



March 19, 2025

Amherst Planning Commission
c/o Sara E. McGuffin
Town Manager
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Sent via U.S. Mail and Electronic Mail (sara.mcguffin@amherstva.gov)

Dear Amherst Planning Commission:

We are following up on our October 2 letter to request an update and to note additional case law relevant to the recently proposed sign ordinance, which as currently written would face strict scrutiny and almost certain invalidation by a court.

As noted in our prior letter, the recently proposed ordinance improves on the current one by removing both the two-sign limit, which directly violates binding Fourth Circuit precedent,¹ and the current durational limits, which functionally ban signs for most of the year.² But the new durational limit, which requires signs to “be removed within 24 hours after the last day of the event to which they pertain,” introduces a new and likely fatal constitutional problem.

By mandating the removal of event-related signs within a specific timeframe while imposing no such requirement for signs unrelated to any particular event, the proposed ordinance treats signs differently based on their subject matter. The Supreme Court has held ordinances that do so must satisfy strict scrutiny, which requires narrow tailoring to serve a compelling government interest.³

McFadden v. City of Bridgeport presaged this point.⁴ In that case, the U.S. District Court for the Northern District of West Virginia enjoined an ordinance that—similar to Amherst’s proposed

¹ *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587, 595 (4th Cir. 1993).

² Amherst currently requires signs to be “removed within 60 days of installation” and bans display “for more than a total of 120 days per year.” AMHERST, VA., CODE OF ORDINANCES ch. 24, art. IX, Sec. 24-576(1)(f), https://library.municode.com/va/amherst/codes/code_of_ordinances?nodeId=PTIICOOR_CH24ZOSU_AR_TIXSI_S24-576SIPEALSIDI.

³ *Reed v. Town of Gilbert*, 576 U.S. 155, 164–65, 171 (2015).

⁴ 422 F. Supp. 2d 659 (N.D. W. Va. 2006).

ordinance—required removal of temporary signs within 48 hours of the events they publicize.⁵ The court held the “plain language” of the ordinance’s durational limits imposed a content-based burden because the “only way to determine which signs are subject to those restrictions is to read the messages printed on them.”⁶ The court further held the city’s asserted interests in aesthetics and traffic safety—even if unrelated to sign content—did not negate the content-based nature of the restrictions because “‘mere assertion of a content-neutral purpose is not enough to save a law which, on its face, discriminates based on content.’”⁷

The court therefore applied strict scrutiny, which the ordinance failed because 1) “a municipality’s interests in traffic safety and aesthetics, while significant, have never been held to be compelling” and 2) durational limits were not the least restrictive way to achieve those interests, as the city could do so through content-neutral rules.⁸ Given these deficiencies, the court enjoined the city’s durational limits as a violation of the First Amendment.

By removing the two-sign limit and current durational limits, Amherst clearly improves upon its current ordinance, and we commend those changes. But it must also avoid introducing new constitutional problems into the ordinance—which as proposed has the same deficiencies as in *McFadden* and would likely face the same fate. Like the *McFadden* ordinance, the only way to determine whether a sign falls subject to the proposed durational limit—that is, whether the sign pertains to an event with an identifiable end date—is to read the sign. The durational limit is thus content-based and subject to strict scrutiny, regardless of Amherst’s motives.⁹ And it would fail for the same reasons the *McFadden* ordinance did. Thus, in its current form, the proposed ordinance will continue to expose the city to a significant risk of costly and time-consuming litigation.

Amherst’s sign ordinance was remanded to the Planning Commission in July. We therefore respectfully request a substantive response addressing both the current status of the proposed

⁵ *Id.* at 677. The ordinance also prohibited displaying signs more than 30 days before the event they publicize, *id.* at 668 n.2, but the court’s analysis did not depend on the timing of the restriction, nor did it distinguish between restrictions imposed before and after an event.

⁶ *Id.* at 673. As an example, the court noted that while “a church may freely display a wire-hinged, cardboard placard with a call to worship on its side of the road, a citizen living across the street is prohibited from displaying an identically constructed placard announcing the birth of his or her child more than two days after delivery.” *Id.* at 674 (internal citations omitted).

⁷ *Id.* (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642–43 (1994)) (cleaned up); *accord Reed*, 576 U.S. at 164–65 (“The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. . . . On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.”).

⁸ *McFadden*, 422 F. Supp. 2d at 674 (quoting *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995); citing *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1268 (11th Cir. 2005)); *see also Curry v. Prince George’s Cnty.*, 33 F. Supp. 2d 447, 452 (D. Md. 1999) (“Again, while recognizing aesthetics and traffic safety to be ‘significant government interests,’ none of these courts found those interests sufficiently compelling to the applicable strict scrutiny test.”).

⁹ *See Reed*, 576 U.S. at 164–65.

ordinance's progress and your willingness to abandon the new durational limit no later than April 2, 2025. As before, FIRE remains willing to assist Amherst in reforming the ordinance.

Sincerely,

A handwritten signature in black ink that reads "M. Brennen VanderVeen". The signature is written in a cursive, flowing style.

M. Brennen VanderVeen, Esq.
Program Counsel, Public Advocacy

Cc: Sara E. McGuffin