewalks, or streets and government selection of artwork for public property, including government buildings, plazas, and parks.

Sale or Display of Private Artwork by Private Individuals on Public Property. Many local codes prohibit the sale of commercial products or the solicitation of business on public property. Some of these code provisions create express exemptions for nonprofit organizations or other forms of noncommercial speech. In cases addressing such regulations, courts first review where the property falls within the public forum doctrine, i.e., whether the property is a traditional, designated, limited, or non-public forum.[68] If the property is a traditional or designated public forum, restrictions must be content neutral and narrowly tailored to serve significant governmental interests, and these restrictions may regulate only the time, place, and manner of speech.[69] If the property is a limited public forum or a non-public forum, the restrictions must only be viewpoint neutral and reasonable, a far more deferential standard than that which is applied in traditional and designated public fora.[70]

In a 2000 case, St. Augustine, Florida, attempted to enforce its ordinance prohibiting "selling, displaying, offering for sale or peddling any goods, wares or merchandise" on public property, including streets and sidewalks, against a street artist displaying and selling newspapers and art that contained political messages.[71] The code provision exempted nonprofit and religious organizations, but did not contain any exemption for political speech. In a cursory analysis, the court found that the artist's visual art and newspapers were protected by the First Amendment, and found that the public property regulated by the ordinance was a traditional public forum, thus requiring the regulation to be content neutral and narrowly tailored to a significant governmental interest.[72] Because the ordinance favored nonprofit and religious organizations over other forms of non-commercial speech, the court held the restriction content based.[73]

Similarly, a New York City law requiring street vendors to obtain a license for the sale of items on city sidewalks was found not to be narrowly tailored or to provide sufficient alternative channels for communication.[74] The restriction capped the total number of licenses available to sidewalk vendors citywide.[75] After finding that the works being sold by sidewalk vendors were subject to First Amendment protection[76] and that the traditional public forum analysis applied to the case,[77] the Second Circuit found that the license requirement and cap were not narrowly tailored to the city's goals of reducing congestion and ensuring clear passage on the sidewalks.[78] The court reasoned that the city could have employed time, place, and manner restrictions to ensure clear passage on the sidewalks while still offering vendors the opportunity to obtain a license, and that exceptions to the licensing cap called into question the rule's tailoring.[79] The court also found that the restriction did not provide ample alternatives, and that the sale of artwork on the street was more accessible than sales in galleries or elsewhere.[80]

To the extent local governments prohibit the sale or display of commercial products on sidewalks or other public properties, exceptions made for non-commercial speech, including non-commercial artwork, should not distinguish among forms of non-commercial speech. Moreover, an outright ban or severe limitations on the display of non-commercial artwork in traditional public fora, such as streets or sidewalks, is likely to fail the narrow tailoring part of the intermediate scrutiny test. Time, place, and manner restrictions are permissible where necessary to ensure safe passage for pedestrians along public sidewalks, or to limit traffic congestion along public streets. Additionally, where the regulation of artwork is taking place in a limited or nonpublic forum, restrictions and prohibitions can be much broader, so long as they are viewpoint neutral.

Government Selection of Artwork for Public Property. Government agencies, from federal agencies to local governments, often beautify public properties through the use of artwork, including murals, sculpture, and other works of art. In some cases, these works of art are commissioned by the government, and in other cases, they are selected through an artwork selection process. Generally, the government has wide latitude to choose artwork for

government properties and to relocate or remove that artwork in the event the government chooses to redevelop or otherwise modify government properties.

Cases addressing questions of government acquisition and placement of artwork have generally held that artwork acquired by the government for display on public property becomes the property and expression of the government,[81] or alternatively, that the government's acquisition and display of artwork creates a nonpublic forum, where the acquisition process need only be viewpoint neutral and reasonable.[82] One court found that a sculpture located on the grounds of a federal government building constituted the expression of the government, and could be relocated freely without the consent of the artist.[83] That court additionally found that even if the sculpture's location had been a public forum, the sculpture's relocation was a time, place, and manner restriction because the government's purpose in relocating the sculpture was related to free passage of pedestrians on the plaza where the sculpture was located.[84] Other cases have held that government acquisition of artwork for display in public buildings or galleries creates a nonpublic forum, and government decisions to reject or remove artwork that could be offensive or critical are permissible when the purposes of the forum are undermined by the artwork's offensive or critical nature.[85]

The foregoing judicial approach to government control of artwork on government property was recently reaffirmed by the First Circuit in the case of *Newton v. LePage*.[86] There, the Maine labor department sought to remove a mural from a waiting room within its offices on the grounds that the mural did not depict evenhanded treatment of organized labor issues. In its analysis, the court did not rely on the public forum doctrine, but rather on the government speech doctrine, which was articulated by the Supreme Court just three years earlier.[87] Although the court did not conclude that the mural was government speech, it nonetheless deferred to the government's choice to remove the mural and concluded that there was no First Amendment violation in so doing.[88]

The government speech doctrine, which carves out from First Amendment application any speech promulgated by the government, lends additional support to local governments engaged in the selection and ownership of artwork on public property.[89] With the adoption and expansion of the government speech doctrine by the Supreme Court, it can be expected that government decisions regarding the acquisition, display, relocation, and removal of works of art on public property will be subject to even lesser scrutiny.[90] The Supreme Court has found that donated monuments in a public park constitute government speech,[91] as do specialty license plates.[92] Given this recent case law, artwork selected by the government for display on public property is likely to be considered by a court to be government speech.

Conclusion

This article's review of artwork through a First Amendment lens occurs on the frontier of constitutional jurisprudence. Yet as First Amendment protections expand, we may be witnessing an expansion of First Amendment applicability that may sweep up previously unchecked governmental controls on artwork and architecture. Local governments are therefore advised to carefully consider how their zoning codes and other regulations affect the ability of artists and architects to speak through their work and to ensure that local efforts to make regulations content neutral and otherwise consistent with the First Amendment preserve free speech rights of all speakers.

Endnotes

1. For purposes of this article, "art" or "artwork" primarily means any form of physical artistic media, including for example, print media such as painting or photography, or sculpture, carpentry or other three-dimensional forms of artwork.

2. *See, e.g.*, Cohen v. California, 403 U.S. 15, 25 (1971).

3. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (music); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557–58 (1975) (theater); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952) (film); Anderson v.

City of Hermosa Beach, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattooing); White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007) (paintings); Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1995) (finding visual art to be entitled to First Amendment protection on par with written or spoken words).

4. *Id.*

5. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995).

6. Roth v. United States, 354 U.S. 476, 485 (1957).

7. Miller v. California, 413 U.S. 15, 24 (1973).

8. *Id.* at 36.

9. New York v. Ferber, 458 U.S. 747, 764 (1982).

10. *See* Kois v. Wisconsin, 408 U.S. 229, 231–32 (1972).

11. *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331–32 (7th Cir. 1985).

12. *See* United States v. Stevens, 559 U.S. 460, 472 (2010).

13. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 236 (2002).

14. *See* Baker v. Glover, 776 F. Supp. 1511, 1515 (M.D. Ala. 1991).

15. *See* Nelson v. Streeter, 16 F.3d 145, 150 (7th Cir. 1994).

16. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

17. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985).

18. Snyder v. Phelps, 562 U.S. 443, 453, 458 (2011).

19. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

20. *See, e.g.*, Hunt v. City of Los Angeles, 638 F.3d 703 (9th Cir. 2011); White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007); Mastrovincenzo v. City of New York, 435 F.3d 78, 90 (2d Cir. 2006).

21. *City of Sparks*, 341 F. Supp. 2d at 1139.

22. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496–98 (1996).

23. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 506 (1981).

24. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

25. *See* Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–74 (1989).

26. 135 S. Ct. 2218 (2015).

27. *See id.* at 2226–27.

28. *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

29. *See Reed*, 135 S. Ct. at 2231.

30. *Cent. Hudson*, 447 U.S. at 564.

31. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223–24 (1990); Mahaney v. City of Englewood, 226 P.3d 1214, 1219 (Colo. Ct. App. 2009).

32. *See* Buckley v. Valeo, 424 U.S. 1, 40–41 (1976).

33. *See* Virginia v. Hicks, 539 U.S. 113, 118–19 (2003).

34. *Reed*, 135 S. Ct. at 2226–27.

35. *See FW/PBS*, 493 U.S. at 223–24; *Mahaney*, 226 P.3d at 1219.

36. *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09, 114–15 (1972).

37. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).

38. 644 F.3d 728 (8th Cir. 2011).

39. *Id.* at 1036.

40. Cent. Radio Co., Inc. v. City of Norfolk, 811 F.3d 625, 629 (4th Cir. 2016).

41. *Id.* at 633 (quoting *Reed*, 135 S. Ct. at 2227).

42. *Id.* at 634.

43. 150 F. Supp. 3d 910 (N.D. Ill. 2015).

44. *Id.* at 920.

45. *See Reed*, 135 S. Ct. at 2232; *id.* at 2233 (Alito, J., concurring).

46. *See, e.g.*, Serra v. Gen. Svcs. Admin., 847 F.2d 1045, 1047 (2d Cir. 1988).

47. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969); *but see* Tipp City v. Dakin, 929 N.E.2d 484, 502 (Ohio Ct. App. 2010).

48. *See, e.g.*, Cent. Radio Co., Inc. v. City of Norfolk, 811 F.3d 625, 633 (4th Cir. 2016).

49. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014).

50. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981).

51. *See, e.g.*, Serra v. Gen. Servs. Admin., 847 F.2d 1045, 1047 (2d Cir. 1988).

52. 597 F.3d 323 (5th Cir. 2010), *cert. den.*, 562 U.S. 837 (2010).

53. *Id.* at 327–28.

54. *Id.* at 328.

55. *See* Kasky v. Nike, Inc., 45 P.3d 243, 253–55 (Cal. 2002).

56. City of Indio v. Arroyo, 143 Cal. App. 3d 151, 154 (1983).

57. Complete Angler, LLC v. City of Clearwater, 607 F. Supp. 2d 1326, 1328 (M.D. Fla. 2009).

58. Tipp City v. Dakin, 929 N.E.2d 484, 494 (Ohio Ct. App. 2010).

59. *Id.*

60. *Id.*

61. Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 370 (4th Cir. 2012).

62. Vincenty v. Bloomberg, 476 F.3d 74, 84 (2d Cir. 2007).

63. *Id.* at 87.

64. *See, e.g.*, Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1127–28 (7th Cir. 1995); Sherwin-Williams Co. v. City and Cnty. of San Francisco, 857 F. Supp. 1355, 1371 (N.D. Cal. 1994).

65. *See, e.g.*, Indianapolis, Indiana's definition:

> Graffiti means any *unauthorized* inscription, word, figure, design, painting, writing, drawing or carving that is written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed on a component of any building, structure, or other facility by any graffiti implement, visible from any public property, the public

> right-of-way, or from any private property other than the property on which it exists. There shall be a rebuttable presumption that such inscription, word, figure, painting, or other defacement is unauthorized. This article does not apply to easily removable chalk markings on the public sidewalks and streets.

INDIANAPOLIS—MARION CNTY. CODE § 575-202 (2013) (emphasis added).

66. Demarest v. City of Leavenworth, 876 F. Supp. 2d 1186, 1195, 1196–97, 1202-03 (E.D. Wash. 2012).

67. Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782, 165–66 (Or. Ct. App. 2011).

68. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44 (1983).

69. *See id.* at 45–46.

70. *See* Cornelius v. N.A.A.C.P. Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 808 (1985).

71. Celli v. City of St. Augustine, 214 F. Supp. 2d 1255 (M.D. Fla. 2000).

72. *Id.* at 1258–60.

73. *Id.*

74. Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996).

75. *Id.* at 692.

76. *Id.* at 696.

77. *See id.* at 696–97.

78. *Id.* at 698.

79. *Id.*

80. *Id.*

81. *See Serra*, 847 F.2d at 1049.

82. *See* Sefick v. Gardner, 164 F.3d 370 (7th Cir. 1998).

83. *Serra*, 847 F.2d at 1049.

84. *Id.* at 1049–50.

85. *See Sefick*, 164 F.3d at 372–73.

86. 700 F.3d 595 (1st Cir. 2012).

87. *Id.* at 602.

88. *Id.* at 602–03.

89. *Serra*, 847 F.2d at 1049.

90. *See* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

91. Pleasant Grove City v. Summum, 555 U.S. 460, 470–72 (2009).

92. *Walker*, 135 S. Ct. at 2249.

CIVIL ACTION NO. 18-2624 SECTION "F"
UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

Morris v. City of New Orleans

399 F. Supp. 3d 624 (E.D. La. 2019)
Decided Jul 9, 2019

CIVIL ACTION NO. 18-2624

2019-07-09

Neal MORRIS v. CITY OF NEW ORLEANS

Bruce W. Hamilton, Katharine Murphy Schwartzmann, American Civil Liberties Union Foundation, Ronald Lawrence Wilson, Law Office of Ron Wilson, New Orleans, LA, for Neal Morris. Mary Katherine Kaufman, U.S. Attorney's Office, Sunni Jones LeBeouf, Corwin St. Raymond, David Joseph Patin, Jr., Donesia Diane Turner, City Attorney's Office, Cherrell Simms Taplin, Liskow & Lewis, New Orleans, LA, for City of New Orleans.

MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE

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Bruce W. Hamilton, Katharine Murphy Schwartzmann, American Civil Liberties Union Foundation, Ronald Lawrence Wilson, Law Office of Ron Wilson, New Orleans, LA, for Neal Morris.

Mary Katherine Kaufman, U.S. Attorney's Office, Sunni Jones LeBeouf, Corwin St. Raymond, David Joseph Patin, Jr., Donesia Diane Turner, City Attorney's Office, Cherrell Simms Taplin, Liskow & Lewis, New Orleans, LA, for City of New Orleans.

SECTION "F"

ORDER AND REASONS

MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE

Before the Court is the plaintiff's motion for summary judgment that the City's murals-permit scheme is an unconstitutional prior restraint and content-based regulation of expression, in violation of the First Amendment, and is void for vagueness under the Fourteenth Amendment. For the reasons that follow, the motion is GRANTED.

Background

This civil rights lawsuit challenges the constitutionality of the City's murals-permit scheme, which regulates the installation of artwork on all private property throughout the City of New Orleans.

Neal Morris lives in Orleans Parish. He owns residential and commercial properties. He is perhaps not a fan of President Donald Trump. On November 4, 2017, Morris commissioned a local artist to paint a mural on a commercial property he owns at 3521 South Liberty Street. The mural quotes a controversial comment made by President Trump that had been recorded in a 2005 "Access Hollywood" segment; the mural replaces with pictograms two vulgar words used by Trump.

Just a few days after the mural was painted, a local news outlet publicized a story about the mural and noted that murals "are typically regulated by the
628 Historic *628 District Landmarks Commission and the City Council." The same day the news story was published, on November 8, 2017, the City of New Orleans Department of Safety and Permits sent Morris a letter advising him that the mural

violated a zoning ordinance. Jennifer Cecil, the purported director of the City's "One Stop for Permits and Licenses," wrote that an inspection of the property on November 8 revealed a violation of Section 12.2.4(8) of the Comprehensive Zoning Ordinance, which, according to her letter, concerns "Prohibited Signs—Historic District." Ms. Cecil described the violation:

> The mural on the building on this property is not allowed in that the property is zoned residentially and murals shall not be permitted in any residentially zoned historic district.

Morris was instructed to remove the mural, and warned that his failure to do so by November 22, 2017 would

> cause the Department of Safety and Permits to initiate appropriate legal action to secure compliance. The penalty for failure to comply is a maximum fine or jail for each and every day the violation continues plus court cost as prescribed by law.

Ms. Cecil said Morris should contact her once the mural had been removed so that she could re-inspect the property.

Not to be outdone, Morris uncovered several stark inaccuracies in the November 8 letter: Section 12.2.4(8) does not in fact exist; there is no section titled "Prohibited Signs—Historic District" in the CZO; nor does the CZO contain a blanket prohibition on murals in residentially zoned historic districts. On November 17, 2017, Morris politely wrote to the City requesting clarification in light of the inaccuracies in Ms. Cecil's letter.[1] Impolitely, apparently the City did not respond.

> Can you tell me whether my artwork is a mural or a sign under the CZO, and can you explain how this determination is made?
>
> Again, I am attempting to comply with the City's zoning regulations, but I cannot tell from the letter I received what the alleged zoning violation is. I would appreciate your clarification.

Anxious about being prosecuted, Morris sued the City on March 13, 2018, alleging that the murals-permit scheme (Comprehensive Zoning Ordinance § 21.6.V *et seq.* and Municipal Code § 134-78A *et seq.*) violate his First and Fourteenth Amendment rights. His complaint alleges that: (1) the City's requirement that property owners obtain advance government approval before receiving a mural permit, or face criminal punishment, subjects him and other property owners to an unconstitutional prior restraint on speech where approval or denial of a permit is left to the unfettered discretion of City officials; (2) the City's murals-permit process is an unconstitutional, content-based restriction on speech insofar as an applicant must pay a $500 fee and must submit a drawing, which will be subject to the City's "acceptability" review before a mural is approved;[2] (3) the City's murals-permit process violates Morris' and other property owners' due process rights by subjecting their artistic expression to prior review, indefinite in duration, by unspecified officials using vague, overbroad, or nonexistent standards; and (4) the City engages in selective enforcement of its mural regulations in violation of the Equal Protection Clause.[3] Morris' complaint requests:

[1] At the conclusion of his letter to the City, Morris wrote:

[2] Morris also complains that "signs" are subject to a different regulatory scheme, and that some signs are exempt from the permit requirements, whereas no murals are exempt from the permit requirement.

3 For example, Morris singles out a mural by artist Yoko Ono, which was painted on November 15, 2017 on the Ogden Museum, without a permit and without being cited for a zoning violation for the mural. See Reed v. Town of Gilbert, —— U.S. ——, 135 S. Ct. 2218, 2223, 192 L.Ed.2d 236 (2015) ("And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner.").

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• A preliminary (and ultimately permanent) injunction barring the City from enforcing the murals-permit scheme, Comprehensive Zoning Ordinance § 21.6.V et seq. and Municipal Code § 134-78A et seq.;

• A declaratory judgment that the City's actions, policies, and procedures embodied in the murals-permit scheme are unconstitutional violations of the plaintiff's rights under the First Amendment, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

• Reasonable attorney's fees, expenses, and costs under 42 U.S.C. § 1988.

In May of 2018, about two months after Morris filed suit, the New Orleans City Council enacted M.C.S., Ordinance No. 27783, which removed Sections 134-78A and 134-78B from the Municipal Code. As a result, the City's murals-permitting scheme was found only at CZO Section 21.6.V. In addition, the City agreed that it would not enforce its murals-permitting scheme against Mr. Morris for any existing or additional murals painted on his properties during the pendency of this lawsuit. In light of the City's non-enforcement pledge, this Court, in its May 31, 2018 Order and Reasons, denied as moot Mr. Morris' motion for preliminary injunctive relief.

Thereafter, the City moved to dismiss the plaintiff's complaint for failure to state a claim under Rule 12(b)(6). On October 18, 2018, the Court denied the City's motion as to all claims, except the plaintiff's "class of one" Equal Protection claim. Faced with this Court's unfavorable decision, the City proceeded to amend its murals-permit scheme once again. Contending that it had undertaken revisions of the CZO that it believed would "change the course of this litigation, including mooting the case," the City moved to the stay these proceedings on December 12, 2018. The next day, the Court held a status conference and denied the City's motion to stay. However, the Court was "convinced that a brief delay [wa]s warranted to give the City an opportunity to remedy issues it faces in this lawsuit." Accordingly, the Court continued the pre-trial conference and trial dates and admonished the City "to act as efficiently and as quickly as possible ... in presenting a new Ordinance which the City feels addresses the issues in this case."

The City has now passed the successor ordinance. On January 22, 2019, the City Planning Commission unanimously approved a text amendment to the City's murals-permit scheme, which modifies the definitions of "sign" and "mural" in CZO § 26.6 and alters the murals-permit application and approval process in CZO § 21.6.V. The City Council adopted the amendment on April 25, 2019, and the Mayor signed the measure into law on April 30, 2019. Most recently, on June 13, 2019, the City amended its mural regulations for a third time, reducing the permit fee from $500 to $50. As currently drafted, the CZO regulates murals as follows:[4]

4 Deletions to the CZO are represented by strikethrough text, while new language is displayed in underlined and bold text.

Article 26.6 DEFINITIONS

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Mural . A work of art painted or otherwise applied to or affixed to an exterior surface that does not include any on- or off-premise commercial advertising **or does not otherwise meet the definition of a sign as set forth in Article 26 of the Comprehensive Zoning Ordinance.**

Sign . Any structure, display, device, or inscription which is located upon, attached to, or painted or represented on any land, structure, on the outside or inside of a window, or on an awning, canopy, marquee, or similar structure, and which ~~displays or includes any numeral, letter work, model, banner, emblem, insignia, symbol, device, light, trademark, or other representation used as, or in the nature of, an announcement, advertisement, attention-arrester, direction, warning, or designation of any person, firm, group, organization, place, community, product, service, business, profession, enterprise, or industry~~ **proposes a commercial or economic transaction through advertisement; promotion; the direction of attention to any commercial establishment, product, service, industry, business, profession, enterprise, or activity for a commercial purpose; or proposes such a transaction through other means.**

ARTICLE 21.6.V – MURALS

ARTICLE 21.6.V.1 – APPLICATION

a. No person, firm, or corporation may commence a mural installation on a site without ~~development plan and design review approval by the Executive Director of the City Planning Commission and the Design Advisory Committee in accordance with Section 4.5. A separate application is required for each mural on a site~~ **the**

submittal of a mural permit application and subsequent mural permit issuance by the Department of Safety and Permits.

b. Any structure within a local historic district or on a historically designated structure requires approval of the Historic District Landmarks Commission or Vieux Carré Commission prior to ~~review by the Design Advisory Committee~~ **the issuance of the mural permit by the Department of Safety and Permits.** If the Historic District Landmarks Commission or Vieux Carré Commission does not approve the mural, the mural is prohibited.

ARTICLE 21.6.V.2 – REQUIRED SUBMITTALS

a. Proof of ownership or written permission of property owner.

b. Building elevation drawn to scale that identifies:

i. The façade on which the mural is proposed.

ii. The location of existing and proposed murals.

iii. The proposed mural dimensions.

iv. The height of the mural above grade.

v. The building eave/cornice and roofline.

c. General ~~drawing~~ **sketch** and written description of the type of mural (painted, mosaic, etc.) **specifically identifying any commercial elements. This requirement shall solely serve to allow the City to determine whether the proposal is more properly permitted as a sign, as defined in Article 26 of the Comprehensive Zoning Ordinance. The Department of Safety and Permits shall make this determination within 15 days of submittal.**

d. If the mural is not painted directly on a wall surface, details showing

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how the mural is affixed to the wall surface.

ARTICLE 21.6.V.3 – STANDARDS

a. Murals are considered public art. Murals are not permitted to advertise any product, service or brand. No off-premise advertising is permitted. Non-commercial messages are permitted.

b. Mural areas will not be painted on or obscure architectural features such as windows, doors (other than egress-only), pilasters, cornices, signs required by the City Code, or other building trim, feature bands, and other recessed or projecting features.

c. Murals with any element that weighs more than seven (7) pounds per square foot, or in total weighs more than four-hundred (400) pounds require structural review and approval from the Director of the Department of Safety and Permits.

d. Building owners are responsible for ensuring that a permitted mural is maintained in good condition and is repaired in the case of vandalism or accidental destruction.

e. Muralists and building owners are encouraged to use protective clear top coatings, cleanable surfaces, and/or other measures that will discourage vandalism or facilitate easier and cheaper repair of the mural if needed.

Contending that the constitutionality of the City's murals-permit scheme is ripe for this Court's review, the plaintiff now moves for summary judgment on his requests for declaratory and injunctive relief. The challenged law, the plaintiff contends, violates the First and Fourteenth Amendments to the U.S. Constitution because it equates to a prior restraint and a content-based restriction of speech, and because it offers little guidance as to the distinction between a "sign" and a "mural," which are treated separately in the ordinance.

I.

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine dispute of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A genuine dispute of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. See Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. Id. Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence. Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987) ; Fed. R. Civ. P. 56(c)(2). "[T]he nonmoving party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." Hathaway v. Bazany, 507 F.3d 312, 319 (5th Cir. 2007) (internal quotation 632 marks and citation omitted). Ultimately, *632 "[i]f

the evidence is merely colorable ... or is not significantly probative," summary judgment is appropriate. Anderson, 477 U.S. at 249, 106 S.Ct. 2505 (citations omitted); King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994) ("Unauthenticated documents are improper as summary judgment evidence.").

In deciding whether a fact issue exists, courts must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. Scott v. Harris, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Although the Court must "resolve factual controversies in favor of the nonmoving party," it must do so "only where there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Antoine v. First Student, Inc., 713 F.3d 824, 830 (5th Cir. 2013) (internal quotation marks and citation omitted).

II.

A.

Morris claims that the City's murals-permit scheme violates the First Amendment as (1) a content-based regulation of expression and (2) a prior restraint of speech. Although he alleges that the scheme is unconstitutional both facially and as applied to him, it is undisputed that the City amended its mural regulations following the events giving rise to this lawsuit. Therefore, Morris asserts a facial challenge to the ordinance. To prevail on a facial challenge in the First Amendment context, as here, Morris must demonstrate that: (1) "no set of circumstances exists under which the [challenged ordinance] would be valid," or (2) "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." United States v. Stevens, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (citations omitted).

B.

The First Amendment, applicable to the states through the Fourteenth Amendment, instructs that a state "shall make no law ... abridging the freedom of speech[.]" U.S. CONST. amend. I ; XIV. Murals are artwork, which has long been held to be expression protected by the First Amendment. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569, 574, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (noting that "the Constitution looks beyond written or spoken words as mediums of expression," and that "the ... painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll [are] unquestionably shielded" by the First Amendment); White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007) (holding that plaintiff's "self-expression through painting constitutes expression protected by the First Amendment"); ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."); Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) ("Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.").

First Amendment protections also extend to signs, which are undeniably "a form of expression." City of Ladue v. Gilleo, 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). The Supreme Court has recognized that signs pose distinctive problems: "Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other
633 problems that legitimately *633 call for regulation." Id. Murals, as works of art housed on exterior surfaces, pose similar problems. As one First Amendment scholar has observed, however, "artwork differs from other forms of speech,

particularly signage, in one critical respect: in the case of artwork, the medium is commonly the message." Brian J. Connolly, Reed, Rembrandt, and Wright: Free Speech Considerations in Zoning Regulation of Art and Architecture, 41 No. 11 Zoning and Planning Law Reports NL 1 (Dec. 2018); see also Christina Chloe Orlando, Art or Signage?: The Regulation of Outdoor Murals and the First Amendment, 35 CARDOZO L. REV. 867, 869-70 (2013) ("Although mural law is still in its infancy, the convoluted status of the limited case law has led to a war ... a real fight around the country.") (citations omitted). This case certainly focuses the troublesome constitutional struggle between signage and artworks.[5]

> 5 The Supreme Court has signaled little patience with content-based distinctions between signs and other forms of public expression. See Reed, 135 S. Ct. at 2228 (" [A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.").

C.

Morris submits that the City's murals-permit scheme is an unconstitutional content-based regulation of speech in three ways; he claims it is content-based on its face, in its purpose, and through its enforcement.

i.

To evaluate the constitutionality of a municipal ordinance that regulates a form of expression, a court must first determine the appropriate level of scrutiny to apply. See Reed v. Town of Gilbert, Ariz., —— U.S. ——, 135 S. Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). "Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Id. (citations omitted). The Supreme Court has emphasized that there are two different categories of content-based regulations. See id. at 2227. First, a regulation of speech is "content based" where the law " 'on its face' draws distinctions based on the message the speaker conveys." Id. (citations omitted). A facial distinction based on message may be obvious, "defining regulated speech by particular subject matter," or subtle, "defining regulated speech by its function or purpose." Id. In either case, the regulation "is subject to strict scrutiny regardless of the government's benign motive or content-neutral justification." Id. at 2228.[6] Alternatively, a content-based regulation exists where a statute is facially neutral but "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.' " Id. at 2227 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Accordingly, "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." Id. at 2228.

> 6 " 'The vice of content-based legislation ... is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.' " Id. at 2229 (quoting Hill v. Colorado, 530 U.S. 703, 743, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (Scalia, J., dissenting)).

Regulations of commercial speech, which Supreme Court jurisprudence defines as "speech proposing a commercial transaction," are superficially subjected to another level of scrutiny.
634 *634 Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Under Central Hudson, a regulation of commercial speech is constitutional if: (1) "the asserted governmental interest is substantial;" (2) "the regulation directly advances the governmental interest asserted;" and (3) the regulation "is not more extensive than is necessary to serve that interest." Id. at 566, 100 S.Ct. 2343.[7]

7 Any attempt to differentiate or reconcile Reed and Central Hudson seems a baffling effort to resolve platitudes.

ii.

Morris contends that the murals-permit scheme is an unconstitutional content-based regulation of speech in three ways: (1) "murals" are regulated differently from "signs" based on their content; (2) murals are explicitly subject to content review; and (3) the City improperly selectively enforces the permit requirement, citing only those murals about which it has received complaints. The City counters that the scheme is a content-neutral regulation of speech that satisfies the time, place, and manner test; the City maintains that: (1) it has the right to treat commercial speech (signage) differently than non-commercial artwork (murals); and (2) it only reviews content to confirm that a proposed mural does not contain commercial speech.

The plaintiff first submits that the murals-permit scheme is content-based on its face in that it regulates murals *because* of their communicative content – artwork that does not contain commercial speech. Invoking Reed v. Town of Gilbert, —— U.S. ——, 135 S. Ct. 2218, 192 L.Ed.2d 236 (2015), Morris contends that this is a facial distinction that violates recent Supreme Court jurisprudence. Reed hints at some Supreme Court support, although it dealt with signs only.

In Reed, the Supreme Court held that a town sign code was facially content-based because the manner in which residents could display outdoor signs depended on their varying forms of communicative content. 135 S. Ct. at 2230. Subjecting 23 categories of signs to different size, location, and durational regulations, the sign code treated "ideological signs" most favorably and imposed more stringent requirements on "temporary directional signs." Id. at 2224. When a local church posted signs for Sunday services beyond the time limit for "temporary directional signs," town officials issued repeated citations, and the church filed suit. Id. at 2255-26. Finding that the sign code "single[d] out specific subject matter for differential treatment," the Court determined that the regulations were facially content-based and subject to strict scrutiny review, even though they did not discriminate among viewpoints within that subject matter. Id. at 2230-31. Ultimately, because the town could not demonstrate that its content-based distinctions were narrowly tailored to serve its asserted interests in, for example, aesthetics or traffic safety, the Supreme Court found the code violated the First Amendment. Id.

According to Morris, a comparison of the CZO's definitions of "mural" and "sign" makes clear that the City of New Orleans, like the Town of Gilbert, subjects public messages to different regulatory frameworks based on their content. Section 26.6 of the CZO defines "mural" and "sign" as follows:

> **Mural.** A work of art painted or otherwise applied to or affixed to an exterior surface that does not include any on- or off-premise commercial advertising or does not otherwise meet the definition of

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> a sign as set forth in Article 26 of the Comprehensive Zoning Ordinance.
>
> **Sign** . Any structure, display, device, or inscription which is located upon, attached to, or painted or represented on any land, structure, on the outside or inside of a window, or on an awning, canopy, marquee, or similar structure, and which proposes a commercial or economic transaction through advertisement; promotion; the direction of attention to any commercial establishment, product, service, industry, business, profession, enterprise, or activity for a commercial purpose; or proposes such a transaction through other means.

If a display affixed to an exterior surface contains a non-commercial message in the form of artwork, it is categorized as a "mural" and subject to the regulations set forth in CZO § 21.6.V, but if the display conveys a commercial message, it is considered a "sign" and regulated under Article 24. Because a zoning official must review the content of a wall display to conclude that it constitutes artwork and does not contain commercial speech, Morris insists that the murals-permit scheme is a content-based regulation that must satisfy strict scrutiny to survive.

The City counters that its regulatory scheme does not trigger strict scrutiny review. It seeks only to regulate murals for one distinct purpose – to determine whether a proposed mural requires a sign permit. Because the content review stops once an applicant provides information establishing that the proposed mural does not contain commercial speech, and because commercial speech enjoys lesser constitutional protection, the City maintains that its effort to differentiate between commercial and non-commercial speech does not run afoul of Reed.[8]

[8] Reed itself counters the City's argument. See Reed, 135 S. Ct. at 2229 ("Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech.").

iii.

In contending that the murals-permit scheme is a facially content-based regulation, Morris submits that the ordinance creates two impermissible content-based distinctions: (1) non-commercial messages in the form of artwork versus non-commercial messages in any other form; and (2) artwork that contains commercial speech versus artwork that does not contain commercial speech.

First, Morris contends that the murals-permit scheme singles out for regulation artwork, as opposed to any other type of non-commercial message, by defining "mural" as a "**work of art** painted or otherwise applied to or affixed to an exterior surface that does not include any on- or off-premise commercial advertising ..." (emphasis added). During discovery, the plaintiff seemingly exposed an example of the content-based nature of the murals-permit application process. In early 2016, an applicant who sought to install a mural called "The Life of Litter" was denied a mural permit on the ground that the proposal constituted an informational display, rather than a "work of art," and therefore required a sign permit. Although this occurred before the recent CZO amendments, Morris submits that the current law features a similarly problematic structure. Because the CZO now defines "mural" as a work of art affixed to an exterior surface that does not contain commercial speech, a zoning official must nevertheless review the content of a wall display to determine whether it qualifies as a "work of art."

The Court notes that another court in this Circuit recently rejected a similar argument *636 in declining to find a sign code to be content based:

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> Here, Reagan and Lamar argue that if a viewer must "read the sign ... just to determine what rules apply, then the regulation is content based under Reed." They submit that the City of Austin Sign Code is content based because the regulations "require the City to look at the content of the sign to determine whether it is an on-premise or off-premise sign," to see if digital sign-faces are permitted. They argue that "the location of the structure itself is not what determines what rules apply. Rather, the content of the sign determines what rules apply." "Does the content advertise something at that location? If so, then the on-premise rules apply. Does th[e] content advertise something not at that location? If so, then the off-premise rules apply." Reagan and Lamar are urging an interpretation of Reed that no court in this circuit has adopted. On their reading, regulations governing stop signs are content based because they must be read to determine its governing provision under the Sign Code. On this view, regulations imposing greater restrictions for commercial signs—a well-established and constitutional practice—would be content-based because a viewer must read a sign to determine if the message was commercial or non-commercial. In effect, Reagan and Lamar urge a rule that would apply strict scrutiny to all regulations for signs with written text.

Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 377 F.Supp.3d 670, 680 (W.D. Tex. 2019). The Court finds the reasoning of the Western District of Texas doctrinally interesting. But not persuasive, or determinative, for several reasons.

The murals-permit scheme also separates out commercial and non-commercial speech. This distinction is undeniably one that is "content-based;" however, the Supreme Court has long recognized that commercial speech is accorded "a lesser protection" than "other constitutionally guaranteed expression." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562-63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) ; see also Mass. Ass'n of Private Career Sch. v. Healey, 159 F. Supp. 3d 173, 193 (D. Mass. 2016) ("The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech ... and nothing in its recent opinions, including Reed, even comes close to suggesting that well-established distinction is no longer valid") (quoting CTIA-The Wireless Ass'n v. City of Berkeley, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015)); Peterson v. Vill. of Downers Grove, 150 F. Supp. 3d 910, 927-928 (N.D. Ill. 2015) ("[T]he [Reed] majority never specifically addressed commercial speech ... because ... the restrictions at issue in Reed applied only to *non* -commercial speech.... [A]bsent an express overruling of Central Hudson, which most certainly did not happen in Reed, lower courts must consider Central Hudson and its progeny ... binding.") (emphasis in original). But the discussion continues, and the point-counterpoint between Reed and Central Hudson is a mere distraction.

Because § 21.6.V indirectly regulates commercial speech in that it bans commercial messages in murals, the murals-permit scheme certainly remains subject to review under Central Hudson. Before installing a non-commercial work of art on an exterior surface, a building owner or artist must obtain a mural permit; to do so, he must pay a $50 fee and submit proof of the owner's permission, information about where and how the mural will be affixed, a written description identifying any commercial elements, and a general sketch of the
637 proposed mural to confirm that it does *637 not contain commercial speech. See CZO § 21.6.V. However, where a work of art conveys a *commercial* message, a building owner or artist must obtain a sign permit; this also involves paying a fee and providing a written description of

the proposed work and the proposed text of the sign. Unlike murals, signs are also subject to size restrictions. See CZO § 24.11.F.

Central Hudson instructs that to sustain a restriction on commercial speech, the City must demonstrate that: (1) "the asserted governmental interest is substantial;" (2) "the regulation directly advances the governmental interest asserted;" and (3) the regulation "is not more extensive than is necessary to serve that interest." Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343. Although the burden of justifying a regulation of commercial speech is less onerous than that for a content-based regulation of non-commercial speech, the hurdle "is not satisfied by mere speculation or conjecture." See Edenfield v. Fane, 507 U.S. 761, 770-71, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). To the contrary, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Id.

Here, the City asserts that it regulates murals only to regulate commercial speech and that "a mural permitting process is necessary to effectively regulate commercial signage." In blindly intoning this civic interest, the City fails to indicate how the differential regulation of commercial and non-commercial artwork advances any substantial governmental interest, such as traffic safety or community aesthetics. In other words, the regulation of commercial signage appears to be a means to an end that the City has not identified. Insofar as that purpose is related to community aesthetics, there is nothing in the record to suggest that commercial messages in artwork are more unsightly than non-commercial messages in artwork.

Because the City of necessity must determine whether a mural contains commercial speech, and, therefore, should be regulated as a sign, the ordinance is a prohibited free speech enemy and does not pass strict scrutiny, or even a more relaxed scrutiny test. The murals-permit scheme is unconstitutional insofar as it distinguishes between commercial and non-commercial artwork. Regulations of commercial speech (such as signs) are not subject to strict scrutiny. But the City has gone beyond signage regulation.[9] *638 III.

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[9] Indeed, if the City is concerned about murals that incite public disorder, the City has other well-known police powers to address that.

Although the Court appreciates that a permit requirement for murals may allow a municipality to keep track of what is and is not graffiti, which in turn, could advance a governmental interest in aesthetics, the summary judgment record seriously casts doubt on the legitimacy of the City's interest in keeping track of graffiti. Notably, the City has readily admitted, fatal selective enforcement, including under oath, that it takes no proactive action against unpermitted murals and only responds to complaints. As the City's Department of Safety and Permits Director, Jared Munster, attests in his affidavit: "In the vast majority of violation cases, mural or otherwise, the Department of Safety and Permits is a responsive agency rather than proactive." Jennifer Cecil, the purported director of the City's "One Stop for Permits and Licenses," similarly testified during her deposition that the City takes no enforcement action until it receives a complaint:

> **Q:** You are saying you are aware of murals that don't have permits for which no enforcement action has been taken?
>
> **A:** Yes.
>
> **Q:** Okay.
>
> **A:** Those murals have not been the subject of complaints or inquiries.
>
> **Q:** Okay. So if you are aware of murals that do not have permits but no one has complained, you take no enforcement action?
>
> **A:** I would say, yes, that is correct.

> In light of the City's admission that it only enforces the permit requirement against murals about which it receives complaints, it is questionable as to whether the murals-permit scheme promotes aesthetics in any meaningful way.

Morris also seeks summary relief in his favor that the murals-permit scheme is impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. In particular, he requests a declaration that the definition of "mural," located in CZO § 26.6, is void for vagueness. The City responds that the challenged text is sufficiently clear to give people of ordinary intelligence fair notice of what constitutes a mural.

The Fourteenth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property without due process of law." U.S. Const. amend. XIV. "Vagueness doctrine is an outgrowth of the Due Process Clause." United States v. Williams, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). The Supreme Court has consistently held that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289-90, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (citing Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)); see also Johnson v. United States, —— U.S. ——, 135 S. Ct. 2551, 2557-58, 192 L.Ed.2d 569 (2015) ; Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) ; Munn v. City of Ocean Springs, Miss., 763 F.3d 437, 439 (5th Cir. 2014) ("The Due Process Clause requires that a law provide sufficient guidance such that a man of ordinary intelligence would understand what conduct is being prohibited.").[10]

> [10] The Supreme Court has also suggested that a law violates due process where its standards are "too vague to support the denial of an application for a license." See City of Mesquite, 455 U.S. at 293, 102 S.Ct. 1070 ("We may assume that the definition of 'connections with criminal elements' in the city's ordinance is so vague that a defendant could not be convicted of the offense of having such a connection; we may even assume, without deciding, that such a standard is also too vague to support the denial of an application for a license to operate an amusement center.").

Morris challenges as impermissibly vague two components of the definition of "mural:" (1) "work of art," and (2) "exterior surface." Morris first submits that, because the CZO does not define "work of art," permit applicants are required to determine for themselves whether paint applied to an exterior surface is "art." Pointing to the deposition testimony of Jennifer Cecil, Director of the New Orleans One Stop for Permits and Licenses, Morris notes that Ms. Cecil herself could not even define the term:

> **A:** ... the presentation of a permit request for a mural is an assertion that this is a work of art....
>
> **Q:** So you are saying that the applicant, by the mere fact of asking for a mural permit, is presuming that the subject is a work of art?
>
> **A:** That's my understanding of how it's approached, yes.
>
> ...
>
> **Q:** So that's what I am sort of getting at. I am trying to understand where the line is drawn.
>
> **A:** If you tell me that it's not a work of art when you come in, that you are just painting solid -- that you are painting a house, there will be no permit required if you are not in a historic district.

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> **Q:** So if I don't think it's a work of art, I don't need a permit?
>
> **A:** If you don't think it is a work of art and you are describing solid color painting to us, we would not tell you that, no. If you begin describing figurative painting or painting of words, we would suggest that you have it reviewed and you present an example of what that would look like.

Tellingly, the City fails to respond to the plaintiff's arguments in this regard. In so doing, the City apparently concedes that the CZO's failure to define "work of art" renders the definition of "mural" impermissibly vague.[11]

> [11] Of course, if the City were to attempt to define "work of art," this would unquestionably give rise to additional content-based distinctions. It appears the City has no choice but to step back and craft a broad, content neutral definition of sign that does not refer to "art," "commercial speech," or "non-commercial speech." And if the City wishes to treat murals differently than signs, it could perhaps create subcategories based on physical characteristics alone, such as "wall sign" or "painted wall sign." Compare Central Radio Co. Inc. v. City of Norfolk, Va., 811 F.3d 625, 628-29 (4th Cir. 2016) (holding that sign ordinance exempting from regulation "works of art which in no way identify or specifically relate to a product or service" was a "content-based regulation that d[id] not survive strict scrutiny") with Peterson v. Vill. of Downers Grove, 150 F. Supp. 3d 910, 919-23 (N.D. Ill. 2015) (holding that sign ordinance's ban on all painted wall signs was content neutral and "narrowly tailored to serve the Village's interest in aesthetics.").

Morris also correctly contends that the meaning of "painted or otherwise applied to or affixed to an **exterior surface** " is vague and unclear. For instance, he questions whether an "exterior surface" includes a roof that is not visible to passerby, or a wall of a penthouse atop a skyscraper. (Or, if maybe one wishes to use two colors to paint an "exterior surface," he will have created a mural.) He also queries whether the mural permit requirement only applies to particular types of structure. To demonstrate that the meaning of "exterior surface" is open to interpretation, Morris again spotlights Ms. Cecil's deposition testimony:

> **Q:** ... I want to paint a mural on the wall of [my] courtyard. It's an exterior wall, but it's not public facing.
>
> **...**
>
> **A:** ... I believe as it is written, you should [obtain a mural permit], but we may never come to know that such a painting exists without having reason to visit the interior courtyard space you have hypothetically referred to.
>
> **Q:** Right. So the question is really more specific. Is that wall considered an exterior wall?
>
> **A:** Would you mind if I looked at the definition again?

Because the CZO's use of the indistinct, shapeless, and obscure phrases "work of art" and "exterior surface" fails to provide "sufficient guidance such that a [person] of ordinary intelligence would understand" when a mural permit is required, Morris is entitled to summary judgment that the definition of "mural" is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. See Munn, 763 F.3d at 439.

IV.

Having determined that the murals-permit scheme is facially unconstitutional, the Court must consider whether to issue an injunction against its enforcement.

"The legal standard for obtaining a permanent injunction mirrors the legal standard for obtaining a preliminary injunction." Viet Anh Vo v. Gee, 301 640 F. Supp. 3d 661, 664 (E.D. La. 2017) (citing *640 Lionhart v. Foster, 100 F. Supp. 2d 383, 385-386 (E.D. La. 1999)). Thus, "[a] plaintiff must demonstrate '(1) actual success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) the threatened injury outweighs any damage that the injunction may cause the opposing party; and (4) the injunction will not disserve the public interest.' " Id. (quoting Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 610 (E.D. La. 1999)). The notable distinction between the legal standards for preliminary and permanent injunctive relief is that the plaintiff must demonstrate actual success on the merits, rather than a likelihood of success. Id. (citing Lionhart, 100 F. Supp. 2d at 386).

After considering the factors governing issuance of injunctive relief, the Court finds that an injunction is warranted. As for the danger of not granting injunctive relief, the Fifth Circuit has consistently held that the loss of First Amendment freedoms constitutes irreparable injury. See Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 506 (5th Cir. 2009) (internal citations omitted). Balanced against this grave threat is the City's irresolute interest in identifying those commercial messages that may be masquerading as murals. Finally, an injunction will not disserve the public interest because "injunctions protecting First Amendment freedoms are always in the public interest." Texans for Free Enter. v. Tex. Ethics Comm'n, 732 F.3d 535, 539 (5th Cir. 2013) (internal citations omitted).

Accordingly, for the foregoing reasons, IT IS ORDERED: that the plaintiff's motion for summary judgment is hereby GRANTED. IT IS FURTHER ORDERED: that New Orleans Comprehensive Zoning Ordinance § 21.6.V is hereby declared facially unconstitutional and that the City of New Orleans is enjoined from enforcing § 21.6.V.

Town of Chincoteague, Inc.

Dear Business Owner

You are receiving this letter because your business or property is located on the route of the Town's planned initial public sewer system. Construction of the low-pressure collection system along Main Street and Maddox Blvd. began in January and the Town anticipates offering public sewer services along this route beginning in January of 2027.

Background:

In December of 2023, the Town of Chincoteague obtained, ownership of the packaged sewer plants servicing Sunset Bay Condominiums on Main St. from the original developer. We then successfully transferred that facility to the Hampton Roads Sanitation District. HRSD has agreed to replace the existing aging plants with new higher capacity plants by December of 2026. For our part of this project, the Town of Chincoteague will build a low-pressure collection system along the Main St./Maddox Blvd. business districts to feed the new plants and offer sewage treatment service to businesses along that route.

The configuration of the new system will require individual grinder pumps for each customer's connection. These pumps, located on the customer's property, will pump all sewage from the customer's property into the collection system and eventually to HRSD's treatment plant on Main St. Business owners that decide to connect to the system will be required to furnish and install these pumps as well as provide associated operation and maintenance costs. **However, there is no requirement to connect to this new public system now and it will be available for future connections as capacity allows.**

For businesses interested in connecting to public sewer as part of this project:

1. General information:

    a. **Town Responsibilities** – the Town's Public Works Department or engineer will collaborate with the property owner to locate the sewer lateral and pumps during an onsite meeting. The Town Public Works Department or utility contractor will provide a service connection to the collection system including all required materials up to the customer's property line or Curb Stop.

    b. **Property Owner Responsibilities** - the property owner will be responsible for the purchase and installation of the grinder pump and all valves, fittings, pipe and electrical service required to connect the business to the grinder pump system and the pump to the Curb Stop. Property owners may hire a properly licensed contractor of their choice to complete this work.

    c. **Timeline and Capacity –** HRSD will upgrade the plant in phases. Phase 1 will be operational in January of 2027 and will support the Town's initial offering of 37,000 gallons per day along with the flow from existing customers. Subsequent phases will increase the capacity of the plant as HRSD obtains additional discharge permits from DEQ. The collection

Town of Chincoteague, Inc.

system has been designed to support an ultimate flow of 350,000 gallons per day and will be adequate through all plant upgrades.

The Town of Chincoteague anticipates that the initial capacity offered will not be adequate to service all businesses that express an interest in connecting. HRSD is therefore actively seeking additional permits from the state to increase capacity to the designed ultimate flow.

d. **Connection Fees** – A standard one-time connection fee based on the customer's water use as well as an annual maintenance fee will be charged by the Town for all businesses electing to connect to the new system. These fees will be determined in the next few months and published on the Town's website.

2. Please complete the *Sewer Connection Interest Form* attached to this letter and return it to our office using the enclosed return envelope by April 1, 2024. Alternatively, the completed form may be scanned and emailed to our office at mtolbert@chincoteague-va.gov.

For Businesses choosing not to connect to public sewer as part of this project:

1. As mentioned above, connecting to this new public sewer system **is not required**.
2. If you choose not to connect as part of this project, please know that the new public sewer system will be available for future connections as capacity becomes available.
3. For business and property owners not connecting to public sewer as part of this project, there is nothing further for you to do at this time.

If you have any questions regarding this project or any of the information provided here, please contact the Town office by phone at (757) 336-6519 or by email at mtolbert@chincoteague-va.gov and I will be happy to discuss it with you.

Sincerely,

Michael T. Tolbert PE
Town Manager

Town of Chincoteague, Inc.

Town of Chincoteague Commercial Sewer Service

Letter of Interest Response

Property Owner Name: _____

Owner Mailing Address: _____

Property Address: _____

Contact Phone Number: _____

Current Name of Business: _____

Type of Business: _____

Months of Operation: (circle all that apply) J, F, M, A, M, J, J, A, S, O, N, D

_____ I am interested in connecting to the Town's Commercial sewer system immediately.

_____ I am interested in connecting to the Town's Commercial sewer system in the future.

_____ If allowed to connect, I intend to expand or alter my business.

_____ My business is limited because my private system is failing, undersized, or inadequate.

_____ If allowed to connect, I intend to make significant improvements to my property.

_____ If not allowed to connect, I intend to close my business or offer my property for sale.

Code of Virginia
Title 15.2. Counties, Cities and Towns
Subtitle II. Powers of Local Government
Chapter 9. General Powers of Local Governments
Article 5. Additional Powers

§ 15.2-983. Creation of registry for short-term rental of property

A. As used in this section:

"Operator" means the proprietor of any dwelling, lodging, or sleeping accommodations offered as a short-term rental, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, licensee, or any other possessory capacity.

"Short-term rental" means the provision of a room or space that is suitable or intended for occupancy for dwelling, sleeping, or lodging purposes, for a period of fewer than 30 consecutive days, in exchange for a charge for the occupancy.

B. 1. Notwithstanding any other provision of law, general or special, any locality may, by ordinance, establish a short-term rental registry and require operators within the locality to register annually. The registration shall be ministerial in nature and shall require the operator to provide (i) the complete name of the operator, (ii) the address of each property in the locality offered for short-term rental by the operator, and (iii) an attestation that the property owner has granted permission for use of such property as a short-term rental if the operator is a lessee or sublessee. A locality may charge a reasonable fee for such registration related to the actual costs of establishing and maintaining the registry.

2. No ordinance shall require a person to register pursuant to this section if such person is (i) licensed by the Real Estate Board or is a property owner who is represented by a real estate licensee; (ii) registered pursuant to the Virginia Real Estate Time-Share Act (§ 55.1-2200 et seq.); (iii) licensed or registered with the Department of Health, related to the provision of room or space for lodging; or (iv) licensed or registered with the locality, related to the rental or management of real property, including licensed real estate professionals, hotels, motels, campgrounds, and bed and breakfast establishments.

C. 1. If a locality adopts a registry ordinance pursuant to this section, such ordinance may include a penalty not to exceed $500 per violation for an operator required to register who offers for short-term rental a property that is not registered with the locality. Such ordinance may provide that unless and until an operator pays the penalty and registers such property, the operator may not continue to offer such property for short-term rental. Upon repeated violations of a registry ordinance as it relates to a specific property, an operator may be prohibited from registering and offering that property for short-term rental.

2. Such ordinance may further provide that an operator required to register may be prohibited from offering a specific property for short-term rental in the locality upon multiple violations on more than three occasions of applicable state and local laws, ordinances, and regulations, as they relate to the short-term rental.

D. No local ordinance shall prohibit an operator from offering a property as a short-term rental solely on the basis that such operator is a lessee or sublessee, provided that the property owner

has granted permission for such property's use as a short-term rental. Localities may enact an ordinance that limits a lessee or sublessee to one short-term rental within the applicable locality. No local ordinance enacted after December 31, 2023, or any subsequent amendment, shall require that a special exception, special use, or conditional use permit be obtained for the use of a residential dwelling as a short-term rental where the dwelling unit is also legally occupied by the property owner as his primary residence.

E. Except as provided in this section, nothing herein shall be construed to prohibit, limit, or otherwise supersede existing local authority to regulate the short-term rental of property through general land use and zoning authority. Nothing in this section shall be construed to supersede or limit contracts or agreements between or among individuals or private entities related to the use of real property, including recorded declarations and covenants, the provisions of condominium instruments of a condominium created pursuant to the Virginia Condominium Act (§ 55.1-1900 et seq.), the declaration of a common interest community as defined in § 54.1-2345, the cooperative instruments of a cooperative created pursuant to the Virginia Real Estate Cooperative Act (§ 55.1-2100 et seq.), or any declaration of a property owners' association created pursuant to the Property Owners' Association Act (§ 55.1-1800 et seq.).

2017, c. 741;2024, cc. 700, 792.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.