

Sign Regulation After *Reed v. Town of Gilbert, AZ* Cleveland Planning & Zoning Workshop November 15, 2015

Professor Alan C. Weinstein
Cleveland-Marshall College of Law
Maxine Goodman Levin College of Urban Affairs
Cleveland State University
a.weinstein@csuohio.edu

What We' ll Cover

- Basic legal issues: 1st Amendment, etc.
- The *Reed* Decision
- Court Rulings Since *Reed*
- Responding To *Reed*: Basic Do's/Don't's

First Amendment in Sign Regulation

- The First Amendment applies to *every* sign
- Government regulation of signs loses the normal presumption of constitutionality and is subject to *heightened scrutiny*
- Sign litigation is common, expensive, and risky
- Most sign ordinances contained at least a few provisions of questionable constitutionality before *Reed* ... and much more after

First Amendment Concepts

- Content (or message) neutrality
- Time, place or manner regulations
- Bans and exceptions
- Off-site vs. on-site signs
- Commercial vs. non-commercial speech
- Permits and prior restraints
- Vagueness and Overbreadth

Vagueness and Overbreadth

Vagueness

- a sign code should specify what is/isn't regulated and how
- if it doesn't, it may be void for vagueness

Overbreadth

- a sign code that restricts “too much” may be struck down as overbroad
- claim has often been brought by billboard companies
 - standing issues

Permitting and Prior Restraint

- If you must get a permit before you can “speak” there’s a potential **prior restraint**
- **Not** a big issue for sign permits **if:**
 - content-neutral regulation
 - strict limits on discretion
 - reasonable time-frame for decision

Commercial speech vs. Non-commercial speech

Commercial speech

- “speech that proposes a commercial transaction” or promotes intelligent market choices
- protected under First amendment ... but not as much as “traditional” (non-commercial) speech

Non-commercial speech

- speech about political, ideological, religious, *etc.* ideas
- highest degree of First amendment protection

Commercial signs vs. Noncommercial signs

Commercial Signs

On-premise and off-premise signs that advertise products and services.

Non-Commercial Signs

- political signs
- personal signs
- public service signs
- official signs
- directional signs

Content neutral vs. Viewpoint neutral

- Content neutral looks at **subject matter**
- Viewpoint neutral looks at **point of view**
 - a ban on **all signs** is content neutral *and* viewpoint neutral
 - a ban on **all political signs** is *not* content neutral but *is* viewpoint neutral
 - a ban on **signs that criticize government** is neither content neutral nor viewpoint neutral

Content neutral vs. Viewpoint neutral

Flags are prohibited, except that each property may display one pole-mounted governmental flag.

- Content problem?
- Viewpoint problem?
- Both?
- Neither?

Content neutral vs. Viewpoint neutral

No temporary sign shall be displayed for more than 60 days per calendar year.

- Content problem?
- Viewpoint problem?
- Both?
- Neither?

Reed v. Town of Gilbert, AZ

- *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966 (9th Cir. 2009), *on remand*, 832 F.Supp.2d 1070 (D. Ariz. 2011), *affirmed*, 707 F.3d 1057 (9th Cir. 2013), *reversed and remanded*, 135 S.Ct. 2218 (2015).

Reed v. Town of Gilbert, AZ

- **Temporary Directional Signs Relating to a Qualifying Event (non-profit)**
 - **6 s.f.** sign allowed for **12 hrs before/1 hr** after event
 - **no more than 4 signs on any property** (w/ owner consent)
- **Political Signs**
 - **unlimited** number of signs up to **32 s.f.**
 - **no time limit** before election - removal **10 days after**
- **Ideological Signs**
 - **Unlimited number/time** for signs up to **20 s.f.**

Homeowners Assn signs

Political signs
(nonresidential zone)

Ideological
signs

Qualifying
Event
signs

Reed v. Town of Gilbert, AZ

Example of Signs at Issue



Reed v. Town of Gilbert, AZ

- Church: rules disfavor “temporary directional signs” compared to political and ideological signs
- City: each classification and its restrictions are based on objective factors relevant to Gilbert’s creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign

Content-neutrality Circuit Split

“Need to Read” – 8 & 11

- Do you have to look at the message to determine if the rule applies?
- If so, it is content-based.
 - political or election signs
 - real estate signs
 - directional/identification signs
 - instructional signs
 - construction signs
 - nameplate signs
 - price signs
 - home occupation signs

“No-censorship” – 3, 4, 6, 7 & 9

- Is the government trying to regulate or censor content?
- If not, it is content-neutral because:
 - local government needs some leeway in navigating through First Amendment law
 - a limited number of content-based provisions that are not intended to censor or restrict speech is acceptable

Reed v. Town of Gilbert, AZ

- Court rules 9-0 that challenged code provision is unconstitutional
- 6-3 majority opinion (Thomas, joined by Roberts, Scalia, Kennedy, Alito & Sotomayor), *plus* concurrence by Alito w/ Kennedy & Sotomayor)
- Breyer and Kagan (joined by Breyer and Ginsburg) each file opinion concurring only in the judgment

Reed v. Town of Gilbert, AZ

Majority Opinion

- **“On its face” Rule:** If you have to read the message displayed to determine how a sign is regulated, then that regulation is content-based.
- “Some facial distinctions based on a message are obvious, **defining regulated speech by particular subject matter**, and others are more subtle, **defining regulated speech by its function or purpose**. Both are distinctions based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”

Reed v. Town of Gilbert, AZ

Majority Opinion

Plus ... a “facially” content-neutral regulation will be considered content-based if:

- a regulation can't be justified without reference to the content ... or
- a regulation was adopted because of disagreement with the message conveyed

Reed v. Town of Gilbert, AZ

Majority Opinion

If a sign regulation is content-based, it is subject to *strict scrutiny* ...

- Presumed unconstitutional ... so gov't bears burden of proof/persuasion to show the regulation:
 - Serves a **compelling** governmental interest
 - **Narrowly-tailored** to achieve that interest ... not over-inclusive or under-inclusive and uses “least restrictive means”

Reed v. Town of Gilbert, AZ

Majority Opinion

Categorical
signs are
“content-based”

- political/election signs
- real estate signs
- directional/identification signs
- instructional signs
- construction signs
- nameplate signs
- price signs
- home occupation signs

Reed v. Town of Gilbert, AZ

Majority Opinion

“Speaker-based”
or “Event-based”
signs are
“content-based”

- “displayed on a lot with a property for sale or rent”
- “displayed on a lot where construction is taking place”
- “gasoline station signs” ??
- “theater signs” ??

Reed v. Town of Gilbert, AZ

Majority Opinion

So what does that mean?

- Fact that government's purpose or justification for regulation had nothing to do with trying to limit speech does not matter
- Strict scrutiny usually means gov't loses
 - *E.g.*, **aesthetics** and **traffic safety** held **not** to be compelling governmental interests

Reed v. Town of Gilbert, AZ

Majority Opinion

Still lots that government can do ...

- “regulate many aspects of signs that have nothing to do with a sign’s message”
- prohibit signs on public property, so long as regulation is content-neutral
- certain signs may be essential (e.g., for safety purposes) and “well might survive strict scrutiny”

Reed v. Town of Gilbert, AZ

Alito's Concurring Opinion

“Here are some rules that would *not* be content-based”

size and location, including placement on private property vs. public property

lighting

fixed vs. changing message, including electronic

on-site vs. off-site

rules restricting total # of signs per mile of roadway

“rules imposing time restrictions on signs advertising a one-time event”

Government “may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.”

Reed v. Town of Gilbert, AZ

Breyer/Kagan Concurring Opinions

Breyer: The majority rule “goes too far” and will lead to “judicial management of ordinary government regulatory activity”

Kagan: Cities “will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.”

Reed v. Town of Gilbert, AZ

What Don't We Know?

- Onsite/Offsite?
- Commercial Signs?
- “Speaker” Based?
- “Event” Based?
- Compelling interests?
- Narrowly Tailored?
- Secondary Effects?

Court Rulings Since *Reed* - 41

- Laws restricting panhandling and solicitation
 - “*Reed*, and not earlier cases concerning the regulation of solicitation, must be the starting point for the inquiry.”
- Restriction on showing photo of ballot
- Onsite/Offsite?
 - most decisions say *Reed* did not overrule *Metromedia*
 - but one federal court case stated “the *Reed* decision likely renders the entire Billboard Act unconstitutional under the First Amendment.”
- Commercial Speech?
 - No ... so far.

Basic Do's and Don'ts After *Reed*

DO

- **review** code to identify content-based regulations; e.g. “categorical” regs.
- add a **severability** clause and a **substitution** clause if you do not have one
- have a strong **purpose clause** and link that to regulations

DON'T

- **enforce** content-based regulations
- enact a **moratorium** on *all* sign permits ... narrower focus and shorter time is always better

Do's and Don'ts After *Reed*

DON'T

- A **nameplate** sign displays the address of the property and/or the name of the occupant of the property on which it is displayed.
- A **real estate** sign is a temporary sign promoting the rental, sale or lease of property.

DO

- In addition to any other permitted sign, each residential property may display a permanent 1 s.f. sign that is visible from the public right of way.
- In addition to any other permitted sign, each residential property offered for sale or rental may display a temporary 6 s.f. sign that is visible from the public right of way.

Define signs based on their structure

- freestanding signs
 - pole
 - monument
- temporary vs. permanent signs
- portable signs
- “snipe” signs
- “blade” signs
- building signs
 - roof
 - wall
 - window
 - marquee/awning
 - projecting and suspended
- “A-frame” signs
- “wind-signs”

What should be in a sign code?

- Regulatory purposes
- Substitution/Severability
- Definitions
- Standards for measuring sign areas/heights
- Regulations for:
 - sign placement
 - height/area
 - setback/spacing/density
 - type/time of lighting
- Regulations for:
 - billboards, etc. (??)
 - temporary/portable signs
 - window/awning signs
- Prohibited signs (??)
- Non-conforming signs
- Administration
 - Permitting provisions
 - Variances
 - Appeals
- Enforcement

Regulatory Purposes

- A. To allow businesses, institutions, and individuals to exercise their right to free speech by displaying an image on a sign, and to allow audiences to receive such information.
- B. To promote and maintain visually attractive, residential, retail, commercial, historic open space and industrial districts.
- C. To provide for reasonable and appropriate communication and identification for on-premise signs in commercial districts in order to foster successful businesses.
- D. To provide for reasonable and appropriate communication for on-premise signs within industrial districts.
- E. To encourage the use of creative and visually attractive signs.
- F. To ensure that signs are located and designed to reduce sign distraction and confusion that may be contributing factors in traffic congestion and accidents, and maintain a safe and orderly pedestrian and vehicular environment.
- G. To protect property values.
- H. To promote the public health, safety and welfare by avoiding conflicts between signs and traffic control devices, avoiding traffic hazards, and reducing visual distractions and obstructions.
- I. To protect and preserve the aesthetic quality and physical appearance of the Township.

Regulatory Purposes

1. To promote the creation of an attractive visual environment that promotes a healthy economy by:
 - a. Permitting businesses to inform, identify, and communicate effectively; and
 - b. Directing the general public through the use of signs while maintaining attractive and harmonious application of signs on the buildings and sites.
2. To protect and enhance the physical appearance of the community in a lawful manner that recognizes the rights of property owners by:
 - a. Encouraging the appropriate design, scale, and placement of signs.
 - b. Encouraging the orderly placement of signs on the building while avoiding regulations that are so rigid and inflexible that all signs in a series are monotonously uniform.
 - c. Assuring that the information displayed on a sign is clearly visible, conspicuous, legible and readable so that the sign achieves the intended purpose.
3. To foster public safety along public and private streets within the community by assuring that all signs are in safe and appropriate locations.
4. To have administrative review procedures that are the minimum necessary to:
 - a. Balance the community' s objectives and regulatory requirements with the reasonable advertising and way finding needs of businesses.
 - b. Allow for consistent enforcement of the Sign Code.
 - c. Minimize the time required to review a sign application.
 - d. Provide flexibility as to the number and placement of signs so the regulations are more responsive to business needs while maintaining the community' s standards.

Message Substitution Clause

The owner of any sign which is **otherwise allowed** by this sign ordinance **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.

Message Substitution Clause

“A **non-commercial message** may be **substituted** for any **commercial** message displayed on a sign, or the content of any **non-commercial message** displayed on a sign may be changed to a **different non-commercial message**, without the need for any approval, provided that the size of the sign is not altered.”

Severability Clause

“If any part, section, subsection, paragraph, subparagraph, sentence, phrase, clause, term, or word in this code is declared invalid, such invalidity shall not affect the validity or enforceability of the remaining portions of the code.”

Definitions

- Clear and unambiguous definitions are a must to avoid vagueness/overbreadth problems
- Include a definition of “sign” – for example:

"A lettered, numbered, symbolic, pictorial, or illuminated visual display designed to identify, announce, direct, or inform that is visible from a public right-of-way."

Source: Mandelker, Bertucci & Ewald, STREET GRAPHICS AND THE LAW, PAS Report No. 527

Standards for measuring sign areas and heights

- Specify for all sign structures/types
 - building-mounted: wall, window, awning, roof
 - free-standing: monument and pole
 - temporary and portable
- Be aware of effect of measurement standards

Measurement Criteria Wall Sign Areas

- Calculate area using multiple geometric shapes; permit logos



Measurement Criteria Wall Sign Areas

- Note difference in Sign Area calculation and resulting sign



Penalty:

Area 66%;

Letter Height 40%

Measurement Criteria Wall Sign Areas

- Note difference in Sign Area calculation and resulting sign



Penalty:

Area 63%;

Letter Height 47%

Measurement Criteria

Free-Standing Signs - Height

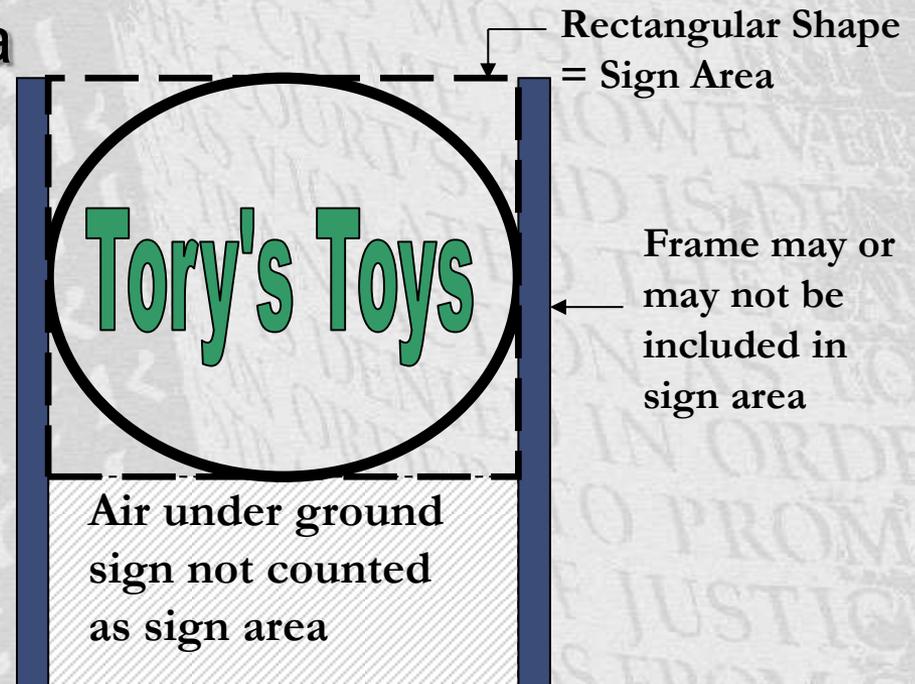
- Measured from the grade of the nearest pavement or top of any pavement curb.
- Not from the top of a development-made mound.



Measurement Criteria

Free-Standing Signs - Area

- Base the size on the area of one face
- Provide exemptions for:
 - Landscaped low base
 - Only architectural features that would be “built anyway”



Measurement Examples Free-Standing Signs

The black dashed line indicates the sign area.



The solid base is not included in the area



The frame may or may not be included in the sign area



Multiple geometric shapes

Numerical Standards

- Use separate formulas ... not total allowance for site
 - Different impacts
 - Less wall sign does not justify more freestanding
 - Ease of administration – institutional memory
- Wall sign allowances - Use lineal feet, not percentage of wall

Numerical Standards - Wall Signs

| Character areas | sq.ft./lineal foot of Building or Tenant frontage | | | | | | | |
|--------------------------------|---|------|------|------|------|------|------|------|
| | 1.50 | 1.75 | 2.00 | 2.25 | 2.50 | 2.75 | 3.00 | 3.25 |
| Downtown | | ■ | ■ | | | | | |
| Small Commercial - Traditional | | ■ | ■ | | | | | |
| Small Commercial - Suburban | | | | ■ | ■ | ■ | | |
| General Commercial | | | | ■ | ■ | ■ | ■ | |
| Highway Commercial | | | | ■ | ■ | ■ | ■ | ■ |
| Mixed Use | | | | ■ | ■ | ■ | ■ | |
| Office | | | ■ | ■ | ■ | ■ | | |
| Industrial | | | ■ | ■ | ■ | ■ | | |

Establishing Numerical Standards - Wall Signs

- Permit

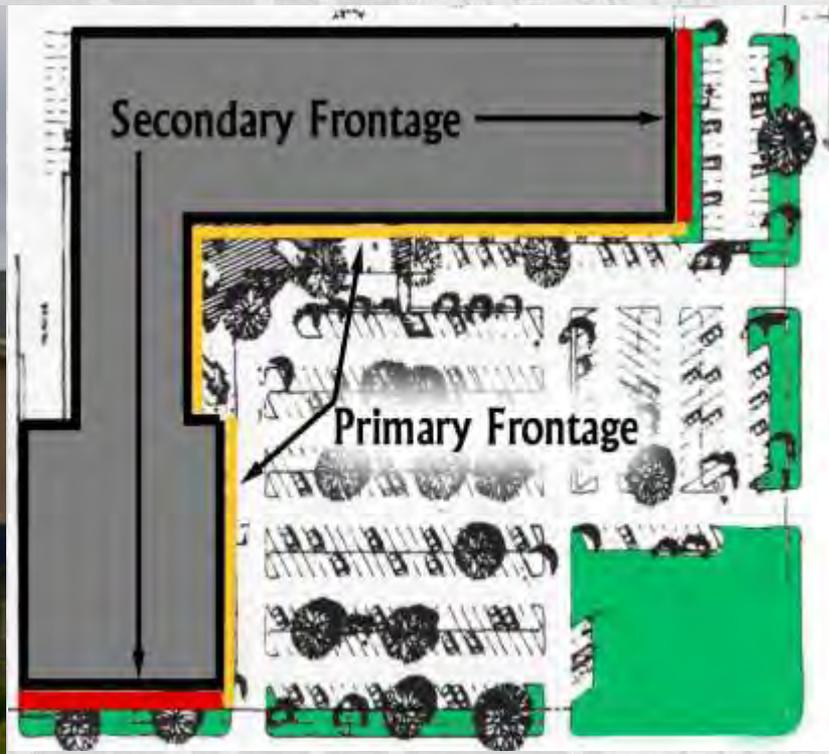
- Signs to be proportional to the building



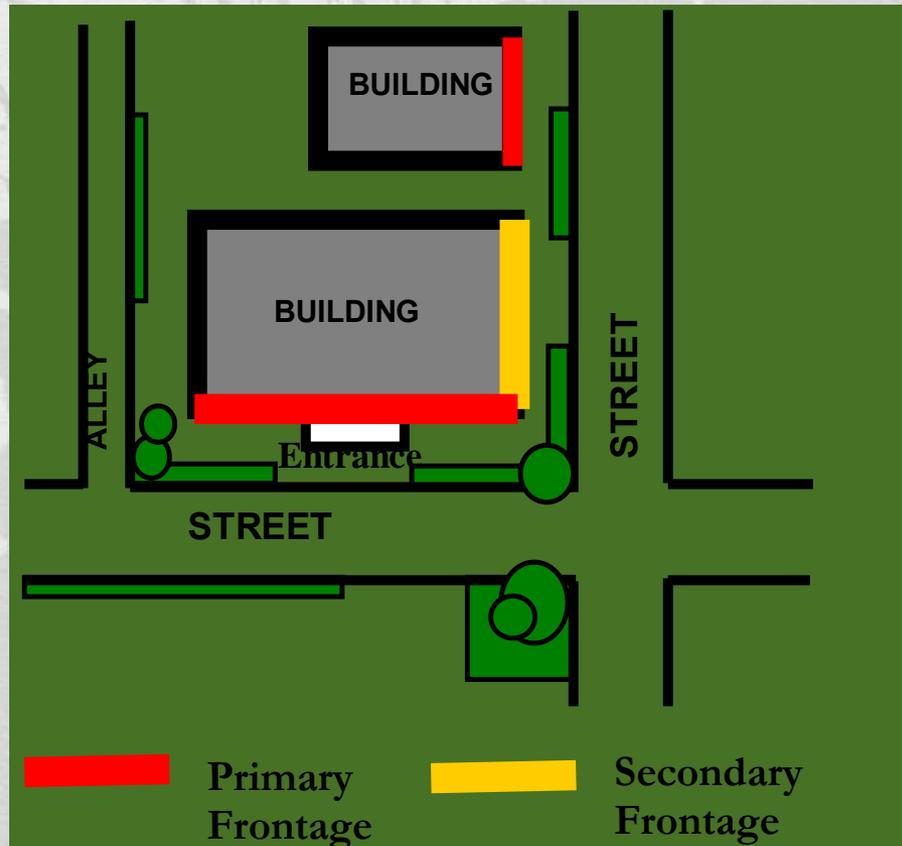
Establishing Numerical Standards - Wall Signs

- Permit

- Sign area bonuses for buildings with multiple entrances



Bonus for multiple “frontages” – Single Tenant



Establishing the Numerical Standards - Wall Signs

■ Permit

- Bonuses for buildings with large setbacks
- Model recommends:
 - 25% increase when wall is 200 feet from street
 - 25% additional increase for each 100 feet beyond 200 feet.



Multiple Signs per Tenant

- Permit multiple signs per tenant
 - Exclude non-sign portion of awning



Multiple Signs per Tenant

- Additional allowances for canopy and projecting signs



Height Guidelines

Free-standing Signs

- Not blocked by cars/snow
- Visible to the intended viewer
- In character with the area
- Meets business needs
- Minimize residential impact

Height/Area of Free-Standing Signs

- Example of too low and too small



Height/Area of Free-Standing Signs

- Examples of too low



Height/Area of Freestanding Signs

Example of too low



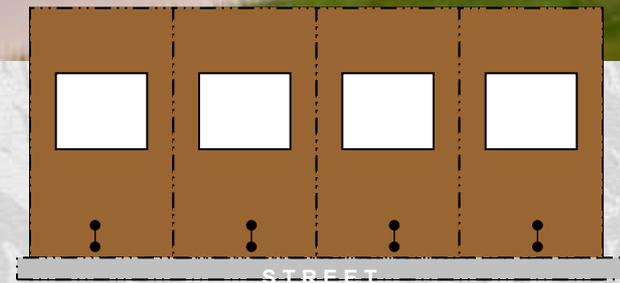
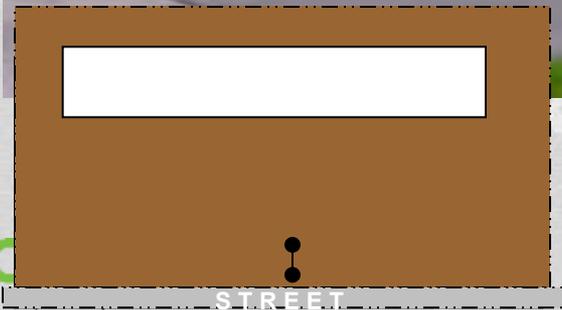
Height/Area of Freestanding Signs

Examples of Appropriate Height



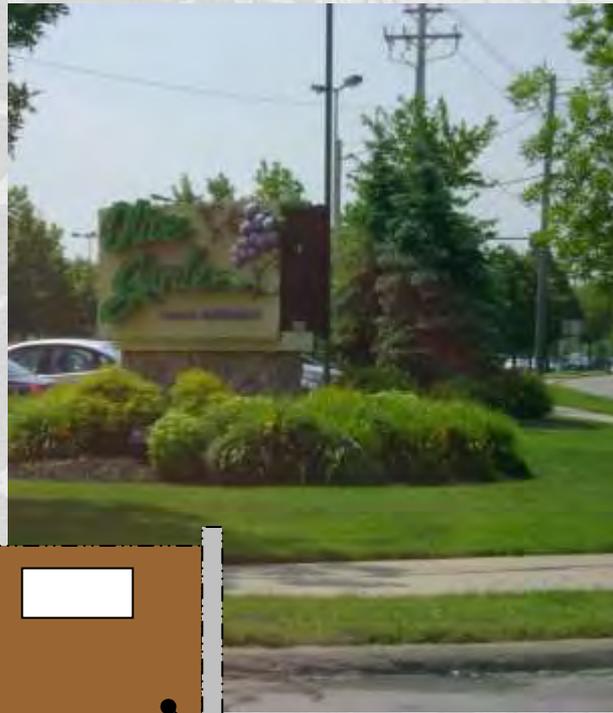
Numerical Standards - Free-standing Signs – Additional Allowances

- Recognize unique needs of large sites



Numerical Standards - Free-standing Signs – Additional Allowances

- Recognize unique needs of corner Lots



Instructional Signs



Instructional Signs

- Not subject to numerical limitations – size or number
- Permitted if intended for instructional purposes
- Numerical standards only for “enter/exit” sign