



## January Case Law Update

January 31, 2023

**A summary of court opinions decided during the month of January affecting planning in Wisconsin<sup>1</sup>**

### ***Wisconsin Supreme Court Opinions***

[No planning-related cases to report.]

### ***Wisconsin Court of Appeals Opinions***

[No planning-related cases to report.]

### ***U.S. Court of Appeals for the 7<sup>th</sup> Circuit Opinions***

#### **Madison Billboard Ordinance Is Constitutional**

In [Adams Outdoor Advertising v. City of Madison](#), \_\_ F.3d \_\_ (2023), the U.S. Court of Appeals for the Seventh Circuit upheld the City of Madison’s billboard ordinance against a challenge by Adams Outdoor Advertising, Inc. The City of Madison has regulated signage for many years. In 1989, the City amended its sign code to ban construction of new billboards. Existing billboards were allowed to remain subject to certain restrictions and were classified as nonconforming uses that could not be modified, restored, or rebuilt without a permit. In 2009, the City amended the sign code to prohibit digital-image displays and in 2017, the City amended the code’s definition of “advertising sign” to delete references to noncommercial messages. The amendment defined an advertising sign as: “A sign containing a commercial message directing attention to a business, commodity, service, or entertainment, not related to the premises at which the sign is located, or directing attention to a business, commodity, service or entertainment conducted, sold[,] or offered elsewhere than on the premises where the sign is located.” This definition limits the definition of “advertising sign” to off-premises signs bearing commercial messages.

Adams Outdoor filed applications seeking to convert existing billboards to digital displays. The City denied the applications. Adams Outdoor sued the City arguing that under the U.S. Supreme Court’s 2015 decision in *Reed v. Town of Gilbert*, any ordinance treating off-premises signs less favorably than other signs is a content-based restriction on speech and thus is unconstitutional unless it passes the high bar of strict scrutiny. (In the *Reed* case the U.S. Supreme Court held that if you needed to read a sign to figure out how to regulate it, the ordinance was not content-neutral thus subjecting the justification for the sign to “strict scrutiny” by the courts under the 1<sup>st</sup> Amendment, a very high standard that is difficult to meet.) Adams Outdoor based its argument on the 5<sup>th</sup> Circuit Court of Appeals decision that was overturned by the U.S. Supreme Court in the *City of Austin v. Reagan National Advertising* case summarized in the [April 2022 Case Law Update](#). (The 5<sup>th</sup> Circuit held the on-premises/off-premises distinction in the City of Austin sign

<sup>1</sup> Previous updates are available at: <https://wisconsin.planning.org/policy-and-advocacy/case-law-updates/>

code was a content-based restriction under *Reed*. The U.S. Supreme Court disagreed holding that *Reed* did not go that far.)

The 7th Circuit Ct. of Appeals delayed deciding the Adams Outdoor case until the U.S. Supreme Court decided City of Austin case. Following the Supreme Court's decision in the *City of Austin* case upholding the on/off premises distinction, the 7th Circuit decided that Madison's on-/off-premises distinction in the City's sign code is not content-based (strict scrutiny does not apply).

The 7<sup>th</sup> Circuit noted that intermediate scrutiny does apply to the case and the Court found that Madison's ordinance was justified under the intermediate level of scrutiny. As stated in the 7<sup>th</sup> Circuit decision, "billboards by their very nature ... can be perceived as an esthetic harm,' ... and the City 'need not try to prove that [its] aesthetic judgments are right.' . . . Likewise, the connection between billboards and traffic safety is too obvious to require empirical proof. 'It does not take a double-blind empirical study, or a linear regression analysis, to know that the presence of overhead signs and banners is bound to cause some drivers to slow down in order to read the sign before passing it.'"