CAO 2017-055

To: City Commission
Cathy Swanson-Rivenbark, City Manager

From: Craig E. Leen, City Attorney for the City of Coral Gables

Re: City Attorney Opinion Regarding Ch. 2017-149, Laws of Florida

Date: October 31, 2017

The opinion below is issued as a City Attorney Opinion pursuant to section 2-201(e)(1) and (8) of the City Code, and section 2-702 of the Zoning Code.

Earlier this year, the Florida Legislature adopted numerous changes to the Florida Building Code. That law – Ch. 2017-149, Laws of Florida – among other things purports to preempt building, design, and sign restrictions by local governments to extent those restrictions apply to two limited types of commercial messages: specifically, "signage advertising the retail price of gasoline" and displays that reflect the "corporate branding identity" of certain corporate franchises such as their trademarks and color patterns. These new provisions took effect on July 1, 2017.

For the sake of completeness, I am copying the new statutory provision below in its entirety, as codified at section 553.79(20), Florida Statutes:

> (20)(a) A political subdivision of this state may not adopt or enforce any ordinance or impose any building permit or other development order requirement that:
>
> > 1. Contains any building, construction, or aesthetic requirement or condition that conflicts with or impairs corporate trademarks, service marks, trade dress, logos, color patterns, design scheme insignia, image standards, or other features of corporate branding identity on real property or improvements thereon used in activities conducted under chapter 526 or in carrying out business activities defined as a franchise by Federal Trade Commission regulations in 16 C.F.R. ss. 436.1, et. seq.; or

2. Imposes any requirement on the design, construction or location of signage advertising the retail price of gasoline in accordance with the requirements of ss. 526.111 and 526.121 which prevents the signage from being clearly visible and legible to drivers of approaching motor vehicles from a vantage point on any lane of traffic in either direction on a roadway abutting the gas station premises and meets height, width, and spacing standards for Series C, D, or E signs, as applicable, published in the latest edition of Standard Alphabets for Highway Signs published by the United States Department of Commerce, Bureau of Public Roads, Office of Highway Safety.

(b) This subsection does not affect any requirement for design and construction in the Florida Building Code.

(c) All such ordinances and requirements are hereby preempted and superseded by general law. This subsection shall apply retroactively.

(d) This subsection does not apply to property located in a designated historic district.

After analyzing this statute and also consulting with the City's Special Counsel on First Amendment matters, it is my opinion that this portion of the new Florida statute violates established U.S. Supreme Court case law that interprets the parameters of the First Amendment's Free Speech Clause – including, and most recently, the decision of *Reed v. Town of Gilbert,* 135 S.Ct. 2218 (2015).

The *Town of Gilbert* decision provides that local governments' regulations on signs and other displays that cannot be justified or applied "without reference to the content of the regulated speech" are considered content-based regulations that will typically not withstand the strict constitutional scrutiny that must be applied to them. *See id.* at 2227, 2232. This is true even if governmental interests, such as traffic safety, are advanced to justify the different treatment. *Id.* at 2231-32. In that case, the Court struck down a local ordinance that provided stricter regulations for temporary directional signs than it did for some other non-commercial signs, including temporary political campaign signs. *Id.* at 2224-25, 2233.

In December 2015, the Coral Gables City Commission – like many local governments around the country – heavily revised the portions of its Zoning Code governing non-commercial signs in order to comply with the broad holding of the *Town of Gilbert* decision. *See* Coral Gables Ordinance No. 2015-33. *See also O'Boyle v. Town of Gulf Stream*, 667 F. App'x 767, 768 (11th Cir. 2016) (instructing courts in our district to apply the *Town of Gilbert* decision to sign regulation laws). The City took painstaking efforts to follow the requirements of the *Town of Gilbert* decision. By way of example, temporary political campaign signs are now treated the same as any other temporary non-commercial signs – no better and no worse.

What this new Florida statute now provides is special treatment for signs that convey certain types of commercial messages. But it does not only provide special treatment for some types of commercial speech over other types of commercial speech; rather, it also implicitly provides for better treatment for those special types of commercial messages than for all ***non-commercial messages***, such as signs conveying religious, political, or ideological messages.

Under well-established First Amendment case law, non-commercial messages are to be given more deference than are commercial messages – not less. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981) (explaining the "distinction between commercial and noncommercial speech" including the fact that "the former could be forbidden and regulated in situations where the latter could not be"); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268-69 (11th Cir. 2006) (holding that the sign ordinance at issue violated the First Amendment in part because it impermissibly favored commercial speech to the detriment of noncommercial speech).

It is unclear whether the Florida Legislature considered these constitutional implications when drafting and enacting this new statutory provision, but it is notable that this law was reportedly passed as a late edition to the bill, and seemingly without significant analysis. Indeed, the committee report analyzing the bill fails to mention this constitutional concern in any way. *See* Fla. H.R. Final Bill Analysis for CS/CS/HB 1021 (May 8, 2017), at p. 15, available at https://www.flsenate.gov/Session/Bill/2017/1021/Analyses/h1021z1.CCS.PDF. Instead, that report pointed only to the fact that the operators of corporate franchisees have made financial investments in their corporate branding identity which deserve protection – a fact which is, of course, also true of smaller businesses as well as non-commercial operations such as political campaigns and religious organizations that are not given this special treatment.

There is also nothing in the text or legislative history of the statute to suggest that the Legislature actually intended to eviscerate local sign codes in this manner, by forcing local governments into the untenable position of either not enforcing any sign regulations whatsoever or violating First Amendment case law by favoring these particular types of commercial messages over all other messages. Indeed, under the Miami-Dade County Municipal Home Rule Amendment to the Florida Constitution and the Municipal Home Rule Powers Act, any such broad preemption would have to be clear from the statutory text. *See D'Agastino v. City of Miami*, 220 So. 3d 410, 423 (Fla. 2017) (noting that implied preemption involving a municipality's home rule powers is disfavored).

Moreover, the City would also have substantial concerns that it would not be in compliance with, and thereby exposed to claims under, the First Amendment and 42 U.S.C. § 1983 if the new statutory provisions are applied as written without any narrowing construction that is consistent with the First Amendment and *Town of Gilbert*. Ultimately, federal law takes precedence over state law where there is a conflict under the Supremacy Clause in Article VI of the United States Constitution, and the City should seek to construe state laws consistently with federal law.

For all of these reasons, it is my opinion that section 553.79(20) of the Florida Statutes should be construed and applied narrowly in a manner consistent with the First Amendment and *Town of Gilbert*.

Chen, Brigette

From: Leen, Craig
Sent: Tuesday, October 31, 2017 5:47 PM
To: Paulk, Enga; Chen, Brigette
Cc: Ramos, Miriam; Suarez, Cristina; Throckmorton, Stephanie
Subject: FW: City Attorney Opinion Regarding Ch. 2017-149, Laws of Florida

Please publish:

City Attorney Opinion

The opinion below is issued as a City Attorney Opinion pursuant to section 2-201(e)(1) and (8) of the City Code, and section 2-702 of the Zoning Code.

Earlier this year, the Florida Legislature adopted numerous changes to the Florida Building Code. That law – Ch. 2017-149, Laws of Florida – among other things purports to preempt building, design, and sign restrictions by local governments to extent those restrictions apply to two limited types of commercial messages: specifically, "signage advertising the retail price of gasoline" and displays that reflect the "corporate branding identity" of certain corporate franchises such as their trademarks and color patterns. These new provisions took effect on July 1, 2017.

For the sake of completeness, I am copying the new statutory provision below in its entirety, as codified at section 553.79(20), Florida Statutes:

> (20)(a) A political subdivision of this state may not adopt or enforce any ordinance or impose any building permit or other development order requirement that:
>
> > 1. Contains any building, construction, or aesthetic requirement or condition that conflicts with or impairs corporate trademarks, service marks, trade dress, logos, color patterns, design scheme insignia, image standards, or other features of corporate branding identity on real property or improvements thereon used in activities conducted under chapter 526 or in carrying out business activities defined as a franchise by Federal Trade Commission regulations in 16 C.F.R. ss. 436.1, et. seq.; or
> >
> > 2. Imposes any requirement on the design, construction or location of signage advertising the retail price of gasoline in accordance with the requirements of ss. 526.111 and 526.121 which prevents the signage from being clearly visible and legible to drivers of approaching motor vehicles from a vantage point on any lane of traffic in either direction on a roadway abutting the gas station premises and meets height, width, and spacing standards for Series C, D, or E signs, as applicable, published in the latest edition of Standard Alphabets for Highway Signs published by the United States Department of Commerce, Bureau of Public Roads, Office of Highway Safety.
>
> (b) This subsection does not affect any requirement for design and construction in the Florida Building Code.
>
> (c) All such ordinances and requirements are hereby preempted and superseded by general law. This subsection shall apply retroactively.
>
> (d) This subsection does not apply to property located in a designated historic district.

After analyzing this statute and also consulting with the City's Special Counsel on First Amendment matters, it is my opinion that this portion of the new Florida statute violates established U.S. Supreme Court case law that interprets the parameters of the First Amendment's Free Speech Clause – including, and most recently, the decision of *Reed v. Town of Gilbert,* 135 S.Ct. 2218 (2015).

The *Town of Gilbert* decision provides that local governments' regulations on signs and other displays that cannot be justified or applied "without reference to the content of the regulated speech" are considered content-based regulations that will typically not withstand the strict constitutional scrutiny that must be applied to them. *See id.* at 2227, 2232. This is true even if governmental interests, such as traffic safety, are advanced to justify the different treatment. *Id.* at 2231-32. In that case, the Court struck down a local ordinance that provided stricter regulations for temporary directional signs than it did for some other non-commercial signs, including temporary political campaign signs. *Id.* at 2224-25, 2233.

In December 2015, the Coral Gables City Commission – like many local governments around the country – heavily revised the portions of its Zoning Code governing non-commercial signs in order to comply with the broad holding of the *Town of Gilbert* decision. *See* Coral Gables Ordinance No. 2015-33. *See also O'Boyle v. Town of Gulf Stream*, 667 F. App'x 767, 768 (11th Cir. 2016) (instructing courts in our district to apply the *Town of Gilbert* decision to sign regulation laws). The City took painstaking efforts to follow the requirements of the *Town of Gilbert* decision. By way of example, temporary political campaign signs are now treated the same as any other temporary non-commercial signs – no better and no worse.

What this new Florida statute now provides is special treatment for signs that convey certain types of commercial messages. But it does not only provide special treatment for some types of commercial speech over other types of commercial speech; rather, it also implicitly provides for better treatment for those special types of commercial messages than for all ***non-commercial messages***, such as signs conveying religious, political, or ideological messages.

Under well-established First Amendment case law, non-commercial messages are to be given more deference than are commercial messages – not less. *See, e.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 506 (1981) (explaining the "distinction between commercial and noncommercial speech" including the fact that "the former could be forbidden and regulated in situations where the latter could not be"); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268-69 (11th Cir. 2006) (holding that the sign ordinance at issue violated the First Amendment in part because it impermisslbly favored commercial speech to the detriment of noncommercial speech).

It is unclear whether the Florida Legislature considered these constitutional implications when drafting and enacting this new statutory provision, but it is notable that this law was reportedly passed as a late edition to the bill, and seemingly without significant analysis. Indeed, the committee report analyzing the bill fails to mention this constitutional concern in any way. *See* Fla. H.R. Final Bill Analysis for CS/CS/HB 1021 (May 8, 2017), at p. 15, available at https://www.flsenate.gov/Session/Bill/ 2017/1021/Analyses/h1021z1.CCS.PDF. Instead, that report pointed only to the fact that the operators of corporate franchisees have made financial investments in their corporate branding identity which deserve protection – a fact which is, of course, also true of smaller businesses as well as non-commercial operations such as political campaigns and religious organizations that are not given this special treatment.

There is also nothing in the text or legislative history of the statute to suggest that the Legislature actually intended to eviscerate local sign codes in this manner, by forcing local governments into the untenable position of either not enforcing any sign regulations whatsoever or violating First Amendment case law by favoring these particular types of commercial messages over all other messages. Indeed, under the Miami-Dade County Municipal Home Rule Amendment to the Florida Constitution and the Municipal Home Rule Powers Act, any such broad preemption would have to be clear from the statutory text. *See D'Agastino v. City of Miami*, 220 So. 3d 410, 423 (Fla. 2017) (noting that implied preemption involving a municipality's home rule powers is disfavored).

Moreover, the City would also have substantial concerns that it would not be in compliance with, and thereby exposed to claims under, the First Amendment and 42 U.S.C. § 1983 if the new statutory provisions are applied as written without any narrowing construction that is consistent with the First Amendment and *Town of Gilbert*. Ultimately, federal law takes precedence over state law where there is a conflict under the Supremacy Clause in Article VI of the United States Constitution, and the City should seek to construe state laws consistently with federal law.

For all of these reasons, it is my opinion that section 553.79(20) of the Florida Statutes should be construed and applied narrowly in a manner consistent with the First Amendment and *Town of Gilbert*.

Craig E. Leen, City Attorney
Board Certified by the Florida Bar in
City, County and Local Government Law
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
Phone: (305) 460-5218
Fax: (305) 460-5264
Email: cleen@coralgables.com

Celebrating 90 years of a dream realized.

From: Leen, Craig
Sent: Tuesday, October 31, 2017 5:45 PM
To: Commissioners <Commissioners1@coralgables.com>
Cc: Swanson-Rivenbark, Cathy <cswanson@coralgables.com>; Foeman, Walter <wfoeman@coralgables.com>; Fernandez, Frank <ffernandez@coralgables.com>; iglesias, Peter <piglesias@coralgables.com>; Ramos, Miriam <mramos@coralgables.com>; Suarez, Cristina <csuarez@coralgables.com>; Throckmorton, Stephanie <sthrockmorton@coralgables.com>; 'Abby Corbett' <ACorbett@stearnsweaver.com>; Urquia, Billy <burquia@coralgables.com>; 'scabrera@coralgables.com' <scabrera@coralgables.com>; Wu, Charles <cwu@coralgables.com>; Trias, Ramon <rtrias@coralgables.com>
Subject: City Attorney Opinion Regarding Ch. 2017-149, Laws of Florida

Mayor and Commissioners,

Please see my following City Attorney Opinion relating to substantial concerns regarding the constitutionality of section 553.79(20) of the Florida Statutes under the First Amendment and *Reed v. Town of Gilbert,* 135 S.Ct. 2218 (2015). My opinion concludes that the City should construe and apply this statute narrowly in a manner consistent with the First Amendment and *Town of Gilbert*. There will be a cover memo and resolution on the upcoming Commission agenda related to this City Attorney Opinion. I would like to acknowledge and thank special counsel Abby Corbett for her assistance in preparing this opinion, as well as the related cover memo and resolution. Please do not reply to all, and please call with any questions. The opinion is as follows:

City Attorney Opinion

The opinion below is issued as a City Attorney Opinion pursuant to section 2-201(e)(1) and (8) of the City Code, and section 2-702 of the Zoning Code.

Earlier this year, the Florida Legislature adopted numerous changes to the Florida Building Code. That law – Ch. 2017-149, Laws of Florida – among other things purports to preempt building, design, and sign restrictions by local governments to extent those restrictions apply to two limited types of commercial messages: specifically, "signage advertising the retail price of gasoline" and displays that reflect the "corporate branding identity" of certain corporate franchises such as their trademarks and color patterns. These new provisions took effect on July 1, 2017.

For the sake of completeness, I am copying the new statutory provision below in its entirety, as codified at section 553.79(20), Florida Statutes:

> (20)(a) A political subdivision of this state may not adopt or enforce any ordinance or impose any building permit or other development order requirement that:
>
> > 1. Contains any building, construction, or aesthetic requirement or condition that conflicts with or impairs corporate trademarks, service marks, trade dress, logos, color patterns, design scheme insignia, image standards, or other features of corporate branding identity on real property or improvements thereon used in activities conducted under chapter 526 or in carrying out business activities defined as a franchise by Federal Trade Commission regulations in 16 C.F.R. ss. 436.1, et. seq.; or
> >
> > 2. Imposes any requirement on the design, construction or location of signage advertising the retail price of gasoline in accordance with the requirements of ss. 526.111 and 526.121 which prevents the signage from being clearly visible and legible to drivers of approaching motor vehicles from a vantage point on any lane of traffic in either direction on a roadway abutting the gas station premises and meets height, width, and spacing standards for Series C, D, or E signs, as applicable, published in the latest edition of Standard Alphabets for Highway Signs published by the United States Department of Commerce, Bureau of Public Roads, Office of Highway Safety.
>
> (b) This subsection does not affect any requirement for design and construction in the Florida Building Code.
>
> (c) All such ordinances and requirements are hereby preempted and superseded by general law. This subsection shall apply retroactively.
>
> (d) This subsection does not apply to property located in a designated historic district.

After analyzing this statute and also consulting with the City's Special Counsel on First Amendment matters, it is my opinion that this portion of the new Florida statute violates established U.S. Supreme Court case law that interprets the parameters of the First Amendment's Free Speech Clause – including, and most recently, the decision of *Reed v. Town of Gilbert,* 135 S.Ct. 2218 (2015).

The *Town of Gilbert* decision provides that local governments' regulations on signs and other displays that cannot be justified or applied "without reference to the content of the regulated speech" are considered content-based regulations that will typically not withstand the strict constitutional scrutiny that must be applied to them. *See id.* at 2227, 2232. This is true even if governmental interests, such as traffic safety, are advanced to justify the different treatment. *Id.* at 2231-32. In that case, the Court struck down a local ordinance that provided stricter regulations for

temporary directional signs than it did for some other non-commercial signs, including temporary political campaign signs. *Id.* at 2224-25, 2233.

In December 2015, the Coral Gables City Commission – like many local governments around the country – heavily revised the portions of its Zoning Code governing non-commercial signs in order to comply with the broad holding of the *Town of Gilbert* decision. *See* Coral Gables Ordinance No. 2015-33. *See also O'Boyle v. Town of Gulf Stream*, 667 F. App'x 767, 768 (11th Cir. 2016) (instructing courts in our district to apply the *Town of Gilbert* decision to sign regulation laws). The City took painstaking efforts to follow the requirements of the *Town of Gilbert* decision. By way of example, temporary political campaign signs are now treated the same as any other temporary non-commercial signs – no better and no worse.

What this new Florida statute now provides is special treatment for signs that convey certain types of commercial messages. But it does not only provide special treatment for some types of commercial speech over other types of commercial speech; rather, it also implicitly provides for better treatment for those special types of commercial messages than for all ***non-commercial messages***, such as signs conveying religious, political, or ideological messages.

Under well-established First Amendment case law, non-commercial messages are to be given more deference than are commercial messages – not less. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981) (explaining the "distinction between commercial and noncommercial speech" including the fact that "the former could be forbidden and regulated in situations where the latter could not be"); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268-69 (11th Cir. 2006) (holding that the sign ordinance at issue violated the First Amendment in part because it impermissibly favored commercial speech to the detriment of noncommercial speech).

It is unclear whether the Florida Legislature considered these constitutional implications when drafting and enacting this new statutory provision, but it is notable that this law was reportedly passed as a late edition to the bill, and seemingly without significant analysis. Indeed, the committee report analyzing the bill falls to mention this constitutional concern in any way. *See* Fla. H.R. Final Bill Analysis for CS/CS/HB 1021 (May 8, 2017), at p. 15, available at https://www.flsenate.gov/Session/Bill/ 2017/1021/Analyses/h1021z1.CCS.PDF. Instead, that report pointed only to the fact that the operators of corporate franchisees have made financial investments in their corporate branding identity which deserve protection – a fact which is, of course, also true of smaller businesses as well as non-commercial operations such as political campaigns and religious organizations that are not given this special treatment.

There is also nothing in the text or legislative history of the statute to suggest that the Legislature actually intended to eviscerate local sign codes in this manner, by forcing local governments into the untenable position of either not enforcing any sign regulations whatsoever or violating First Amendment case law by favoring these particular types of commercial messages over all other messages. Indeed, under the Miami-Dade County Municipal Home Rule Amendment to the Florida Constitution and the Municipal Home Rule Powers Act, any such broad preemption would have to be clear from the statutory text. *See D'Agastino v. City of Miami*, 220 So. 3d 410, 423 (Fla. 2017) (noting that implied preemption involving a municipality's home rule powers is disfavored).

Moreover, the City would also have substantial concerns that it would not be in compliance with, and thereby exposed to claims under, the First Amendment and 42 U.S.C. § 1983 if the new statutory provisions are applied as written without any narrowing construction that is consistent with the First Amendment and *Town of Gilbert*. Ultimately, federal law takes precedence over state law where there is a conflict under the Supremacy Clause in Article VI of the United States Constitution, and the City should seek to construe state laws consistently with federal law.

For all of these reasons, it is my opinion that section 553.79(20) of the Florida Statutes should be construed and applied narrowly in a manner consistent with the First Amendment and *Town of Gilbert*.

Craig E. Leen, City Attorney
Board Certified by the Florida Bar in
City, County and Local Government Law

City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
Phone: (305) 460-5218
Fax: (305) 460-5264
Email: cleen@coralgables.com

CORAL GABLES
THE CITY BEAUTIFUL

Celebrating 90 years of a dream realized.