

**VILLAGE OF DOWNERS GROVE**  
**Report for the Village Council Meeting**  
**9/8/2015**

<b>SUBJECT:</b>	<b>SUBMITTED BY:</b>
Sign Ordinance Text Amendments	Stan Popovich, AICP Planning Manager

**SYNOPSIS**

A motion has been prepared to waive the first reading to approve an ordinance adopting a text amendment to Article 9 of the Downers Grove Zoning Ordinance. An ordinance has been prepared to amend Article 9, Signs, of the Zoning Ordinance to include a substitution clause and a severability clause.

**STRATEGIC PLAN ALIGNMENT**

The goals for 2011-2018 include *Exceptional Municipal Services*

**FISCAL IMPACT**

n/a

**RECOMMENDATION**

Approval on the September 8 active agenda per the Plan Commission's unanimous 5:0 recommendation. The Plan Commission discussed this petition at a special September 3, 2015 meeting. The Plan Commission found that the proposed text amendments are compatible with the Comprehensive Plan and meet all the standards for approval of a Zoning Ordinance Text Amendment found in Section 28.12.020.

**BACKGROUND**

The Village is requesting two amendments to the Sign Ordinance in light of the recent Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) decision of the U.S. Supreme Court. As background, the Reed case involved non-commercial sign regulations which incorporated different rules and sign regulations based upon the type of non-commercial message being conveyed (religious vs ideological vs political). The U.S. Supreme Court declared that this differentiation rendered the non-commercial sign restrictions to be content-based speech regulations subject to strict scrutiny. Strict scrutiny is the most stringent standard of judicial review used by U.S. courts. The Village's non-commercial portion of the Sign Ordinance possesses some similarities to the Town of Gilbert's regulations.

In order to protect the Village's Sign Ordinance from constitutional challenges to the non-commercial sign regulations, staff is recommending the inclusion of a substitution clause and a severability clause as noted below. The adoption of these clauses will help protect the sign ordinance from constitutional challenges, while allowing the Village an opportunity to review the entire sign ordinance in upcoming months.

### Substitution Clause

A substitution clause would permit non-commercial copy to be substituted in place of any commercial copy. The Village is recommending the following substitution clause be added to the Sign Ordinance:

#### **Sec. 9.010.E No Discrimination Against Non-Commercial Signs Or Speech.**

The owner of any sign which is otherwise allowed under this Article 9 may substitute non-commercial copy in lieu of any other commercial or non-commercial copy. This substitution of copy may be made without any additional approval or permitting. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over non-commercial speech, or favoring of any particular non-commercial message over any other non-commercial message. This provision prevails over any more specific provision to the contrary. This provision does not create a right to increase the total amount of signage on a parcel or allow the substitution of an off-site commercial message in place of an on-site commercial message.

### Severability Clause

A severance clause provides that if any provision of the ordinance is found to be invalid, the remainder of the ordinance stands on its own and is still valid. The State of Illinois has a general severance provision within 5 ILCS 70/1.31 and the Downers Grove Zoning Ordinance also has a general severability provision in Section 1.130. A specific severance clause in the Sign Ordinance will show that the Village has a specific intent that the commercial sign regulations can and should stand on their own and be severed from non-commercial speech regulations if the non-commercial speech regulations are deemed unconstitutional by a court. The Village recommends adding the following severance clause to the Sign Ordinance:

#### **Sec. 9.130 Severability.**

If any portion of this Article 9 or any regulation contained herein is held to be invalid or unconstitutional by a court of competent jurisdiction, it is the Village's specific legislative intent that said portion or regulation is to be deemed severed from this Article 9 and should in no way affect or diminish the validity of the remainder of Article 9 or any other sign regulation set forth herein.

### Public Comment

One speaker at the September 3 Plan Commission meeting stated general opposition to the Sign Ordinance.

The proposed text amendments are consistent with the Comprehensive Plan and meet the review and approval criteria set forth in Section 28.12.020 of the Zoning Ordinance.

### **ATTACHMENTS**

Ordinance

Staff Report with attachments dated September 3, 2015

Draft minutes of the Plan Commission meeting dated September 3, 2015

VILLAGE OF DOWNERS GROVE  
COUNCIL ACTION SUMMARY

INITIATED: Village Attorney DATE: September 8, 2015  
(Name)

RECOMMENDATION FROM: \_\_\_\_\_ FILE REF: \_\_\_\_\_  
(Board or Department)

**NATURE OF ACTION:**

**STEPS NEEDED TO IMPLEMENT ACTION:**

- Ordinance
- Resolution
- Motion
- Other

Motion to Adopt "AN ORDINANCE ADOPTING A TEXT AMENDMENT TO ARTICLE 9 OF THE DOWNERS GROVE ZONING ORDINANCE", as presented.



**SUMMARY OF ITEM:**

Adoption of the attached ordinance shall adopt a text amendment to Article 9 of the Downers Grove Zoning Ordinance.

**RECORD OF ACTION TAKEN:**

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**ORDINANCE NO. \_\_\_\_\_****AN ORDINANCE AMENDING ADOPTING A TEXT AMENDMENT  
TO ARTICLE 9 OF DOWNERS GROVE ZONING ORDINANCE**

WHEREAS, the Village sign ordinance separates commercial sign regulations from non-commercial sign regulations because based upon U.S. Supreme Court precedent, non-commercial speech, including non-commercial signage, is afforded greater constitutional protection than commercial speech under the First Amendment to the U.S. Constitution; and

WHEREAS, while commercial signs are relatively uniform in purpose and function, non-commercial signs are fundamentally non-uniform and serve an almost unlimited variety of purposes and functions; and

WHEREAS, the Village sign ordinance was adopted to fulfill expressly stated goals, which include, but are not limited to, traffic safety, aesthetics, preservation of property values and maintenance of competitive balance between property owners and businesses within the Village; and

WHEREAS, all regulations within the sign ordinance are subject to judicial review for compliance with the First Amendment, and the Village accepts its obligation to create narrowly tailored regulations, and accepts that the Village must be prepared to prove that each sign regulation it adopts successfully serves one or more of the stated purposes for which the Village has elected to regulate signs; and

WHEREAS, because non-commercial signs are so diverse and serve such a broad variety of purposes and functions, the Village's non-commercial sign regulations limit the size, number, location and physical aspects of non-commercial signs based upon the purpose of the category of non-commercial sign and/or the function of the non-commercial sign being regulated. In this way, the size, number, location and other physical aspects of the non-commercial signs can be narrowly tailored to serve one or more of the Village's stated purposes, predicated upon the function or purpose of the non-commercial sign; and

WHEREAS, based upon the prior precedential decisions of the Seventh Circuit Court of Appeals which has jurisdiction over the Village, the non-commercial sign regulations, as currently adopted and in effect, met the content neutrality definition under the First Amendment; and

WHEREAS, on June 18, 2015 the U.S. Supreme Court issued a fractured decision in the case of Reed v. Town of Gilbert, Ariz., 135 S.Ct. 2218 (2015), which addressed the constitutionality of a municipal sign ordinance which regulated non-commercial signs based upon the different function or purpose of the non-commercial signs, and found that those non-commercial sign regulations were content-based and violated the First Amendment; and

WHEREAS, the Reed decision recently caused the Seventh Circuit Court of Appeals to reverse its interpretation of content neutrality for purposes of regulating non-commercial signs; and

WHEREAS, as a result, the Village now confronts a legislative dilemma. If the Village must be prepared to prove that its non-commercial sign regulations are narrowly tailored and actually serve one of the stated Village purposes justifying the regulation of non-commercial signs, then the function and purpose of the category of non-commercial sign being regulated must be taken into consideration. If, however, the non-commercial regulations are legislatively established based upon the function and the

purpose of the various categories of non-commercial signs, after the Reed decision, the non-commercial regulations now run the risk of being declared to be content-based and unconstitutional; and

WHEREAS, the substitution clause adopted by this Ordinance under Section 9.010.E is expressly intended to allow the existing categories of non-commercial sign regulations to be maintained because they have been historically legislated with an intention of allowing the purpose and function of the non-commercial sign to impact the regulations. In light of the Reed decision, however, the substitution clause will also now permit the owner of a lawful sign to substitute non-commercial sign copy in lieu of any other commercial or non-commercial sign copy, because the federal courts have broadly and consistently held that such substitution clauses render municipal sign regulations to be content-neutral; and

WHEREAS, the severance clause adopted by this Ordinance under Section 9.130 is expressly intended to articulate the Village Council's specific legislative determination and intent that individual regulation within the sign ordinance stand separate and distinct from one another, such that should one portion or regulation within the sign ordinance be declared to violate the U.S. Constitution, the remainder of the sign ordinance and regulations should be severed and remain valid and in full force and effect.

NOW, THEREFORE, BE IT ORDAINED by the Village Council of the Village of Downers Grove in DuPage County, Illinois, as follows: (Additions are indicated by redline/underline; deletions by ~~strikeout~~):

**Section 1. That Section 28.9.010E is hereby added as follows:**

**Sec. 9.010.E No Discrimination Against Non-Commercial Signs Or Speech.**

The owner of any sign which is otherwise allowed under this Article 9 may substitute non-commercial copy in lieu of any other commercial or non-commercial copy. This substitution of copy may be made without any additional approval or permitting. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over non-commercial speech, or favoring of any particular non-commercial message over any other non-commercial message. This provision prevails over any more specific provision to the contrary. This provision does not create a right to increase the total amount of signage on a parcel or allow the substitution of an off-site commercial message in place of an on-site commercial message.

**Section 2. That Section 28.9.130 is hereby added as follows:**

**Sec. 9.130 Severability.**

If any portion of this Article 9 or any regulation contained herein is held to be invalid or unconstitutional by a court of competent jurisdiction, it is the Village's specific legislative intent that said portion or regulation is to be deemed severed from this Article 9 and should in no way affect or diminish the validity of the remainder of Article 9 or any other sign regulation set forth herein.

**Section 3.** That all ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

**Section 4.** That this ordinance shall be in full force and effect from and after its passage and publication in the manner provided by law.

\_\_\_\_\_  
Mayor

Passed:

Published:

Attest: \_\_\_\_\_  
Village Clerk



**VILLAGE OF DOWNERS GROVE  
REPORT FOR THE PLAN COMMISSION  
SEPTEMBER 3, 2015 AGENDA**

SUBJECT:	TYPE:	SUBMITTED BY:
15-PLC-0034	Zoning Ordinance Text Amendments	Stanley J. Popovich, AICP Planning Manager

**REQUEST**

The Village is requesting text amendments to Article 9, Signs.

**NOTICE**

The application has been filed in conformance with applicable procedural and public notice requirements.

**GENERAL INFORMATION**

**APPLICANT:** Village of Downers Grove  
801 Burlington Avenue  
Downers Grove, IL 60515

**ANALYSIS**

**SUBMITTALS**

This report is based on the following documents, which are on file with the Department of Community Development:

1. Application/Petition for Public Hearing
2. Zoning Ordinance
3. Proposed Amendments

**PROJECT DESCRIPTION**

The Village is requesting review of two text amendments to Article 9, Signs, of the Zoning Ordinance. The requested amendments are the inclusion of a substitution clause and a severability clause to Article 9. The proposed amendments are necessary additions to the Sign Ordinance in light of the recent Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) decision of the U.S. Supreme Court. As background, the Reed case involved non-commercial sign regulations which incorporated different rules and sign regulations based upon the type of non-commercial message being conveyed (religious vs ideological vs political). The U.S. Supreme Court declared that this differentiation rendered the non-commercial sign restrictions to be content-based speech regulations subject to strict scrutiny. Strict scrutiny is the most stringent standard of judicial review used by U.S. courts.

The Village's non-commercial portion of the Sign Ordinance possesses some similarities to the Town of Gilbert's regulations. Provisions such as these had previously been held constitutionally valid non-commercial speech regulations prior to Reed, but with the Reed decision, the U.S. Supreme Court has found these types of regulations to be content-based speech regulations. The U.S. Supreme Court has

historically held that non-commercial speech gets greater First Amendment protection than commercial speech.

The Village's commercial portion of the Sign Ordinance is viewed as a time, place and manner regulation (rules about size and location) and is thus content neutral. The U.S. Supreme Court has previously ruled that time, place and manner restrictions are not content based and subject to intermediate scrutiny, which is less rigorous than strict scrutiny.

In order to protect the Village's Sign Ordinance from constitutional challenges to the non-commercial sign regulations, staff is recommending the inclusion of a substitution clause and a severability clause as noted below. The adoption of these clauses will help protect the sign ordinance from constitutional challenges, while allowing the Village an opportunity to review the entire sign ordinance in upcoming months.

### **Substitution Clause**

A substitution clause would permit non-commercial copy to be substituted in place of any commercial copy. The clause provides that for every commercial sign that is allowed, any non-commercial message could be legally substituted. This ensures that non-commercial speech is never discriminated against based on content because it will always allow a non-commercial message. For example, the owner of 'Bob's Burgers' may replace his otherwise code compliant 'Bob's Burgers' monument sign with a similar sized 'Vote for Mickey Mouse' monument sign. The substitution clause, as noted below, does not favor commercial speech over non-commercial speech or favor any particular non-commercial message over any other non-commercial message. The substitution clause has the legal effect of regulating all varieties of noncommercial speech in the same manner.

The Village is recommending the following substitution clause be added to the Sign Ordinance:

### **Sec. 9.010.E No Discrimination Against Non-Commercial Signs Or Speech.**

The owner of any sign which is otherwise allowed under this Article 9 may substitute non-commercial copy in lieu of any other commercial or non-commercial copy. This substitution of copy may be made without any additional approval or permitting. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over non-commercial speech, or favoring of any particular non-commercial message over any other non-commercial message. This provision prevails over any more specific provision to the contrary. This provision does not create a right to increase the total amount of signage on a parcel or allow the substitution of an off-site commercial message in place of an on-site commercial message.

### **Severability Clause**

A severance clause provides that if any provision of the ordinance is found to be invalid, the remainder of the ordinance stands on its own and is still valid. This clause may prevent a flaw in part of an ordinance from invalidating the entire sign ordinance. In this particular instance, 'severance' provides that constitutionally valid sign regulations can stand on their own and be 'severed' from unconstitutional sign regulations in the same ordinance.

The State of Illinois has a general severance provision within 5 ILCS 70/1.31 and the Downers Grove Zoning Ordinance also has a general severability provision in Section 1.130. A specific severance clause in the Sign Ordinance will show that the Village has a specific intent that the commercial sign regulations can and should stand on their own and be severed from non-commercial speech regulations if the non-



commercial speech regulations are deemed unconstitutional by a court. The Village recommends adding the following severance clause to the Sign Ordinance:

**Sec. 9.130 Severability.**

If any portion of this Article 9 or any regulation contained herein is held to be invalid or unconstitutional by a court of competent jurisdiction, it is the Village's specific legislative intent that said portion or regulation is to be deemed severed from this Article 9 and should in no way affect or diminish the validity of the remainder of Article 9 or any other sign regulation set forth herein.

Also attached is a memorandum from the Village's legal counsel further explaining these issues.

**PUBLIC COMMENT**

The legal notice was published in the *Downers Grove Suburban Life*. At this time, no public comments have been received on either proposed text amendment.

**FINDINGS OF FACT**

***Section 12.020.F Review and Approval Criteria of Zoning Ordinance Text Amendments***

*The decision to amend the zoning ordinance text is a matter of legislative discretion that is not controlled by any one standard. In making recommendations and decisions about zoning ordinance text amendments, review and decision-making bodies must consider at least the following factors:*

**(1) Whether the proposed text amendment is in conformity with the policy and intent of the comprehensive plan**

The proposed text amendments are consistent with the policy and intent of the Comprehensive Plan. The Comprehensive Plan notes that the Zoning Ordinance should be regularly reviewed and updated. In each case, the proposed amendments further these policies and goals of the Comprehensive Plan:

- Maintain the Village's image and desirability as a great place to live
- Develop aesthetically pleasing and functionally well-designed retail and commercial shopping areas
- Enhance the economic viability, productivity, appearance and function of the Village's commercial corridors
- Review and update the Sign Ordinance to be flexible
- Continue to support the operation of other important community service providers

This standard is met.

**(2) Whether the proposed zoning ordinance text amendment corrects an error or inconsistency in the zoning ordinance, meets the challenge of a changing condition or is necessary to implement established policy.**

The proposed text amendments meet the challenge of a changing condition. The U.S. Supreme Court's decision in Reed v. Town of Gilbert on June 18, 2015 has changed the way municipalities must administer and draft sign regulations to ensure their constitutionality and to ensure that non-commercial speech is never discriminated against based on content. The Village proposed amendments are necessary to ensure that the Village's Sign Ordinance is constitutionally valid and does not discriminate against non-commercial speech. The Village has reacted quickly to this challenging condition. This standard is met.

## RECOMMENDATION

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As detailed above, the two proposed text amendments to the Article 9, Signs, of the Zoning Ordinance meet the review and approval criteria identified in Section 12.020.F of the Zoning Ordinance. The proposed amendments are in conformity with the Comprehensive Plan and meet the challenge of a changing condition. The proposed amendments also ensure that the Village does not discriminate against non-commercial speech. Staff recommends the Plan Commission forward a positive recommendation to the Village Council regarding these requests.

Staff Report Approved By:



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Stanley J. Popovich, AICP  
Planning Manager

**Day & Robert, P.C.**

# Memo

**To:** Village of Downers Grove/Leibundguth  
**From:** Scott M. Day  
**CC:** Enza I. Petrarca, Village Council and Plan Commission of the Village of Downers Grove  
**Date:** August 24, 2015  
**Re:** Sign Ordinance Text Amendments

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## I. INTRODUCTION

The Village of Downers Grove, like most communities, has detailed regulations intended to control the size, height, location and number of signs within the Village. The sign regulations cover both commercial and non-commercial signs.

Commercial signs are very uniform in messaging (generally identifying the business) so it is easy to regulate their physical aspect without reference to what the sign says. In contrast, the non-commercial sign regulations cover a broad spectrum of different types of signs including political signs, memorial signs, yard sale signs, no trespassing signs, railroad signs, public notice signs, street signs, for sale signs and contractor signs. The messages of non-commercial signs are infinitely variable and diverse. Because each category of non-commercial signs has a different purpose, a different intended viewer and a different function, the sign ordinance has different regulations defining the size, height, number and location where each category of non-commercial sign is permitted within the Village. Simply stated, the function and purpose of the non-commercial sign category shapes the regulations applicable to each category.

The freedom of speech rights protected by the First Amendment of the U.S. Constitution limit the authority of all municipalities to regulate signs. While the U.S. Supreme Court decisions have long supported sign regulations which distinguish between commercial and non-commercial signs, the federal courts are fractured regarding regulatory distinctions between different categories of non-commercial signs. This fracture stems from two very different tests that have been applied to assess whether the distinctions between different types of non-commercial signs are deemed lawful **content-neutral** speech regulation or unlawful **content-based** speech regulation in violation of the First Amendment, as detailed hereafter.

## II. SPLIT AUTHORITY – ABSOLUTIST V. PURPOSIVE TESTS

For a number of years a split has existed in how the federal appellate courts analyze whether a sign regulation is or is not content-based. As detailed in the recent decision in Brown v. Town of Cary, 706 F.3d 294 (4<sup>th</sup> Cir. 2013), two distinctly different approaches have been used – the "**absolutist**" and "**purposive**" approaches.

Circuits that favor the "**purposive**" analysis—the Third, Fourth, Sixth, Seventh, and Ninth Circuits -- reject the notion that any code that requires a categorization of a sign for regulatory purposes based on the content of the sign must be seen as content-based, and thus subject to strict scrutiny. Rather, these courts look to whether the challenged regulation is "justified without reference to the content of the regulated speech." To make that judgment, the courts employ a "practical inquiry" such as that in Wag More Dogs, Ltd. Liability Corp. v. Cozart, 680 F.3d 359 (4<sup>th</sup> Cir. 2012). Under the "practical inquiry," the courts ask not whether a regulation has made distinctions merely based on the content of various signs, but whether the regulation made distinctions because of the **substantive content** of the signs. The Village of Downers Grove is under the jurisdiction of the Seventh Circuit, and thus falls under a jurisdiction which has historically embraced this practical "**purposive**" analysis.

In contrast, the "**absolutist**" approach has been employed by the Eighth Circuit in Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8<sup>th</sup> Cir. 2011). Under this approach, the court does not apply any practical inquiry into the reason a municipality has different regulations for different signs. The mere fact that a sign ordinance has different regulations for different categories of non-commercial signs necessarily renders the regulations to be content-based (subject to strict scrutiny) because one must look at the content of the sign to see which regulations apply. Under this approach, it makes absolutely no difference if the municipality is in no way favoring a particular view point or message.

### III. REED V. TOWN OF GILBERT

In June, 2015, the U.S. Supreme Court decided Reed v. Town of Gilbert, 135 S.Ct. 2118 (2015), which involved a church's challenge to sign regulations that the church claimed disfavored its temporary directional signs based on their content. This decision has arguably resolved the split in the federal circuits as to the correct approach to determine what constitutes content-based sign regulation. The Reed decision addressed a village sign ordinance that had different regulations for different types of non-commercial signs. Both the district court and the circuit court applied the practical "purposive" analysis and found the differing non-commercial sign regulations to be lawful and constitutionally valid. In a fractured decision, the U.S. Supreme Court reversed. All nine justices agreed to the result, but for no less than four different reasons.

Reed is now being interpreted as adopting the **absolutist** approach to determine whether or not a sign ordinance is "content-neutral." As a result, various circuits have now already reversed their prior position and use of the "purposive" test to assess content neutrality. As explained in a recent decision in the Fourth Circuit:

Our earlier cases held that, when conducting the content-neutrality inquiry, "[t]he government's purpose is the controlling consideration. Clatterbuck v. City of Charlottesville, 708 F.3d 549, 555 (4<sup>th</sup> Cir. 2013) (quoting Ward, 491 U.S. at 791). But Reed has made clear that, at the first step, the government's justification or purpose in enacting the law is irrelevant. 135 S.Ct. at 2228-29.

Following Reed, the Seventh Circuit has also reversed its embrace of the practical "purposive" test for content neutrality, stating:

Reed understands content discrimination differently. It wrote that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S.Ct. at 2227.

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“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” It is added: “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” Id. At 2230

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The majority opinion Reed effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.

Because the Village of Downers Grove is within the Seventh Circuit, the Village is bound by this interpretation of Reed. Thus, it would appear that the Village’s non-commercial sign regulations are now subject to the strict “absolutist” analysis. This analysis creates an almost insurmountable difficulty for municipalities in regulating non-commercial signs. It is fundamentally clear that municipal governments have constitutional lawful authority to regulate the physical aspects of signs. These physical aspects include the size, shape, height, location, and number of signs as being permitted areas of regulation. Even Reed emphasized that regulating the size, height, location and number of signs is constitutional. But the constitutionally permitted regulation of physical aspects of signs must nevertheless be justified by a significant governmental interest such as traffic safety, aesthetics or maintenance of property values. And if a municipality elects to regulate signs for one of these well recognized purposes, then the municipality must be prepared to prove that the regulation imposed **actually serves** or accomplishes that purpose. Simply put, a regulation adopted to improve traffic safety must serve traffic safety interests, and a regulation imposed to protect the aesthetics of the municipality must actually serve aesthetic concerns.

Prior to Reed, it was very common for municipalities to categorize different non-commercial signs with different regulations for each category. Many municipalities have adopted sign ordinances similar to the Village of Downers Grove in recognition that non-commercial signs as a category fulfill a multitude of very specific and very diverse purposes. By way of example, a residential "for sale" sign is different from a "no trespassing" sign, and a railroad crossing sign is different from a religious institution sign. A sign announcing the location of an upcoming civic event is different than a baby birth yard decoration, and different than a garage sale sign. A sign identifying the location of restrooms is fundamentally different in purpose from a sign memorializing the date a historic building was constructed. Traffic speed limit signs and traffic control signs have a different purpose from flags and street address signs.

In recognition of this diversity, in order to assure that the purpose and goal of a particular type of non-commercial sign was fulfilled, many municipalities first defined the category of sign and then defined the regulations applicable to that category of signage. In this way, the legislation could assure that the function or purpose of the non-commercial sign would dictate the location where that type of sign should be permitted, and also the size the sign should have in order to be seen by the targeted viewer. Matching the regulation to the function and purpose of the sign also assured that the lawful purpose of the regulation could be achieved. Signs that have absolutely no "wayfinding" traffic safety function, like political signs or "no trespassing" signs, can and should be regulated differently from street address signs, stop signs or speed limit signs which clearly must be designed with a different safety function and different viewer in mind. Assuring regulation of physical sign attributes reasonably considered the function of the sign as a proper legislative

goal, and clearly this goal was also in keeping with the constitutional requirement that whatever sign regulations the municipality adopted, the municipality must be prepared to prove that either traffic safety, or aesthetics, or property value preservation was actually supported by the regulation. That said, a valid purpose and valid goal are now arguably irrelevant after Reed.

Reed has turned this thoughtful process on its ear. Any municipality that now categorizes different types of non-commercial signs with different regulations is creating facially content-based sign regulations. The Reed case is being interpreted as holding that classifying sign types by the message they are designed to convey, even if done for proper goals, is content-based speech regulation. Content-based sign regulations are subject to strict scrutiny by the judiciary, and will almost certainly be held to be unconstitutional following Reed. Simply put, the Reed decision makes subject matter regulation the same thing as content regulation. As a result, the job of a municipality in regulating the size, height, number and other physical aspects of non-commercial signs must now be done without regard to the function of the specific type of sign being regulated. Municipalities may still regulate the size, height, number, and location of non-commercial signs, but these regulations must now be established without reference to the type of sign being regulated. It is difficult to even imagine how this is to be done.

Because some of the Village of Downers Grove non-commercial sign regulations fit the same “categorization pattern” as the non-commercial sign regulations at issue in Reed, it is very possible that a court would apply the holding of Reed and declare the Village’s non-commercial sign regulations to be content-based and thus subject to strict scrutiny. Strict scrutiny requires the municipality to prove the regulations are narrowly tailored to serve a **compelling governmental interest**, and as recently noted by Robert Post, the dean of Yale Law School in discussing the impact of the Reed decision in the New York Times, “You can stare at those words as long as you like, but here is what you need to know: Strict scrutiny, like a Civil War stomach wound, is generally fatal.”

#### IV. RECOMMENDATIONS

##### A. **Substitution Clause.**

As a result of the Reed decision, Day & Robert, P.C. first recommends that the Village amend the text of the Village sign regulations to incorporate the following new provision:

##### **Sec. 9.010.E No Discrimination Against Non-Commercial Signs Or Speech.**

The owner of any sign which is otherwise allowed under this Article 9 may substitute non-commercial copy in lieu of any other commercial or non-commercial copy. This substitution of copy may be made without any additional approval or permitting. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over non-commercial speech, or favoring of any particular non-commercial message over any other non-commercial message. This provision prevails over any more specific provision to the contrary. This provision does not create a right to increase the total amount of signage on a parcel or allow the substitution of an off-site commercial message in place of an on-site commercial message.

This proposed amendment incorporates what has come to be known as a “substitution clause,” and the addition of a substitution clause has been recommended by legal scholars who have analyzed the Reed decision. Critically also, multiple decisions have held municipal sign regulations to be “content-neutral” (thus avoiding “strict scrutiny” under Reed) when such a “substitution clause” exists within a sign ordinance. Citizens for Free Speech, LLC v. County of Alameda, 62 F.Supp.3d 1129 (2014); Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895 (9<sup>th</sup> Cir. 2007); Get Outdoors II, LLC v.

City of San Diego, 381 F.Supp.2d 1250 (2005); Clear Channel Outdoor Inc., a Delaware Corp. v. City of Los Angeles, 340 F.3d 810 (9<sup>th</sup> Cir. 2003); Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9<sup>th</sup> Cir. 1993). By adding the “substitution clause” amendment, the Village will clarify its specific intent not to discriminate or differentiate between commercial and non-commercial speech, as well as among the diverse types of non-commercial speech. This amendment will maximize the Village’s opportunity to defeat any challenge to the non-commercial regulations as being content-based, and comply with new constitutional law after Reed.

#### **B. Severance Clause.**

The second amendment recommended by Day & Robert, P.C. is to add what is known as a “severance clause” to the sign regulations. In the context of a sign ordinance, “severance” addresses whether constitutionally valid sign regulations can stand on their own and be “severed” from unconstitutional sign regulations in the same ordinance, as discussed hereafter.

Severability of a local ordinance in federal litigation is a question of state law, City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S.Ct. 2138 (1988), and Illinois courts have given guidance as to when severance will or will not be ordered by the court. In this regard, whether or not a portion of an act is severable is a question of legislative intent whereby the court ascertains and gives effect to the intent of the legislature. Russell Stewart Oil Co. v. State, 124 Ill.2d 116, 529 N.E.2d 484 (1988); Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill.2d 221, 503 N.E.2d 300 (1986). This inquiry is twofold: the legislature must have intended that the act be severable, and the act must be capable of being severed. City of Chicago Heights v. Public Service Co. of Northern Ill., 408 Ill. 604, 97 N.E.2d 807 (1951).

To determine whether an act is severable, the court will assess “whether the valid and invalid provisions of the Act are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature **intended** them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently. \*\*\* The provisions are not severable if “they are essentially and inseparably connected in substance.” Fiorito v. Jones, 39 Ill.2d 531, 236 N.E.2d 698 (1968).

Making a severance determination is a matter of statutory construction. While the existence of a severability clause within the legislation at issue is not conclusive, it may be viewed as a rebuttable presumption that the legislature intends severance. Jacobson v. Department of Public Aid, 171 Ill.2d 314, 664 N.E.2d 1024 (1996). “**General**” severability statutes carry less weight in ascertaining legislative intent than **specific** severability clauses. (See 2 N Singer, Sutherland on Statutory Construction § 44.11, at 517 (Sands 4<sup>th</sup> ed. 1986.)

Knowing that severability is a question of state law, federal courts have acknowledged in reviewing severability, the separation of powers requires that the judiciary “show great deference to the legislative prerogative to enact laws”. Schmitt v. State, 590 So.2d 404, 415 (Fla. 1991). The doctrine of severability thus, “recognizes that federal courts have an affirmative duty to preserve the validity of legislative enactments when it is at all possible to do so.” Ray v. Mortham, 742 So.2d 1276, 1280 (Fla. 1999).

As set forth earlier, after the Reed decision, Day & Robert, P.C. believes at least some of the Village’s existing non-commercial provisions are now vulnerable, and if challenged, there is a likelihood they would be subject to strict scrutiny as content-based regulations. These provisions would likely be declared unconstitutional after Reed. Under severance law, this then begs the question as to whether the entire Village sign ordinance would be jeopardized, or whether the challenged non-commercial sign regulations should simply be severed from the balance of the sign regulations.

The current overall Village Zoning Ordinance contains a **general** severance provision which reads as follows:

**Sec. 1.130 Severability**

If any portion of this zoning ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, that portion is to be deemed severed from the zoning ordinance and in no way affects or diminishes the validity of the remainder of the zoning ordinance.

The State of Illinois also has a **general** severance provision within 5 ILCS 70/1.31, and reads as follows:

**70.13.1 Severability**

If any provision of an Act enacted after the effective date of this amendatory Act or application thereof to any person or circumstance is held invalid, such invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid application or provision, and to this end the provisions of each Act enacted after the effective date of this amendatory Act are severable, unless otherwise provided by the Act.

Day & Robert, P.C. believes addition of a specific severance provision within the sign regulations will provide a presumption and further support for severance of the non-commercial sign regulations from the commercial sign regulations. The Village's legislative intent to seek severance of any unconstitutional non-commercial speech regulations from the balance of the sign ordinance should be specifically declared to make clear that severance is desired by the Village. For the foregoing reasons, Day & Robert, P.C. recommends the following amendment and addition to the sign ordinance:

**Sec. 9.130 Severability.**

If any portion of this Article 9 or any regulation contained herein is held to be invalid or unconstitutional by a court of competent jurisdiction, it is the Village's specific legislative intent that said portion or regulation is to be deemed severed from this Article 9 and should in no way affect or diminish the validity of the remainder of Article 9 or any other sign regulation set forth herein.



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VILLAGE OF DOWNERS GROVE  
PLAN COMMISSION MEETING  
PUBLIC HEARING

SEPTEMBER 3, 2015, 7:00 P.M.

Chairman Rickard called the September 3, 2015 meeting of the Downers Grove Plan Commission to order at 7:00 p.m.

**ROLL CALL:**

**PRESENT:** Chairman Rickard, Mr. Cozzo, Ms. Hogstrom, Mrs. Rabatah, Mr. Thoman

**ABSENT:** Mr. Bassler, Mr. Cronin, Mr. Quirk, (ex-officios Davenport, Menninga, Souter)

**STAFF:** Planning Manager, Stan Popovich, AICP; Marcia Schirdewahn

**VISITORS:** Bob Peterson, 6861 Camden Road, Downers Grove

Chairman Rickard explained the protocol for the meeting.

**PUBLIC HEARINGS:**

Chairman Rickard explained the protocol for the public hearings and swore in those individuals that would be speaking on the following petitions:

**FILE 15-PLC-0034:** A petition seeking approval of text amendments to Article 9, Signs. Village of Downers Grove, Petitioner.

Planning Manager Stan Popovich reviewed the Reed vs. Gilbert U.S. Supreme Court decision from June 2015. He noted this case involved non-commercial sign regulations that incorporated different rules and sign regulations based upon the type of non-commercial message being delivered, e.g. religious versus political signs. He noted that the Supreme Court declared that this differentiation rendered non-commercial sign restrictions to be content-based speech regulations subject to strict scrutiny, the most stringent standard of judicial review.

Mr. Popovich noted the Village's non-commercial portion of the Sign Ordinance possesses some similarities to the Town of Gilbert's regulations. Provisions such as these had previously been held constitutionally valid non-commercial speech regulations prior to Reed, but with the Reed decision, the U.S. Supreme Court has found these types of regulations to be content-based speech regulations. The U.S. Supreme Court has historically held that non-commercial speech gets greater First Amendment protection than commercial speech.

Mr. Popovich stated the commercial portion of the Sign Ordinance is viewed as a time, place and manner regulation that is content neutral. Previous U.S. Supreme Court rulings have noted these types of regulations are content neutral.

## DRAFT

Mr. Popovich noted that to protect the Sign Ordinance from constitutional challenges, the Village is requesting two amendments to the Sign Ordinance. The first is a substitution clause. A substitution clause would permit non-commercial copy to be substituted in place of any commercial copy. The clause allows commercial signs to be substituted with a non-commercial message. As such, non-commercial speech is never discriminated against. The substitution clause has the legal effect of regulating all varieties of non-commercial speech in the same manner. Mr. Popovich provided an example of the substitution clause and noted the clause's proposed language on the overhead.

Mr. Popovich noted the second change is the inclusion of a specific severance clause in the Sign Ordinance. Although the state has a general severance clause and the Village has a severance clause in Section 1.130, the specific proposed clause in the Sign Ordinance would provide that valid sign regulations can stand on their own and be severed from sign regulations that are found to be invalid. Mr. Popovich noted the clause's proposed language on the overhead.

Mr. Popovich noted the two standards for approval for text amendments. He noted the requested revisions are consistent with the policy and intent of the Comprehensive Plan. The plan wishes to maintain the Village's image and desirability, improve economic vitality and calls for review and updates of the Sign Ordinance to be flexible. Standard two is also met as the proposed amendments meet a challenging and changing condition. Reed has changed how municipalities must administer and draft sign regulations to ensure non-commercial speech is not discriminated against.

Mr. Popovich recommended the Plan Commission forward a positive recommendation to the Council.

It was confirmed for Mr. Thoman that a severance clause already existed in the Zoning Ordinance. Mr. Thoman received further clarification on what non-commercial speech could be substituted for commercial speech. He was concerned about hateful speech and the allowance for that under non-commercial speech. Mr. Popovich explained that permits are not required for non-commercial speech. Mr. Popovich noted if a commercial message was replaced by a non-commercial message, it would most likely be a Code Enforcement Officer who would notice it first since they are on the streets more often.

Mr. Thoman noted other municipalities have similar substitution clauses wherein Mr. Popovich noted there were not any glaring concerns from other communities with these clauses. Mr. Popovich noted it was important not to discriminate against non-commercial speech.

Mr. Rickard inquired about home occupation signs being placed in a yard where political signs are located. Mr. Popovich explained home occupation signs are commercial speech and have specific time, place and manner restrictions. If the professional wished to replace his home occupation sign with a political sign that would be permitted under the substitution clause.

Mr. Popovich was not aware of how long other communities have had a substitution clause but noted it is becoming a trend in municipal sign regulations. Following up, Mr. Cozzo noted the challenging situation municipalities will be facing based on Reed.

Ms. Hogstrom inquired about non-commercial sign size regulations, wherein it was explained that the Village cannot differentiate based on the type of non-commercial messages being conveyed.

## DRAFT

Chairman Rickard opened up the meeting for public comment.

Mr. Bob Peterson, 6861 Camden Road, Downers Grove, spoke and noted he owns Leibundguth Moving and Storage and was suing the Village over the Sign Ordinance and his painted sign on the back of his building. Mr. Peterson expressed his discontent with the Sign Ordinance. He noted the smaller signs are harder to read and cause people to slow down and have to turn around to read a sign. He was concerned that this would allow graffiti and disparaging remarks about the Village to be displayed. He has spoken to other businesses who have noted displeasure over the sign ordinance as well. He cautioned that the Sign Ordinance is hurting businesses, which in turn causes the middle class to pay more taxes because the rich hardly pay anything and the "poor don't have it". He noted there used to be a lot more car dealers, hardware stores and gas stations in downtown but they are all looking for bigger businesses and move out of downtown, but the sign code makes them get smaller signs.

Mr. Popovich noted property maintenance codes deal with graffiti. Mr. Popovich noted the criteria for a text amendment were met and asked that the Plan Commission forward a positive recommendation to the Village Council.

Chairman Rickard closed the public participation portion of the meeting.

Mr. Thoman noted his concern about obscenity or hate laden non-commercial messages, but felt there had to be something in the municipal code already about community standards. He is supportive of the two changes and inquired when the entire Sign Ordinance would be reviewed.

Mr. Cozzo felt the ruling itself is difficult to deal with for municipalities. It could be a mess for communities and could open up a lot of gray situations. Other members agreed. Ms. Hogstrom noted similar thoughts in other articles about the Reed decision. Mrs. Rabatah felt the proposed amendments were sufficient for right now.

Mr. Cozzo agreed with Mr. Thoman's concern about hate language but felt this was a necessary first step to address the Reed decision. He felt the standards for approval of the proposed text amendments were met. Mr. Thoman concurred.

**WITH RESPECT TO FILE 15-PLC-034, MR. COZZO MADE A MOTION THAT THE PLAN COMMISSION FORWARD A POSITIVE RECOMMENDATION TO THE VILLAGE COUNCIL.**

**SECONDED BY MRS. RABATAH**

**ROLL CALL:**

**AYE: MR. COZZO, MRS. RABATAH, MS. HOGSTROM, MR THOMAN, CHAIRMAN RICKARD**

**NAY: NONE**

**MOTION CARRIED. VOTE: 5-0**

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Mr. Popovich announced that the next meeting is scheduled for September 14, 2015 and there are three items on the agenda. Mr. Popovich thanked the commission members for their attendance tonight and thanked Marcia Schirdewahn for helping with meeting notes.

**THE MEETING WAS ADJOURNED AT 7:40 P.M. ON MOTION BY MR. THOMAN, SECONDED BY MS. HOGSTROM. MOTION CARRIED UNANIMOUSLY BY VOICE VOTE OF 5-0.**

/s/ Stan Popovich, AICP  
Stan Popovich, AICP

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