



**AGENDA**  
**BREVARD PLANNING BOARD– REGULAR MEETING**  
**Tuesday, March 15, 2016 – 7:00 PM**  
**Council Chambers**

- 
- I. Welcome**
  - II. Introduction of Board Members**
  - III. Approval of Minutes**
    - a. February 16, 2016
  - IV. New Business**
    - a. Updated 2016 Meeting Schedule
  - V. Old Business**
    - a. Short term rentals
    - b. Annual review Sign Chapter 12.9.J
  - VI. Other Business**
  - VII. Adjourn**

**MINUTES  
BREVARD PLANNING BOARD – SPECIAL CALLED MEETING  
FEBRUARY 16, 2016**

Brevard Planning Board met for a regular meeting, Tuesday, February 16, 2016, at 7:00 PM in Council Chambers of City Hall.

**Members Present:** Kimsey Jackson, Chair  
Demi Loftis, Vice Chair  
Frank Porter  
Katie Thompson  
Jimmy Perkins  
Chris Strassner  
Keenan Smith

**Staff Present:** Daniel Cobb, Planning Director  
Janice H. Pinson, Board Secretary

**I. Welcome and Introduction of Planning Board Members -**

At 7:00 PM Chair, Kimsey Jackson, called the meeting to order and there was a moment of silent reflection. Board members and staff introduced themselves.

**II. Approval of Minutes –**

a. January 26, 2016, Frank Porter moved to approve as amended, seconded by Jimmy Perkins, unanimously approved.

**III. New Business – None.**

**IV. Old Business –**

a. Annual Review Sign Chapter 12.9.J

D. Loftis stated that the sign ordinance needs a more comprehensive look, that she feels that we are trying to beautify Brevard and keep it a quaint place to live and that the sign ordinance seems to have exceptions. Further noting that our main business is tourism. She voiced her concerns about flashing signage and the request for bigger signs. She commented on the nice wayfinding signs that the City installed and that she feels this is a more correct path for Brevard.

K. Jackson stated that he shared D. Loftis' concerns but that flashing signs were approved by Council a couple of years ago and that he also shares her concerns about Brevard's appearance with continuing to add flashing signs to the main corridor. He stated that he has lived in places without all of the flashing signage and that businesses still thrive without them.

J. Perkins stated that he too shares the same concerns and that it was approved by Council several years ago and then proceeded to name several locations with flashing signage and read a portion of the staff report: "The City's comprehensive plan which was adopted in November of 2015 states that Brevard will continue to strive to be an outstanding place to live, work, and play while building upon its distinctive small-town charm and remain a livable community for everyone."

J. Perkins stated that his thoughts are that the flashing signs are unnecessary and that everyone will feel that they need one just to compete. That he agrees with D. Loftis that a more comprehensive look at the whole chapter on signs is in order.

K. Jackson asked if D. Cobb had comments.

D. Cobb directed the board to page 14 and 15 of his staff report for clarification. He stated that electronic display signs are allowed and from a zoning administrator standpoint an electronic and a flashing sign are different and maybe that needs to be more clearly defined in the ordinance. He explained the distinction between electronic and flashing signage.

D. Cobb stated that he felt that bringing this section of the ordinance before the board would initiate them to want to take a more comprehensive look at the chapter. He informed the board that he asked Mike Egan, Land Use Attorney, to look over Chapter 12 due to legal regulatory concerns. He further agreed that the chapter needs to be approached more comprehensively.

F. Porter asked if Staff would come back with recommendations on how to clean up the chapter. He further stated that he would assume due to the discrepancies in the chapter that Staff would be making some revisions.

D. Cobb stated that it was up to the board as to whether or not they wanted to allow decorative flags, banners and moving devices.

D. Loftis stated they should be prohibited.

J. Perkins stated that he is not a fan of these types of signs, especially when they are used as a permanent sign for a business. He further stated that he feels they are a special event temporary type sign that should have a time limitation.

K. Thompson stated that she felt the criteria should also include our comprehensive plan values so that things could be addressed that do not fit with those values, and so that we can pay closer attention to those items as well.

D. Cobb stated that from an administrator standpoint we can regulate signage but it is up to the board and council to decide what to regulate and allow based on their vision of community character.

D. Loftis asked D. Cobb the process for regulating illegal signage. D. Cobb explained that signs are picked up and held at the office for a couple of weeks and if there is a phone number available we will call and tell them we picked up their sign and the reason why. He

explained the sign outreach program that the Planning Department administered and how well he felt the outcome brought noncompliant businesses into compliance. He further explained the notice of violation process.

K. Smith asked D. Cobb if during the comprehensive review of chapter 12.6 and 12.9, he would be cleaning up the conflicts, discrepancies and redundancies between the two (2) chapters.

D. Cobb stated that they would look at the chapters from a purely technical standpoint and try to find all of the discrepancies, redundancies, and add missing definitions and contradicting language. We will not be recommended many changes because that needs to come from the board.

K. Jackson asked if the board had any further questions or comments, there were none. The matter was tabled until the March meeting.

#### b. Short Term Rentals

K. Jackson asked D. Cobb to present information to the board.

D. Cobb presented his staff report, going over the recommended amendments to the UDO for Short Term Rentals, staff report and presentation are attached hereto and labeled, "Exhibit A". His presentation included the answers to board questions presented to him at the last meeting. He explained the special use permit application process in detail.

C. Strassner voiced concerns about requiring a special use permit as it relates to the waiting period for the applicant to appear before the Board of Adjustment.

F. Porter voiced the same concerns and asked if there was some process in government that could be set up to fast track the special use permit process for the existing operating properties.

D. Cobb stated that there is no way to fast track at the local government level, but that the rules of procedure for the Board of Adjustment could be amended to allow them to hear more than 3 cases per meeting and they could also call special meetings.

K. Thompson stated she wanted to have a discussion as to why D. Cobb was holding so strongly in the two (2) districts to the special use permit rather than permitted with standards. Stating that her main concern has been density and that she would like to see a different way to approach density rather than the 300 to 500 feet proximity. She suggested the use of a percentage of census tract. Further saying that she would like to see the permitted with standards used for all areas.

D. Cobb stated that there is no other way to limit density other than a separation requirement. Legal counsel has advised that it would not be advisable to cap the number of units and the permitting process would not protect density, the only solution would be to have buffering requirements. He further explained that staff cannot make the determination as to whether or not a use is compatible, this would be a function of the

board of adjustment and is the reason that staff has held on to the special use permit process for the general residential districts.

K. Thompson asked if there would be a way to use a trigger based on census tract, that when density went over a certain percentage that a special use permit would be required.

K. Smith stated that he has looked at the situation from all sides involved and feels that the special use permit would be a fairly inexpensive and easy process for starting a new business and provides protection for the character of the neighborhood. He explained that he feels there is a need for this use in our community but feels there is weight to using the special use permit for providing protection.

D. Loftis stated that it seemed the special use permit would make enforcement easier.

J. Perkins stated his thinking to be a lot like K. Smith's because the special use permit gives the ability to evaluate on an individual basis. He further stated that he is real sensitive to what the Waterford Place folks have been going thorough and could see where people see that money is being made and everyone wanting to do the same and jeopardizing the integrity of neighborhoods. Stating that there is an advantage to the special use permit in that you do not have to renew it annually.

F. Porter asked what would happen if someone had to wait for two (2) years to get a special use permit, would they be allowed to continue to operate as usual.

D. Cobb explained that his opinion is that if someone had applied and the docket is full and this person had already been operating, there would be no reason to tell them to stop operating. Their continuing to operate would be a decision that they would have to make, knowing that the board of adjustment might not approve their special use permit.

D. Cobb requested the chance to answer K. Thompson's question regarding density. He referred to the existing density requirements in Chapter 2 of the UDO and stated that there could be amended language to trigger a special use permit based on density and used the following example: 2 bedroom short term rentals could be permitted with standards but 3 bedrooms or more would require a special use permit.

Elda Brown, Maple Street, short term rental owner, asked if there is a complaint against a short term rental owner that is in the district that is permitted with standards and they apply for their annual permit, they could be denied the right to continue to operate. Therefore, she feels there is a process in place to handle through the permitting process.

D. Cobb explained that if the short term rental owner had complaints against them, staff would have to make the decision as to whether or not to approve the renewal of their permit. If the permit is denied, applicant would have the right to appeal to the board of adjustment.

K. Jackson stated that he had a problem with requiring a special use permit because of the waiting period for people to come before the board of adjustment.

F. Porter had the same concerns and further stated his concerns about the business community having to wait because of the back log of cases to be heard.

D. Cobb stated that cases would be heard on a first come, first served basis and that it is not uncommon for a schedule to be set up for compliance to be met, and that Council could set up a schedule.

K. Smith voiced that he feels the special use permit, as opposed to permitted with standards would force people to think upfront about what they are doing. That there would be more community eye and a holistic view of what is happening upfront and would possibly alleviate problems that might otherwise arise. If all is good, then you would not have to go through the process again.

K. Jackson voiced his concerns about host absent.

D. Cobb stated the permitting process would require a local contact as part of the application.

D. Loftis stated she was confused about recommended parking requirements, that what was on the board was not what she read in the recommendations. She further voiced that she was in favor of parking in the rear, buffering and lighting requirements.

D. Cobb stated that the parking and buffering requirements were Mr. Christie's request and voiced concerns about the commercial feel this would bring to the properties if required, especially if the parking areas were paved. He stated that the lighting requirements make perfect sense, but that staff is recommending parking in the front be allowed but that it is up to the board.

K. Thompson questioned parking standards. She offered advice on revisions as follows: Appendix A: per room or suite should be changed from room to bedroom and to also make a definition for operational bedroom in the ordinance.

J. Perkins voiced his opinion that he did not see why the board of adjustment could not deal with hearing these applications for special use permits, because he felt most of them would be a rubber stamp process and would only take a few minutes to hear. Further stating that if the case took longer to hear, would only be further proof of the need of the special use permit process.

D. Cobb explained that the board of adjustment could approve the applications with additional standard requirements, such as, parking and buffering requirements.

F. Porter asked how to move this forward and next steps.

D. Cobb stated they could recommend approval, make changes and you can view changes at the March meeting.

Elda Brown requested to be allowed to present public comment. She stated that she was first opposed to the special use permit process, but after further discussion she has a different opinion now. That she feels there is no evidence to prove the best method and

that what better way to handle but to issue the one (1) year permits and start the clock. She further has a problem with the notification process of the special use permit because it will raise red flags from neighbors who might otherwise have no reason to be concerned because nothing different is happening at a property than would normally happen there. She gave a history of their operation and the relationships they have formed and stated that most of their renters have a connection with the community.

The board discussed Chief Phil Harris' memo as to potential problems with short term rentals.

J. Perkins stated the problem is not theoretical and that someone was sitting in the audience that has had a problem in their neighborhood and have tried to address it with their covenants, only to be threatened with legal action and that he viewed this as a real problem. He further stated that communities all across the country are struggling with short term rentals and further that as many people have spoken in opposition as in favor of short term rentals.

Mr. Christie, Waterford Place, spoke in favor of the special use permit stating that it is functionally the only way to regulate density, and that he has confidence that the board and council can make sure that the process is expedited. He further urged the board to ask staff to prepare language for review at their next meeting and to include his recommendations for parking and lighting.

K. Thompson asked why the special use permit process was not being recommended for properties zoned neighborhood mixed use (NMX).

D. Cobb explained that NMX does not allow single family dwellings and is a more commercial district and expected to have a higher density and the special use permit process is being recommended for general residential in order to protect the tranquility of the neighborhoods.

D. Cobb read Phil Harris' memo to the board to identify the existing complaints and possible concerns. Memo is attached hereto and labeled "Exhibit B".

D. Loftis made a motion to adopt staff recommendations with the addition of the parking for home stay be located in the back with landscaping and noting that it include the current lighting standards, J. Perkins clarified that this would include the requirement of the special use permit and then seconded the motion.

There was discussion about lighting requirements.

D. Cobb read Mr. Christie's recommended language as follows: "For homestays in GR districts, parking shall be at the rear of the lot and screened with vegetation from adjacent properties and from the street." "Exterior lighting shall be residential in nature and shall not be directed towards adjacent properties."

D. Cobb stated that the buffer requirement would need to be better defined and recommended a Type A buffer as defined in the current standards.

There was further discussion about what parking standards to require.

D. Loftis stated that her intention was to keep parking out of the front yard.

D. Loftis amended her motion to request that staff bring text back to the board at the next meeting regarding staff's recommendations for special use permits and to include language about parking and lighting, seconded by J. Perkins. The board voted all in favor except F. Porter voted against, the motion carried.

K. Thompson recommended that staff bring another draft before the board at their next meeting to incorporate the current discussion.

C. Strassner made a motion to amend the use matrix to include that a special use permit be required for homestays in general residential, seconded by K. Smith and F. Porter voted against, all other votes were in favor, the motion carried.

Motion to direct staff to bring back additional language for review including parking and lighting standards, motion carried unanimously.

K. Thompson asked about the notification process, questioning if 200 feet was enough.

D. Cobb explained that the public is notified by advertising, the property is posted and that adjoining property owners within 200 feet is the standard that has been used which is a little greater than statute requirements. He further explained that making that notification area larger could be questionable as to who would have standing in the case.

She further questioned the application not requiring proof of insurance coverage.

D. Cobb explained that unless the City could prove a benefit to the public in requiring proof of coverage, they would have no legal authority to make this requirement.

F. Porter asked if a permit fee had been established for permitted with standards.

D. Cobb recommended \$50.00 and it was requested that he include this in his draft language.

K. Thompson asked if a limit could be set on the special use permit, so that it would not follow the property.

D. Cobb stated he did not know if the board had the authority to put a sunset on a special use permit, but that he would find out.

The board discussed this further and came to the conclusion that if a property owner had complaints, and was not managing the use properly that they would end up before the board anyway.



The City of  
**Brevard**  
North Carolina

**OLD BUSINESS STAFF REPORT**

March 15, 2016

**TITLE:** Short-Term Rentals  
**SPEAKER:** Daniel P. Cobb AICP, Planning Director  
**PREPARED BY:** Daniel P. Cobb AICP, Planning Director

**EXECUTIVE SUMMARY:** Planning Board will continue their discussion regarding text amendments for short-term rentals, including draft ordinance amendments to UDO chapters 2, 3, 10, 12, and 19, included as attachment A.

**BACKGROUND:** At the Board's meeting on February 16, 2016 Staff presented revised draft ordinance language for the Board's consideration. Several questions and concerns were raised by the Board regarding the Special Use Permit (SUP) application and review process, parking, landscaping, and allowing an application window that allows hosts to operate while awaiting a hearing by the Board of Adjustment.

Staff has further revised the draft ordinance language and rental application form to reflect changes outlined in the Board's discussion at the February meeting; the revised language and application form are included as Attachment A and Attachment B respectively. Revisions resulting from the Board's discussion at the February meeting have been highlighted.

Additionally, the Board tasked Staff with researching a question regarding special use permits, specifically, does the Board of Adjustment have authority to put a "sunset" on a special use permit so that the permit does not follow the property? Upon discussions with consulting attorney Mr. Mike Egan Staff feels that legally it would not be a good idea to include something like this in our ordinance, and practically this would be difficult for Staff to manage and track. A special use permit is not a personal right and is legally tied to the property for which it is issued.

**DISCUSSION:** The attached draft language reflects the Board's discussion at the February meeting as well as advice from the Planning Department's consulting land use attorney.

One item of note that does not appear in the draft ordinance language is the timeframe that existing rentals will have to apply for a special use permit in order to continue operation while awaiting to be adjudicated by the Board of Adjustment. This provision should not be included in the language that will appear in the UDO, instead this component will be included in the adopting ordinance that is approved by City Council.

**POLICY ANALYSIS:** The draft language being presented by Staff has several key aspects:

Draft UDO Amendments for Short-Term Rentals

**2.2.C – Use Matrix**

	GR	RMX	NMX	DMX	CMX	IC	GI
<b>Lodging</b>							
Bed and Breakfast Home	PS	PS	PS	PS	PS	PS	–
Bed and Breakfast Inn	SUP	PS	PS	PS	PS	PS	–
Accessory Rental Cottage/Cabin	PS	PS	PS	–	–	–	–
Hotels/Motels/Inns	–	–	–	P	P	P	–
Rooming or Boarding House	–	–	P	P	P	P	–
Recreational Vehicle Park	–	–	–	–	–	–	–
<u>Short-Term Rental (Host-Absent)</u>	<u>SUP</u>	<u>SUP</u>	<u>PS</u>	<u>PS</u>	<u>PS</u>	<u>PS</u>	<u>–</u>
<u>Homestay (Host-Present)</u>	<u>SUP</u>	<u>PS</u>	<u>PS</u>	<u>PS</u>	<u>–</u>	<u>PS</u>	<u>–</u>

**Chapter 3 – Additional standards**

**3.34 – Short-Term Rentals and Homestays**

**A. Operational requirements**

1. Occupancy: Overnight occupancy shall not exceed two persons per bedroom plus two additional persons. The number of “bedrooms” used in calculating occupancy limits shall be taken from the property’s application. For example: a two bedroom rental would have an occupancy limit of 6 (2 x 2 bedrooms = 4 + 2 additional = 6 total).
2. Signs: Signage shall be limited to a single sign, not to exceed four square feet, attached to the primary structure which houses the lodging unit(s).
3. Parking: Off-street parking shall be provided as required by Chapter 10 of this ordinance. Parking shall be located on the same lot on which the rental units are located. Homestays in GR districts shall require guest parking to be located to the rear or side of the principal structure.
4. Screening: Parking areas shall be screened with a Type A buffer in accordance with Chapter 8 of this ordinance.
5. Lighting: Exterior lighting shall be residential in nature and shall not be directed towards adjacent properties.

**B. Permits required**

1. The owner, or authorized agent thereof, of any property upon which a Homestay or Short-Term Rental proposes to operate shall secure a permit from the City of Brevard Planning & Zoning Department.
2. The application shall designate a “Primary Contact” which is to be a local responsible party who is available by phone 24-hours per day while the property is being rented.

**C. Violations: Any act constituting a violation of these standards shall subject the owner to enforcement procedures as set forth in Chapter 18 of this ordinance.**

**D. Duration of permit:**

1. Short-Term Rental and Homestay permits are temporary, and shall not establish a vested right to renewal. Short-Term Rental and Homestay permits shall be valid for a period of one year from the date upon which approval is granted.
2. Annual renewal applications shall be filed 30 days prior to expiration of the current permit.

structure fronts. Where a structure fronts upon two or more streets, parking may be permitted between the principal structure and the adjacent street of lesser classification when parking cannot reasonably be placed in another location.

4. The following uses and parking types shall be exempt from Sections 10.5(G.2) and 10.5(G.3) above:

- a. Single-family and duplex residential structures in GR, RMX and NMX districts, including those used for Homestay and Short-Term Rental uses, except those which are subject to Chapter 2, Section 2.3(E.2).
- b. Handicapped parking spaces as required by the North Carolina Accessibility Code or other federal, state, or local regulations.
- c. Bicycle parking spaces required by this Ordinance.
- d. Existing non-residential and multi-family development undergoing significant or substantial improvement or change of use as defined in Chapter 19 of this Ordinance, provided that all newly created parking spaces associated with such redevelopment shall conform with Sections 10.5(G.2) and 10.5(G.3) unless the approving authority deems that compliance would be impractical due to existing site constraints.

#### 12.9 – Signs allowed with permits

A. Signs allowed in GR districts: The following types of signs shall be allowed in all of the residential districts subject to the accompanying restrictions and the issuance of a sign permit:

##### 1. Nameplate signs:

- i. Home occupations and Short-Term Rental uses shall be allowed one nameplate sign for purposes of identification.
- ii. Signs shall not exceed four square feet of surface area and shall be attached to the residence.
- iii. Signs shall not be illuminated.

#### Chapter 19 – Definitions

***Bed and breakfast establishments:*** Establishments primarily engaged in providing short-term lodging and the service of the breakfast meal in facilities known as bed and breakfast inns and bed and breakfast homes. These establishments provide short-term lodging in private homes or small buildings converted for this purpose. Bed and breakfast establishments are characterized by a highly personalized service and meet the following requirements:

1. They do not serve food or drink to the general public for pay;
2. They serve only the breakfast meal, and that meal is served only to overnight guests of the business;
3. They include the price of breakfast in the room rate; and
4. They serve as the permanent residence of the owner or the manager of the business.

***Homestay:*** A private, owner-occupied single-family residence that offers one or more guest rooms for overnight accommodations which are rented for periods of less than 30 days for compensation, so long as the lodging use is subordinate to the main residential use of the building. The key distinction of a Homestay from a Short-Term Rental is that the host is present in a Homestay.

***Rooming or boarding house:*** Short or long-term accommodations that serve a specific group or membership such as a dormitory, fraternity or sorority house, youth or adult hostel, or similar **tourist** accommodations, or single room occupancy units that provide a number of related services including,



**APPLICATION FOR SHORT-TERM RENTAL UNIT**

New rental permit or  Renewal of an existing permit

*This application shall be completed with the following information, attachments, and all required signatures.*

<b>Property Owner Information (required)</b>	<input type="checkbox"/> This is the primary contact.
Property Owner Name: _____	
Mailing Address: _____	
Email: _____	Telephone: _____

<b>Applicant Information (if different than owner)*</b>	<input type="checkbox"/> This is the primary contact.
Property Owner Name: _____	
Mailing Address: _____	
Email: _____	24-Hour Telephone: _____

<b>Managing Agent Information (if applicable)</b>	<input type="checkbox"/> This is the primary contact.
Property Owner Name: _____	
Mailing Address: _____	
Email: _____	24-Hour Telephone: _____

**Rental Information (required)**

Address of rental: \_\_\_\_\_ Parcel # (PIN): \_\_\_\_\_

Market name of rental (if applicable): \_\_\_\_\_

Type of Rental:  Homestay (host-present)  Short-Term Rental (host-absent)

Number of bedrooms† available for rent: \_\_\_\_\_

**Total allowed occupancy = Number of rooms × 2 + 2**

Briefly describe your rental: \_\_\_\_\_  
 \_\_\_\_\_

**Site Plan (required)**

Attach a site plan of your rental unit(s) showing: all of the home or building (all heated square feet) with all areas and rooms to be rented indicated, location of off-street parking, locations of all smoke detectors, and all guest entrances/exits.

**Signatures (required)**

*I, the undersigned, acknowledge the following: that I am authorized to make decisions concerning the property represented herein; that I understand and hereby agree to comply with all laws, regulations, and requirements of the State of North Carolina, Transylvania County, and the City of Brevard that are applicable to the use proposed by this application, including but not limited to the City of Brevard Noise Ordinance and the remittance of occupancy taxes by state law to the Transylvania County Finance Department; and that I grant permission to the Review Officer, and designees thereof, to enter upon the property represented herein for the purposes of administering this application.*

Property Owner: \_\_\_\_\_ Date: \_\_\_\_\_  
 Print Name: \_\_\_\_\_

Applicant: \_\_\_\_\_ Date: \_\_\_\_\_  
 Print Name: \_\_\_\_\_

Managing Agent: \_\_\_\_\_ Date: \_\_\_\_\_  
 Print Name: \_\_\_\_\_

\* If the applicant is other than the property owner, proof of owner's consent is required. Owner's signature proves consent. The applicant will be the liaison with the City and will be the party to receive official notice. Notice communicated to the applicant will be deemed communicated to the owner. By signing this application, the applicant is consenting to the designation for these purposes.

† All bedrooms available for rent must be classified as bedrooms per the Transylvania County Tax Administration property appraisal card.



The City of  
**Brevard**  
North Carolina

**OLD BUSINESS STAFF REPORT**

March 15, 2016

**TITLE:** Sign Ordinance Review  
**SPEAKER:** Daniel P. Cobb AICP, Planning Director  
**PREPARED BY:** Daniel P. Cobb AICP, Planning Director

**EXECUTIVE SUMMARY:** The Board will continue their discussion and review of Chapter 12 of the UDO.

**BACKGROUND:** This item originally came before the Board on January 26, 2016. Upon further discussion it was decided to table any action on this item until the next regular meeting on February 16, 2016. At the February 16<sup>th</sup> meeting the Board asked Staff for updated language including recommendations on changes to Chapter 12 for consistency purposes, insufficient definitions, and contradictory sections.

**DISCUSSION:** Staff has reviewed all of Chapter 12 and discussed it with Mike Egan, a consulting land use attorney for his opinion on sections of Chapter 12. Given Mr. Egan's opinion (Attachment A) and a recent decision by the U.S. Supreme Court (Attachment B) on signage (*Reed v. Town of Gilbert*) Staff has reached the conclusion a much broader approach should be applied to any changes to Chapter 12. Staff will present a basic framework for these changes during the meeting.

**POLICY ANALYSIS:** The City's comprehensive plan which was adopted in November of 2015 states that Brevard will continue to strive to be an outstanding place to live, work, and play while building upon its distinctive small-town charm and remain a livable community for everyone. There are no other specific plans or policies available for review to address this issue. Signs are common in every community and necessary to a certain extent for the advertisement of local businesses. While there are safety implications to consider (visibility at intersections, not blocking access, etc.) the overall amount, location, and size of signs is largely a decision to be made by policy makers depending on the overall sense of community and aesthetic appeal desired.

**STAFF RECOMMENDATION:** Staff recommends the Board review UDO Chapter 12 and consider Mr. Egan's comments as well as the Supreme Court's decision in *Reed v. Town of Gilbert* and consider tabling any decisions until work is completed on the short-term rental ordinances amendments. Tabling this item will allow Staff appropriate time to draft text amendments for

## MEMORANDUM

**To:** Daniel Cobb, Planning Director

**From:** Michael Egan, Consulting Attorney

**Date:** 16 February 2016

**Subject:** City of Brevard Sign Regulations

Last year the United States Supreme Court decided *Reed v. Town of Gilbert*, and struck down various sign regulations of the Town of Gilbert, Arizona, as violative of the First Amendment. Basically, the Court held that the regulations in that case were not "content-neutral" and, thus, were subject to the strict scrutiny test which requires a showing that the regulations are designed to serve a compelling governmental interest and are narrowly tailored to achieve that interest. Professor Adam Lovelady has written an excellent analysis of the case which can be found in Coates' Canons here:

<http://canons.sog.unc.edu/?p=8167>.

At your request I have reviewed Sections 12.6 through 12.9 of the City's Unified Development Ordinance for compliance with the *Reed* decision. This task is complicated by the fact that, although all nine justices found the sign regulations to be unconstitutional, four different opinions were written. The majority opinion was written by Justice Thomas, but only two justices joined him who did not also join other opinions which seem to conflict with the majority decision. One of the two who joined Thomas is no longer on the Court. So, it is challenging to predict what the future may hold. This is my best guess. That guess is based in large part on the more sensible approach voiced in the concurring opinions authored by Justices Alito, Kagan, and Breyer.

If I do not mention a section, it is my opinion it is content-neutral and, thus, safe from the strict-scrutiny test.

Paragraph L is also not content neutral. I think you may be able to allow signs for special events, but they should not be limited to the list put forward in this paragraph.

This completes my review of Sections 12.6 through 12.9 of the UDO. I have attempted to offer a legal analysis which is also practical. In light of the contradictory analyses contained in *Reed's* various opinions, I am confident the Supreme Court will be revisiting signs and the First Amendment before too long. It is to be hoped the decision in such case will be more coherent and helpful.



test is unclear.

### Case Summary

The Town of Gilbert, Arizona, had a sign code requiring permits for signs, but outlining a variety of exemptions. The *Reed* decision focused on the exemptions for three types of signs: Political Signs, Temporary Directional Signs, and Ideological Signs. Under the local code, Political Signs were signs designed to influence the outcome of an election; they could be up to 32 square feet and displayed during political season. Temporary Directional Signs were defined to include signs that direct the public to a church or other qualifying event; they could be up to six square feet and could be displayed 12 hours before and 1 hour after the qualifying event. Ideological signs were defined to be signs that communicate a noncommercial message that didn't fit into some other category; they could be up to 20 square feet.

A local church—after being cited for violation of the rules for Temporary Directional Signs—challenged the sign code as abridging their freedom of speech. The Town argued (and the lower courts found) that its regulations were content-neutral. The distinctions among types of signs, they said, were based on objective factors not the expressive content of the sign. The distinctions did not favor nor censor a particular viewpoint or philosophy. And, the justification for the regulation was unrelated to the content of the sign.

Justice Thomas, writing for the Court, disagreed. He found that the distinctions were plainly content-based and thus subject to strict scrutiny. The distinctions—between Political Signs, Temporary Directional Signs, and Ideological Signs—“depend[ed] entirely on the communicative content of the sign” (slip op., at 7). “Regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints with that subject matter” (12). And, “an innocuous justification cannot transform a facially content-based law into one that is content neutral” (9).

In its failed attempt to meet the strict scrutiny standard, the Town offered two governmental interests to support its distinctions: aesthetic appeal and traffic safety. Even if these were considered compelling governmental interests (which the Court assumed without ruling), the Town's distinctions were not narrowly tailored. Justice Kagan noted in her own opinion (concurring in the judgment only) that the Town's distinctions did “not pass strict scrutiny, or intermediate scrutiny, or even the laugh test” (slip op., at 6, Kagan, J., concurring in judgment).

### Impact of Local Ordinances

So what does this decision mean for local ordinances? In the end, some distinctions among signs clearly are allowed and will withstand judicial review. Some code provisions, though, must be revised. And then, there are the open questions.

The Court was unanimous in judgment: The particular provisions of the Town of Gilbert's sign code violate Constitutional protections for free speech. The Court was fractured, though, in the opinions, making it harder to discern the full scope of the decision. Justice Thomas offered the majority opinion of the court with five justices joining. Justice Alito offered a concurring opinion to further clarify the impact of Justice Thomas' opinion. He was joined by Justices Kennedy and Sotomayor. Three justices concurred in judgment only, and they offered two separate opinions to outline their legal reasoning and their concerns with the majority's reasoning.

So we have a split court. Three joined the majority only; three joined the majority, but also joined an explanatory concurrence; and three disagreed with the majority's legal reasoning. This three-three-three split, unfortunately, causes even more head-scratching for an already complex topic.

**Content-Based Distinctions.** In thinking about your sign ordinance, ask this: Does this regulation apply to a particular sign because of the non-commercial content on the sign? If yes, the regulation must meet strict scrutiny under *Reed*. The government must show that the regulation is designed to serve a *compelling* governmental interest and *narrowly tailored* to achieve that interest.

If your ordinance distinguishes among noncommercial sign types—political v. ideological v. religious—those distinctions are unconstitutional and must be changed.

Justice Thomas did offer some content-based regulations that may survive strict scrutiny if they are narrowly tailored to address public safety. These include warning signs for hazards on private property, signs directing traffic, or street



And second, Justice Alito listed the distinction between on-premises and off-premises signs. The enforcement officer must read the sign in order to determine if a sign is off-premises or on-premises. As such, these would seem to be facially content-based and subject to strict scrutiny. But, prior Supreme Court caselaw has upheld the on-premise/off-premise distinction and that precedent is not overruled by the majority opinion.

**Commercial and Noncommercial Speech.** In past decisions the Supreme Court has treated commercial speech to slightly less protection than noncommercial speech. Commercial speech regulation needs to meet a version of intermediate scrutiny, not the strict scrutiny applied to regulation of non-commercial speech (See, generally, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1987)).

Arguably, the *Reed* decision opened the door to challenge a sign ordinance that distinguishes between commercial and noncommercial speech. Justice Alito's concurring opinion noted that distinguishing based on the *type of property*—commercial or residential—would be valid. Regulating based on the *content of the sign*—commercial or noncommercial—arguably is undermined by the *Reed* decision.

Notably, though, the majority in *Reed* did not overrule its prior decisions. The *Reed* decision was focused on the Town code's distinctions among types of noncommercial speech. Presumably the long-held standards for regulation of commercial speech still apply.

### Conclusion

In the wake of *Reed*, some things are clear. Governments still have an array content-neutral regulations to apply to signs. But, content-based distinctions such as the ones in the Town of Gilbert's code must survive strict scrutiny to stand. Because of mix of opinions from the Court, there are several open questions. We will not know the full scope and meaning of *Reed v. Town of Gilbert* until the federal courts begin to apply this decision to other sign litigation.

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