

To: **Mayor and City Council**
Through: **Ryan Schroeder, City Manager**
Jim Hartshorn, Community Development Dir.
From: **Kori Land, City Attorney**
Date: **April 26, 2021**

Review of Sign and Fence Ordinances

BACKGROUND INFORMATION:

After the April 12th Open Council Work Session discussion concerning a non-compliant fence with the words “Black Lives Matter” and a picture of a mayoral candidate painted on it, the City Council indicated that they wanted to revisit and review the sign and fence ordinances.¹ This memo reviews the relevant code definitions and provisions specific to regulating time, place and manner, as well as considers various scenarios or questions that have been raised by Council and attempts to answer or respond as a starting place for discussion.²

The question presented to Council is whether or not changes are needed to the sign code or fence regulations that currently prohibit signs/paintings on fences.

ZONING CODE LANGUAGE:

First, it is helpful to know the rules that apply and while this memo does not regurgitate all of the rules and regulations from the Sign Section of City Code §§153.430-153.438,³ there are relevant sections that will be helpful in order to facilitate the discussion.

Here are some definitions in the Code as it relates to this discussion:

§ 153.431 DEFINITIONS.

SIGN. Any structure, fixture, placard, announcement, declaration, device, demonstration or insignia used for direction, information, identification or to advertise or promote any business, product, goods, activity, services, ideas or interests.

¹ Attached you will find a memo that was prepared in October 2020 to address a somewhat similar question about noncommercial signs. While the questions at that time related to different signs than the fence sign, the City must apply the same analysis now. Particularly relevant are sections regarding post-election season signs, and the Reed v. Gilbert decision regarding the inability to regulate the content of signs. (The photos have been removed)

² The legislative history of the sign ordinance on the website is not accurate. The entire city code was enacted in 1963, which is why that date is repeated throughout the chapter. Since 1999, the Sign Ordinance has been amended 14 times, including a complete repeal and replace of the Sign Ordinance in 2007.

³ For purposes of this memo and discussion, we are only addressing signs as regulated and defined in the Zoning Ordinance, not sign permits, which are found in City Code §§150.105-150.110. The permit section for signs is intended to complement the Zoning Ordinance regulations, not contradict them. It also provides regulations for temporary commercial signs, such as real estate signs, special events signs, etc.

COMMERCIAL SPEECH. Speech advertising a business, profession, commodity, service or entertainment.

NONCOMMERCIAL SPEECH. Dissemination of messages not classified as commercial speech which include, but are not limited to, messages concerning political, religious, social, ideological, public service and informational topics.

Certain types of signs are prohibited in all zoning districts, regardless of whether they contain commercial or noncommercial speech. The full list of prohibited signs is below, with the relevant provision related to painting fences underlined:

§ 153.434 PROHIBITED SIGNS.

The following signs are prohibited in all zoning districts:

- (A) Abandoned signs;
- (B) Balloon signs;
- (C) Flags other than noncommercial flags, as defined herein;
- (D) Illegal signs;
- (E) Permanent banners or pennants, except those permitted by Minn. Stat. § 412.221(34), as it may be amended from time to time;
- (F) Permanent sale signs;
- (G) Portable (trailer) signs unless approved under §§ [150.105](#) through [150.110](#);
- (H) Projecting signs other than awning signs or canopy signs that extend or project over the sidewalk, street right-of-way or highway right-of-way;
- (I) Roof sign;
- (J) Rotating signs;
- (K) Search lights or strobe lights unless approved as a temporary sign under §§ [150.105](#) through [150.110](#);
- (L) Signs containing audio speakers or any form of pyrotechnics;
- (M) Signs painted, attached or in any other manner affixed to fences, roofs, other than integral roof signs, trees, rocks or other similar natural surfaces, or attached to a post or pole in the right-of-way, or bridges, towers or similar public structures; (emphasis added)
- (N) Signs that appear in color or design to resemble a traffic sign or signal or that make use of words, symbols or characters in such a manner as to interfere with, mislead or confuse pedestrian or vehicular traffic;
- (O) Signs that are affixed to inoperable vehicles or trailers or signs that are affixed to vehicles parked on a property and not intended to be moved for a period of 48 hours or more. At all times, vehicles containing advertising and/or signage shall not be parked along the property frontage or Robert Street;
- (P) Temporary signs, except as allowed by permit pursuant to § [150.105](#) through [150.110](#);
- (Q) Unsafe signs; and
- (R) Video display signs.

Then, within each zoning district, there are specific sign regulations to protect each zoning district appropriately. The Residential District (“R District”) regulations are provided here:

§ 153.436 PERMITTED SIGNS BY DISTRICT.

(A) Within the R Districts, signs must comply with the following regulations.

- (1) Signs shall not exceed 32 square feet in gross area and six feet in height.
- (2) The following types of signs are permissible:
 - (a) Monument signs; and
 - (b) Non-illuminated awning signs and non-illuminated canopy signs, provided they comply with the following requirements.
 1. They shall be limited to single-story buildings or to the first level only of multi-story buildings.
 2. They shall have a minimum clearance of eight feet above grade unless projecting over a sidewalk, in which case clearance shall be 14 feet above grade.
 3. They shall not be located closer than two feet from any street right-of-way or highway right-of-way, and shall not extend above the top of the wall of a building.
 4. The maximum height of an awning or canopy shall be five feet.
 5. Wall hangers shall not be visible.
 6. Signage on awnings or canopies may be substituted for allowed wall signage, but is limited to 25% of the awning or canopy area.
- (3) The following types of signs are prohibited:
 - (a) Electronic changeable copy signs;
 - (b) Electronic graphic display signs;
 - (c) Integral roof signs;
 - (d) Non-electronic changeable copy signs;
 - (e) Wall signs;
 - (f) Dynamic display signs;
 - (g) Pylon signs; and
 - (h) Off-premises signs.

You will note that the regulations address size, lighting, location, height, type of sign, but not content.

The Council also requested to review specific fence regulations. Again, only the relevant language has been provided below:

§ 153.381 FENCES.

(C) *Appearance and location.* Fences shall not contain pictures or lettering and shall be one uniform color. Fences shall be located inside of property lines and cannot be located on the property line, a neighbor’s land or on public property (boulevards, sidewalks, etc.). It is the responsibility of the permittee to ensure that it is constructed on the permittee’s property. Structural supports of the fence shall be on the interior side of the fence.

SCENARIOS/QUESTIONS ABOUT SIGNS:

With all of this Code language as background, some hypothetical scenarios have been asked to better

understand how the code would be interpreted and applied. These hypotheticals may be helpful to answer a few of your questions, as well as to start the discussion.

1. *Are there restrictions as to the quantity, size or content of flags and to what they can be attached?*

Answer: No, there are no restrictions on noncommercial flags. Flags are defined as follows:

FLAG. Any fabric or similar lightweight material attached at one end of the material, usually to a staff or pole, so as to allow movement of the material by atmospheric changes and that contains distinctive colors, patterns, symbols, emblems, insignia or other symbolic devices.

Noncommercial speech flags are exceptions to the sign ordinance regulations. As defined on p. 2 of this memo, Noncommercial Speech is a message concerning political, religious, social, ideological, public service and informational topics. Since it is an exception to the sign ordinance, there are no restrictions on size, quantity, or in which zoning district they can wave.

There does not appear to be any regulations regarding how flags are mounted, affixed or secured, but they must be safely and securely mounted so as not to fly away or fall, they cannot block sight lines, or in any other way be a nuisance, hazard or unsafe. “Unsafe” signs are listed in the prohibited section (see p. 2 of this memo).

2. *Can I have a banner?*

Answer: Banners are signs, and permanent banners are prohibited in all zoning districts. The only exception to the general rule is commercial speech banners if approved for a limited duration as part of a temporary sign permit. Otherwise, banners are prohibited.

3. *What is the rule on signs during election season?*

Answer: Noncommercial speech signs during an election are allowed in any size and quantity without regard to local municipal regulations. This is a state law. That does not mean all regulations such as setbacks are also disregarded – only size and quantity.

Minn. Stat. §211B.045 NON-COMMERCIAL SIGNS EXEMPTION.

All noncommercial signs of any size may be posted in any number beginning 46 days before the state primary in a state general election year until ten days following the state general election. Municipal ordinances may regulate the size and number of noncommercial signs at other times.

The City Code also provides additional allowances for noncommercial speech signs beginning 13 weeks prior to a special election until 10 days after a special election. (City Code §153.438) However, 10 days after any election, all municipal regulations for noncommercial speech signs are back in play and enforceable.⁴

⁴ Technically, only size and quantity of signs are exempt during an election, however, the City made the decision not to regulate any signs during the election, unless they were unsafe or within the right of way. The City could have enforced the provision regarding no painting a sign on a fence but chose not to do that.

4. *Can I have a mural or art on my house or garage?*

Answer: If the mural or art is promoting any business, product, goods, activity, services, ideas or interests, it is a Sign. If it is a sign, then it falls under the City’s sign regulations. If the mural or art is on a house, garage, shed or retaining wall, it is a wall sign. Wall signs are allowed in all zoning districts *except* the R Districts. You can have a mural or art on a wall, but not in an R District.

5. *Can we define art in the Code?*

Answer: Maybe? Art is subjective (beauty is in the eye of the beholder). It is interpreted differently by every individual who sees it. Generally, art is intended to invoke a reaction, identify an idea, an interest, or a social, political, religious or ideological position. Art is *noncommercial speech*. Under the City’s sign definition, art such as a mural, is a sign. If art is a sign, it falls under our sign regulations. While these signs/murals below would not be allowed on a wall in the R District, they would be allowed in a Business or Industrial District (up to 200 sq. ft. in a B-4 Shopping Center District or 700 sq. ft. in an I-2 Industrial District).

The murals/art/paintings below illustrate the difficulty when attempting to define and regulate art.⁵



⁵ Credit is given to Kevin Hendricks for the first 3 photos.



While these first three murals likely invoke a neutral or positive reaction, the painting below clearly creates, and is intended to create, a different reaction. If the City's Code tried to define, regulate and subjectively determine what "art" is, while still keeping its regulations content neutral as required by the Constitution, it is important to think about the possible implications. It is possible that something similar to the painting below could appear on a wall, fence or banner.

To be clear, murals/art that make a strong statement hold an important place in society. The issue is not about the value of such art, but rather does the City want that art on walls and fences in the City's residential districts? The Code currently allows murals within commercial districts, provided they meet the size requirements.



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It is also really important to remember that the sign code is part of the Zoning Ordinance. If the Council changes the code to allow art and then someone paints a mural that may be offensive to most, but is legal, changing the code back to its former verbiage will not remove that mural. Any art/mural that appeared during the time it was legal under the Code becomes legal nonconforming and can continue through repair, improvement, and replacement. The unintended consequences are too numerous to imagine.

STAFF RECOMMENDATION:

The City Staff is requesting the Council discuss the current code and provide staff with direction on if and what changes are to be made.

ATTACHMENTS:

Memo from the City Attorney to Ryan Schroeder dated October 9, 2020, which was then distributed to the City Council

Memo and Minutes from January 11, 2021 & Memo and Minutes from February 8, 2021

⁶ *Slaves* by Thomas Hart Benton