Item 2.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, 576 U.S. ____ (2015) (slip op. at 6)*

To members of the Planning Commission and City Council,

Two years after this opinion was issued, the City has rightly decided to amend its sign laws in a comprehensive way. Unfortunately, some of the amendments at issue seem, as much as possible, to try to retain the original laws with new justifications, even when there are still clear content-based distinctions and the justifications are not narrowly tailored as required. These laws, if passed, will likely continue as they did before, with uneven compliance, until someone decides to sue the city for violation of their First Amendment rights, at which point they will win based on the unambiguous precedent in *Reed*, and the city will be out tens or hundreds of thousands of dollars in legal fees and time. **This paper, Ord. 2017-149, should be amended at the appropriate places on pages 6, 8 and 10 as mentioned below before it is passed.**

On page 6, the treatment of flags, pennants, banners and the like are suspect because of the attempts to regulate them based on their content. Banning commercial flags and the like discriminate based on the content of the speech – its commercial nature – and, though previous Supreme Court precedent has differentiated commercial speech, the narrowing in *Reed* for this purpose is troublesome. Since non-commercial flags are allowed (see pg 11, section 5) then that belies the rationale that banning flags is a danger as they may distract motorists, because then the City would ban all motion-producing flags and the like, not just commercial ones. Prohibiting commercial flags in residential districts may be an appropriate use of zoning, but allowing non-commercial flags city-wide while banning commercial flags city-wide prevents people from exercising protected speech anywhere in the city based on the content of the speech, not the manner or place where it is, nor the type of medium the speech is made using. *The distinction based on the intended use of the flags and the like should be removed except possibly for banning commercial flags and the like in residential districts on all lots that don't have an otherwise-acquired right to conduct commercial activity, whether by permit or grandfather exception.*

On page 8, the exemption in the first sentence on section 10 for "Service station pump island and canopy signs" is likely unconstitutional. "Signs displayed on service station pump islands shall not be included in the calculation of aggregate sign area permitted on a lot, provided that such signs do not exceed a total of six square feet per pump face within the pump island," gives special treatment to service station operators and so is content-based, because it grants more free speech rights to display signs to someone operating a service station than someone who might buy the property and makes no changes to its configuration but does not choose to operate it as a service station. Allowing service stations get a special exemption to display more speech, most likely advertising, than other businesses is specifically a content-based differentiation that has no public purpose. There is no governmental or public safety interest in allowing a gas station but no one else to display a 79-cent soda ad in addition to all other signage area that would otherwise be allowed. *This includes the exception given in section 11 to service stations on page 9, and should be removed.*

On page 10, the section "Temporary sign on lot for sale or rent" seems like a too-cute-by-half attempt to retain the otherwise impermissible "for sale" sign exception without saying as such. If the section no longer applies specifically to for sale or rent signs, then why allow property owners selling or renting that property to display a sign but not anyone else? This differential treatment clearly has, as its purpose, to privilege the free speech rights of people who rent or sell their property over others, and since some apartment buildings almost always have a vacancy, this gives those property owners a permanent exception to the sign regulation law that others do not get. The City previously would have justified this regulation by claiming it had a purpose to allow advertisement of the sale and rental of property, but now that that justification is no longer permissible, it has chosen instead to privilege certain property owners over others even though it is clear that this is the intent of this section. *This, along with the following two sections concerning temporary construction signs and subdivision development signs, for which governmental-required permit signs are already permitted to be displayed, seems likely to fall to a challenge, and so should be removed.*

Further, there may be an issue with the restrictions I highlighted in the previous paragraph in its impact in certain areas. The last sentence of those clauses highlighted on page 10, "If affixed to the ground, such signs shall not be located within five feet of any street line or within 15 feet of any other property line," may be unconstitutional in its impact in certain areas, such as when property has a width of less than 30 feet or the distance from the property building to the public right of way is less than five feet, as it could prevent certain people from displaying such a sign at all without any compelling government interest. *As such, if the sections are to be kept for all properties and purposes, an exception should be made for those with narrow properties.*

The purpose of sign restrictions is certainly noble in many cases, and in this case in particular I understand the City's intent. For example, it wants to allow certain activity, such as allowing people to find apartments for rent or displaying the American flag on their home balconies and porches, while preventing the proliferation of signs everywhere or flags that may distract drivers. Unfortunately, these are precisely the kinds of restrictions the Supreme Court prohibited in *Reed* and has judged do not have a compelling government interest. Without significant changes, the City is exposing itself to costly litigation all in the name of denying people in its jurisdiction their First Amendment rights. The Commission and Council should continue this paper until it can be amended to properly satisfy the new law as outlined in *Reed*.

While some have argued that Supreme Court rulings on First Amendment issues relating to signs have intruded too far into local government's traditional police powers domain, the Court has nonetheless done so, and the city is required to follow the Court's edicts. As the Court said in *Reed*, "This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature'." *(citations omitted) supra, at 14*. While localities can regulate the time, manner and place of speech, content-based restrictions are presumptively unconstitutional, and the city should not engage in them.

Sincerely,

Nicholas Smith