

SOUND MUNICIPAL CONSULTANTS

906 Wood Avenue, Sumner, WA 98390 • 253.709.6044 • Emily@soundmunicipal.com

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Mr. Chris Pasinetti, AICP
Community Development Director
City of Enumclaw
cpasinetti@ci.enumclaw.wa.us

Re: Sign Code Update – Gaps Analysis Memo

Case Law Review

SMC has performed an analysis of the existing Enumclaw Sign Code (Chapter 19.10 EMC) as it relates to compliance with the following recent court cases:

- *Reed et. al. v. Town of Gilbert*, 576 U.S. ___ (2015) – Content neutrality for non-commercial speech
- *Central Radio Co. Inc. v. City of Norfolk, VA*, 811 F.3d 625 (4th Cir. 2016) – Size limitations
- *Ackerly Communications v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997) - Billboards
- *Billboards Outdoor Systems v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) – Billboards
- *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895 (9th Cir. 2007) – Billboards
- *City of Seattle v. Mighty Movers*, 152 Wn.2d 343, 96 P.3d 979 (2004) – Ban on signs on utility poles
- *Worldwide Rush, LLC v. City of Los Angeles*, 606 F.3d 687 (9th Cir. 2010) – Content neutral exceptions for freeway-facing signs
- *Catsiff v. McCarty*, 167 Wash. App. 698, 274 P.3d (2012) – Regulating height location and size of wall signs
- *Kitsap County v. Mattress Outlet/Gould*, 153 Wn. 2d 506, 104 P.3d 1280 (2005) – Sign walkers
- *Collier v. Tacoma*, 212 Wn.2d 737, 854 P.2d 1046 (1993) – Regulation of political signs
- *Berger v. Seattle*, 569 F.3d 1029 (9th Cir. 2009) – Permit requirements for temporary signs
- *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) – Content neutrality in residential areas
- *Salib v. City of Mesa*, 133 P.3d 756, (AZ 2006) – Window coverage

Recently Adopted Codes

We have identified several sections of the exiting Enumclaw sign code that will not pass intermediate or strict judicial scrutiny based on the above case law. In order to help us craft a new, compliant sign code for the City, we have reviewed several examples of recently adopted sign codes as well as the Association of Washington Cities Model Sign Code. We are suggesting Enumclaw merge the best of the existing sign code with portions of the newly adopted sign codes in the following cities:

- Bremerton (Chapter 20.52 BMC)
- Covington (Chapter 18.55 CMC)
- Edmonds (Chapter 20.60 ECDC)
- Kirkland (Chapter 100 KZC)
- Sammamish (Chapter 21A.45 SMC)

Decision Points

There are a couple of up-front decisions that affect how we change the Enumclaw code. The *Reed v. Gilbert* case was focused on non-commercial (ideological, political, religious) speech. Recent court cases nationally have declined to extend that same protection to commercial speech. However, given *Citizens United*, it's possible a court case could come along and extend those protections. If that happens, any code that is based on content neutrality for non-commercial speech only, will be invalidated. However, adopting a severability clause would protect the remaining, compliant portions of the code. The benefits of dividing commercial from non-commercial speech is that it sidesteps the question of how to deal with campaign signs which have their own sets of protections under Washington State Law and via *Colliers v. Tacoma*.

Recently adopted codes in Washington have taken different tacks to regulate commercial signs versus just non-commercial signs with respect to content neutrality. The AWC Model Sign Code is completely content neutral. Regulations are based on sign type, location, materials, illumination, size, and height with distinctions based only on the zone. Certain sign types are allowed by zone and those sign types are then further refined by size, etc.

Nearly all the recently adopted municipal sign codes are structured around temporary v. permanent signs. Some offer complete content neutrality (Kirkland) while others draw the distinction between commercial and non-commercial speech (Bremerton and Sammamish). Covington offers a hybrid code. None of these recent codes have been challenged in court and therefore there is no way to know right now which is the best approach. Complete content neutrality will pass strict scrutiny in all cases, but that presents its own set of challenges as noted above with campaign signs. If all temporary signs are permitted as openly as campaign signs, it is difficult for the City to require permits for temporary signs. Also, campaign signs are allowed by State law to be placed for long periods of time and are allowed in the rights of way.

SMC's approach is to recommend what we think is the safest, most workable solution and then note where there are some alternate options other cities have taken.

Code Structure

Enumclaw's existing code is well done, but there are some additional review process and legal protections we suggest to strengthen it. We also suggest a slight change in organization to the code to make it easier to navigate and administer. We propose the following organizational strategy for the revised code:

Section 1 General Provisions

- 19.XX.010 Purpose and Intent
- 19.XX.020 Relationship to Chapter 16.06 EMC
- 19.XX.030 Definitions
- 19.XX.040 Applicability
- 19.XX.050 Exemptions
- 19.XX.060 General Provisions
- 19.XX.070 Prohibited Signs

Section 2 Permitting and Enforcement

- 19.XX.080 Permit Required
- 19.XX.090 Master Sign Plans
- 19.XX.100 Variances
- 19.XX.110 Non-conforming Signs
- 19.XX.120 Maintenance Required
- 19.XX.130 Removal
- 19.XX.140 Code Enforcement

Section 3 Permanent Signs

- 19.XX.150 Sign Placement Requirements
- 19.XX.160 Exceptions and Incentives
- 19.XX.170 Design Criteria
- 19.XX.180 Criteria for Signs in all Residential Zoning Districts
- 19.XX.190 Criteria for Signs in all Non-Residential Zoning Districts
- 19.XX.200 Additional Criteria for Signs in CB, NB, GO Zoning Districts
- 19.XX.210 Additional Criteria for Signs in HCB, LI Zoning Districts
- 19.XX.220 Additional Criteria for Signs in P, H, and GO-H Zoning Districts

Section 4 Temporary Signs

- 19.XX.230 Temporary Signs

Suggested Changes to Codes by Section

Section 1 General Provisions (New Section Heading)

19.10.010 Purpose and Intent (Existing)

This section needs:

- A content neutral bullet (Model Code xx.xx.010(3) or Covington CMC 18.55.010)
- A statement regarding implementing goals and policies of the Comp Plan and zoning code (Model Code xx.xx.010(1))
- A statement referencing consistent design standards (Model Code xx.xx.010(7))
- A statement referencing administration and code enforcement (Model Code xx.xx.010(10))

- A statement referencing electronic signs (Model Code xx.xx.010(11))
- Addition of an opening paragraph that discusses regulation of the type, number, location, size and illumination of signs. Could add content-neutrality here.
- A severability clause.

19.10.020 Relationship to Chapter 16.06 EMC (Existing)

This section requires no changes.

19.10.030 Definitions (Existing references 15.04 EMC)

Many of the definitions within section 15.04 EMC are content based. All sign code definitions need to be reviewed and content based definitions need to be removed. Replace with definitions from Covington 18.55.040 CMC and/or Model Code xx.xx.290. Definitions can either be altered in 15.04 EMC or moved to a new section of the sign code (19.XX.030). A review of the further sections will be required to ensure no code points back to a removed definition.

19.10.040 Applicability and Exemptions (Existing) to become two sections:

19.XX.040 Applicability

Most of this existing section is content based. SMC suggests replacing with a mix of Model Code xx.xx.020 and Covington 18.55.030 CMC.

19.XX.050 Exemptions

This section is new and includes only content neutral items. SMC suggests adopting the list from the Model Code xx.xx.030 along with several others from other cities including:

Bremerton (20.52.040 BMC) –

- (e) Legal non-conforming signs
- (f) Incidental Signs with size limitations
- (h) Art (with Covington 18.55.040(37))
- (i) Public Information with CUP
- (n) General public information designed to be read at a pedestrian scale

Sammamish (21A.45.030 SMC) –

- (1) Historic Plaques, Gravestones and Address Numbers
- (2) Official or legal notices issued and posted by any public agency or court
- (7) Non-verbal symbols attached to places of worship

Kirkland (100.15 KZC) –

- (2) Point of purchase advertising displays such as product dispensers
- (6) Structures or improvements intended for a separate use, such as phone booths, donation containers, newspaper recycling boxes and utility cabinets

- (9) Signs not exceeding two (2) square feet per sign face, either providing public information about the facilities present on the subject property or announcing a restriction on the subject property.

19.10.050 General Provisions applying to signs in all zoning districts (Existing)

- Renamed 19.XX.060.

19.10.060 Prohibited Signs (Existing)

- This section gets renamed to 19.XX.070.
- Most of this code is fine. 19.10.140 needs a re-write.
- The reference to 19.10.070(O) needs to be eliminated or re-written.
- 19.10.060(K) should reference the IPMC, if adopted or be eliminated. That section will be covered later in 19.XX.120-.140.
- Need to add nuisance signs and furniture signs (Model Code XX.040(C) and (D), respectively.
- Another option is to delete the whole existing code and replace with Model Code XX.040 and Sammamish 21A.45.040(3) and (4).
- Also, good time to reference Covington's 18.55.050(11) and (13) CMC, and Kirkland's 100.85.1.g and 100.85.2 KZC.

Section 2 Permitting and Enforcement (New Section)

19.XX.080 Permit Required (New)

- New section, a mix of Bremerton 20.52.030 BMC and Sammamish 21A.45.020 SMC. We need to think about whether temporary signs need permits, implications for political signage and must comply with *Berger v. Seattle*.

19.XX.090 Master Sign Plans (New)

- New section, mix of Model code xx.060.A, G and F and Kirkland 100.80 KZC.

19.XX.100 Variances (New)

- New section, mix of Bremerton 20.52.150 BMC and Covington 18.55.100 CMC.

19.XX.110 Non-conforming Signs (New)

- New section modeled after Covington 18.55.120 CMC.

19.XX.120 Maintenance Required (New)

- New section, modeled after Model Code xx.080.B.

19.XX.130 Removal (New)

- New section, modeled after Covington 18.55.110(2) CMC.

19.XX.140 Code Enforcement (New)

- New section, mix of Sammamish 21A.45.100 SMC and Covington 18.55.130 CMC.

Section 3 Permanent Signs (New Section Name)

19.XX.150 Sign Placement Requirements (New)

- New section, modeled after Bremerton 20.52.070 BMC and/or Model Code xx.110.A.

19.XX.160 Exceptions and Incentives

- This is existing section 19.10.070 renamed.
- Most of this is fine, except 19.10.070(F), (I), (J), (K) and maybe (O). I'm thinking of slightly modifying (F) and (I), eliminating (J) and (K) but bringing them back up altered to be more content neutral in 19.XX.180 and leaving (O) and hoping for the best.
- Add pictures, tables, graphics as appropriate.

19.XX.170 Design Criteria

- This is existing section 19.10.080 renamed.
- Change the words 'company' and 'trademarks' to symbols in 19.10.080(E).
- Consider adding some example pictures from the Model Code or others.

19.XX.180 Criteria for Signs in all Residential Zoning Districts

- This is existing section 19.10.090 renamed.
- Sections 19.10.090(D)-(G) are not content neutral and need to be altered to focus on zone or use.
- Add a graphic or table.

19.XX.190 Criteria for Signs in all Non-Residential Zoning Districts

- This is existing section 19.10.100 renamed.
- Add a chart and pictures, as appropriate.

19.XX.200 Additional Criteria for Signs in CB, NB, GO Zoning Districts

- This is existing section 19.10.110 renamed.
- Add a chart and pictures, as appropriate.

19.XX.210 Additional Criteria for Signs in HCB, LI Zoning Districts

- This is existing section 19.10.120 renamed.

- Add a chart and pictures, as appropriate.

19.XX.220 Additional Criteria for Signs in P, H, and GO-H Zoning Districts

- This is existing section 19.10.130 renamed.
- Add a chart and pictures, as appropriate.

Section 4 Temporary Signs (New Section Name)

19.XX.230 Temporary Signs

- This is formerly section 19.10.140.
- To remain content neutral, we need to eliminate 19.10.140(A) and modify 19.10.140(B) and allow for administrative approval of an extension.
- Add language from Bremerton 20.52.080(C) and (D).
- Add size limitation (20sf) to 19.10.140(E).
- Eliminate final sentence in 19.10.140(F).
- Alter 19.10.140(I) to specify address (rather than business) within a listed zoning district.
- Add Kirkland 100.115 KZC and Covington 18.55.140.

Hot Topics

In our review of the existing sign code and the process other cities have undergone, we've noticed a few hot topics that we'll pay attention to when proposing code changes. These are:

- Billboards
- Banners over the ROW
- Electronic Signs
- Inflatable Signs
- Window Signs
- Campaign Signs
- Real Estate Signs

Though Enumclaw has dealt with many of these, the City may want to revisit the existing code to ensure the code reflects the current desires of the City's businesses, residents and leadership.