

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0957**

Johnsonville, LLC, a Minnesota limited liability company,
Relator,

vs.

City of Buffalo, a Minnesota municipal corporation,
Respondent.

**Filed May 2, 2022
Reversed
Wheelock, Judge**

City of Buffalo City Council
File No. 2021-24

Johnsonville, LLC, Montrose, Minnesota (relator)

James J. Thomson, Michelle E. Weinberg, Kennedy & Graven, Chartered, Minneapolis,
Minnesota (for respondent)

Considered and decided by Bryan, Presiding Judge; Jesson, Judge; and Wheelock,
Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Relator challenges a decision by respondent-city imposing administrative penalties for violations of the city's sign ordinance stemming from relator's display of a large political flag from a construction crane. Relator asserts that the flag did not violate one sign-ordinance provision the city relied on and challenges the constitutionality of the

others. We reverse because (1) a provision of the ordinance prohibiting advertising or business signs attached to equipment does not apply to relator's sign, and (2) the other provisions of the ordinance applied to relator's sign create content-based restrictions on speech that do not survive strict scrutiny.

FACTS

In early 2021, Johnsonville displayed a 30-by-50-foot flag saying, "TRUMP 2020 Keep America Great," from atop a mobile construction crane on its agricultural zone in Buffalo. The city attorney issued three notices of administrative penalties to Johnsonville in April 2021 for violations of multiple provisions of chapter 13 of the Buffalo City Code (the sign ordinance or ordinance) because of the flag's size and manner of display.¹ The notices imposed penalties for flying the flag from an extended crane on the property and for exceeding size restrictions deemed applicable to the flag.

Johnsonville appealed the administrative penalties, and the city council scheduled a review hearing for May 2021. At the hearing, Johnsonville argued that its flag display was protected speech.

In June 2021, the city council issued a written decision sustaining the administrative penalties. The decision cited to several provisions of the sign ordinance and concluded

¹ After the events relevant to this appeal and prior to the commencement of this appeal, the city recodified the sign ordinance as Buffalo City Code, Chapter 34 (Signs) (2021); however, this opinion references the sign ordinance as it existed at the time the administrative penalties were issued, the city council conducted its hearing on Johnsonville's appeal, and the city council issued its written findings.

that Johnsonville’s flag violated the sign ordinance “in regards to size, height, being erected on equipment, and being installed on the property without a permit.”

Johnsonville appeals by writ of certiorari.

DECISION

Johnsonville challenges the city’s decision to impose administrative penalties on three grounds.² First, Johnsonville asserts that the city erred by interpreting the sign ordinance’s substitution clause to prohibit all signs attached to equipment. Second, Johnsonville argues that the varying size limitations in different provisions of the sign ordinance create unconstitutional content-based restrictions on speech. Third, Johnsonville argues the city enforced the sign ordinance in a discriminatory manner. Because the first two issues are dispositive of Johnsonville’s appeal, we need not address Johnsonville’s discriminatory-enforcement argument.

We review a city’s quasi-judicial decision to determine whether it was “arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (quotation omitted). And while appellate courts typically make only a limited and deferential review of a quasi-judicial decision, *Big Lake Ass’n v. St. Louis Cnty. Plan. Comm’n*, 761 N.W.2d 487, 491 (Minn. 2009), ordinance interpretation and constitutional analysis present questions of law subject to de novo review. *See Fletcher Props., Inc. v.*

² Johnsonville argued at the city-council hearing that its flag should not be considered a “sign” regulated by the sign ordinance because, it argued, a flag is different from a sign. Because Johnsonville does not make this argument on appeal, we accept as true the city’s finding that the definition of “sign” in the ordinance encompasses flags.

City of Minneapolis, 947 N.W.2d 1, 9 (Minn. 2020) (applying de novo review to a challenge to the constitutionality of an ordinance); *Cannon v. Minneapolis Police Dep’t*, 783 N.W.2d 182, 192 (Minn. App. 2010) (applying de novo review to a question involving the interpretation and application of a city ordinance).

I. The sign ordinance’s equipment-prohibition provision does not apply to Johnsonville’s flag.

Johnsonville first argues that the city erred by finding that its flag violated the provision of the sign ordinance that prohibits advertising or business signs attached to equipment. That provision, to which we will refer as the equipment-prohibition provision, prohibits “[a]dvertising or business signs on or attached to equipment such as semi-truck trailers where signing is a principal use of the equipment on either a temporary or permanent basis.” Buffalo, Minn., City Code (BCC) § 13.06, subd. 2(B) (1985). The city asserts that another sign-ordinance provision—the substitution clause—subjected Johnsonville’s flag to the equipment-prohibition provision.

We address the issue of whether the flag violated the equipment-prohibition provision first because Johnsonville does not challenge the constitutionality of that provision, and thus it could provide an independent basis to affirm the city’s decision that would allow us to avoid a constitutional question. *See In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) (“It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise.”); *see also Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (holding that appellant lacked standing to

challenge sign-code provisions where proposed sign would still violate other, unchallenged provisions of the sign code).

“The same rules that apply to the interpretation of a statute apply to the interpretation of an ordinance.” *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). When interpreting a statute, we attempt to “ascertain and effectuate the intent of the Legislature.” *State v. S.A.M.*, 891 N.W.2d 602, 604 (Minn. 2017). Appellate courts “construe words and phrases in a statute according to their plain and ordinary meaning.” *Id.* “We interpret a statute as a whole to give effect to all of its provisions.” *Id.*

The sign ordinance’s substitution clause provides that “[s]igns containing non-commercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs.” BCC § 13.05, subd. 3 (1985). Consistent with the generally understood purpose of a substitution clause,³ the plain language of the substitution clause *permits* non-commercial speech in any circumstances commercial speech is permitted. But the sign ordinance does *not* permit advertising or business (i.e., commercial) signs to be attached to equipment, so the substitution clause does not apply. The plain language does not extend *prohibitions* on commercial speech to non-commercial speech. Moreover, interpreting the clause in that

³ Substitution clauses are typically added to sign ordinances to ensure compliance with the constitutional requirement that there are not greater restrictions placed on non-commercial speech than on commercial speech. *Maldonado v. Kempton*, 422 F. Supp. 2d 1169, 1175 (N.D. Cal. 2006); *see also Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 902 (9th Cir. 2007) (“[A] message substitution clause . . . permits the substitution of noncommercial content for existing copy on any otherwise permissible sign. This clause cures any potentially impermissible burdens on noncommercial speech . . .”).

manner would wholly nullify all distinctions between commercial and non-commercial speech in the sign ordinance. *See S.A.M.*, 891 N.W.2d at 604 (stating appellate courts “interpret a statute as a whole to give effect to all of its provisions”). We therefore conclude that the substitution clause does not extend the prohibition against advertising or business signs attached to equipment to non-commercial signs.

Because the sign ordinance does not generally prohibit signs attached to equipment, the city erred by deciding that Johnsonville’s flag violated the equipment-prohibition provision. The administrative penalties must be reversed to the extent that they are based on the equipment-prohibition provision. That provision therefore cannot provide a basis for us to affirm the city’s decision without reaching Johnsonville’s constitutional challenge to the remaining provisions of the sign ordinance under which it was penalized.

II. The size restrictions of the sign ordinance’s permitted-signs subdivision violate the First Amendment.

Johnsonville’s primary argument on appeal is that the city’s decision imposing penalties must be reversed because the sign ordinance, as applied, violates the First Amendment.⁴ Johnsonville does not dispute that its flag exceeds the size limitation for a

⁴ We reject the city’s argument that because the sections that Johnsonville identifies as content based were not the sections upon which the violations were based, Johnsonville is asserting an overbreadth challenge. “An overbreadth challenge is a facial attack on a statute in which the challenger must establish that a substantial number of a statute’s applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *State v. Casillas*, 952 N.W.2d 629, 646 (Minn. 2020) (alteration omitted) (quotation omitted), *cert. denied*, 142 S. Ct. 90 (2021). “The rationale for allowing an overbreadth challenge, even when a statute is constitutional as applied in a particular circumstance, is that enforcement of an overbroad law chills protected speech, which ‘inhibit[s] the free exchange of ideas.’” *State v. Hensel*, 901 N.W.2d 166, 170 (Minn.

non-commercial sign. Rather, it argues that because the sign ordinance permits larger holiday signs, the ordinance is not content neutral, and accordingly the sign ordinance's size restrictions must be subjected to strict scrutiny review, which the ordinance's content-based restrictions cannot withstand.

To examine these arguments, we first address our standard of review and the constitutional backdrop. We then consider whether the sign ordinance creates content-based restrictions, triggering a strict-scrutiny analysis of its size limitations for non-commercial signs. After engaging in this analysis, we conclude that the ordinance impermissibly creates a content-based regulation of speech and reverse the city's decision to impose administrative penalties against Johnsonville.

A. Standard of Review and Constitutional Backdrop

As noted above, the constitutionality of a statute or an ordinance is a question of law, which we review *de novo*. *See Fletcher Props., Inc.*, 947 N.W.2d at 9. “Because statutes are presumed constitutional, we exercise our power to declare a statute unconstitutional with extreme caution and only when absolutely necessary.” *Id.* (quotation omitted). “Ordinarily, laws are afforded a presumption of constitutionality, but statutes allegedly restricting First Amendment rights are not so presumed.” *Dunham v. Roer*, 708 N.W.2d 552, 562 (Minn. App. 2006).

Also as stated above, we apply the same rules to the interpretation of an ordinance as we apply to the interpretation of a statute. *Vasko*, 889 N.W.2d at 556. Appellate courts

2017) (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)). Johnsonville, however, argues that the sign ordinance is unconstitutional *as applied* to its flag.

“construe words and phrases in a statute according to their plain and ordinary meaning.” *S.A.M.*, 891 N.W.2d at 604. “We interpret a statute as a whole to give effect to all of its provisions” and “may also consider the structure of the statute in determining its meaning.” *Id.* If a statute’s language has more than one reasonable interpretation on its face, it is ambiguous, and we then may look beyond the statute’s text to ascertain the intent of the legislature. Minn. Stat. § 645.16 (2020); *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017).

The United States and Minnesota Constitutions guarantee the right to free speech. U.S. Const. amend. I; Minn. Const. art. I, § 3. Under the First Amendment, “a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quotation omitted). “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Id.*

In *Reed*, the U.S. Supreme Court determined that a town’s comprehensive code restricting signs was content based on its face. *Id.* at 164. The town’s sign code prohibited the display of outdoor signs without a permit but exempted 23 categories of signs from that requirement, including designations of temporary directional signs and political or ideological signs. *Id.* at 159-60. Reed displayed temporary directional signs advertising

the location of church services, and the town cited the church for violating the code by displaying its temporary directional signs. *Id.* at 161. The Supreme Court held that municipal sign regulations are content based if they base any restrictions or allowances on the communicative content of the sign, regardless of the speaker or the type of content. *Id.* at 164-65; *see also City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, No. 20-1029, 2022 WL 1177494, at *4 (U.S. Apr. 21, 2022) (reaffirming and clarifying principles of *Reed*).

In determining the constitutionality of the provisions under which Johnsonville was penalized, we are persuaded by a decision from the Eighth Circuit that we may properly consider other provisions of the ordinance. *Willson v. City of Bel-Nor*, 924 F.3d 995, 1000 (8th Cir. 2019) (explaining that a “court may take into account other provisions of [an] ordinance that may affect the constitutionality of those provisions applied”); *see also Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (explaining that a claimant may challenge exemptions where “others similarly situated were exempt from the operation of a state law adversely affecting the claimant”); *Café Erotica of Fla., Inc. v. St. Johns County*, 360 F.3d 1274, 1278-79 (11th Cir. 2004) (considering facial challenges to particular provisions of sign ordinance while “taking into account other provisions that may affect the constitutionality of those provisions”).

B. The size restrictions of the permitted-signs subdivision constitute content-based restrictions on speech.

The city council determined that Johnsonville’s 1,500-square-foot flag suspended from a 150-foot-tall crane violated a provision of the sign ordinance limiting

non-commercial signs in agricultural zones to eight square feet in size. *See* BCC § 13.06, subd. 1(F) (the non-commercial-signs provision) (1985). The city also determined that Johnsonville’s flag violated a provision limiting business signs (for which non-commercial signs may be substituted) to 32 square feet in size and 8 feet in height and requiring a permit for such signs. *See* BCC § 13.07, subd. 1(C) (the business-signs provision) (1985). The specific ordinance sections the city council cited in its findings do not discuss content. But Johnsonville argues that another provision—the holiday-signs provision—creates a content-based exemption to the size restrictions otherwise applicable to commercial and non-commercial signs. The holiday-signs provision allows the display of signs that “contain or depict a message pertaining to a religious, national, state or local holiday and no other matter” without an explicit limitation on size. BCC § 13.06, subd. 1(G) (1985). The city argues that holiday signs are subject to the same size limitations applied to all non-commercial signs, and therefore, a holiday sign would not have been exempt from the restrictions that Johnsonville’s flag violated. We are not persuaded.

The city argues that the non-commercial-sign size restrictions apply to holiday signs because they are not commercial signs and because the holiday-signs provision does not include size restrictions. The holiday-signs provision is included under the umbrella of a permitted-signs subdivision and is structurally parallel to the other restrictions laid out in that same subdivision, including the non-commercial-signs provision. Thus, the structure of the ordinance indicates that the size restrictions established by the non-commercial-signs provision do not apply to other parallel provisions, including the holiday-signs provision.

Further, the sign ordinance does not indicate through explicit language or by its structure that the non-commercial-sign size restrictions apply to the other provisions.

It is therefore not logical to apply the restrictions of the non-commercial-signs provision to the other parallel provisions because it is not clear which restriction controls. Reading the ordinance to apply one provision to all other provisions that are silent on certain restrictions on the manner of displaying a sign without any clear indication that the provision should apply to all other provisions does not make sense based on the structure and plain meaning of the ordinance. We therefore conclude that each provision of the permitted-signs subdivision stands alone and does not restrict any other provision unless it states that restriction explicitly.

Based on our plain reading of the sign ordinance, the non-commercial-signs provision does not restrict the size of holiday signs. Therefore, if Johnsonville had raised a flag containing “a message pertaining to a religious, national, state or local holiday,” the flag could have been larger than the size limits applied to non-commercial signs. BCC § 13.06, subd. 1(G). Consequently, in evaluating whether Johnsonville’s flag violated the ordinance, the city had to consider the content of the flag—whether the flag contained a message pertaining to a holiday. If it did, it would be exempt from the general non-commercial-sign size restrictions. Because the flag’s content had to be reviewed to determine whether it violated the size restrictions, the Supreme Court’s decision in *Reed* dictates that the ordinance provision is content based as applied to Johnsonville’s flag. *Casillas*, 952 N.W.2d at 640 (“[I]f a law applies to particular speech because of the topic

discussed or the idea or message expressed,’ it is a content-based regulation.” (quoting *Reed*, 576 U.S. at 163)).

C. The size restrictions of the permitted-signs subdivision do not survive strict scrutiny.

Having concluded that the ordinance provision contains a content-based restriction, we turn next to an analysis of whether the restriction can survive strict scrutiny. Content-based restrictions on speech “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 163. Strict scrutiny “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Id.* at 171 (quotation omitted). “[N]arrow tailoring means that the statute must be the least restrictive means for addressing the government’s interest.” *Casillas*, 952 N.W.2d at 640 (quotation omitted). The city thus must meet the burden of demonstrating that the difference in size restrictions on holiday signs and non-commercial signs is the least restrictive way to further a compelling governmental interest, or those provisions of the sign ordinance are unconstitutional and unenforceable against Johnsonville. *See Reed*, 576 U.S. at 171 (“Because the Town’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny . . .”).

Here, the city argues that the sign ordinance meets the city’s “interests in preserving and promoting aesthetics, ensuring that signs do not create safety hazards, and allows for reasonable opportunities for residents to communicate.” *Reed* considered similar

government interests: “preserving the Town’s aesthetic appeal and traffic safety.” 576 U.S. at 171. *Reed* determined that, even if those interests were “compelling governmental interests, the Code’s distinctions fail[ed] as hopelessly underinclusive.” *Id.* The distinctions were underinclusive because limiting temporary directional signs to a smaller size than larger ideological signs did not preserve aesthetics since temporary directional signs were “no greater an eyesore than ideological or political signs.” *Id.* at 171-72. Likewise, the town in *Reed* did not show that limiting temporary directional signs was necessary to ensure traffic safety but that limiting other types of signs was not necessary. *Id.*

Here, the city has similarly failed to show that exempting holiday signs from size restrictions applied to other non-commercial signs preserves and promotes aesthetics and ensures that signs do not create safety hazards. The city has not presented any reasons why a holiday sign, by the nature of its content, promotes aesthetics and ensures safety at any size, while a non-commercial sign that does not contain holiday-related messages may not exceed eight square feet in an agricultural zone. The city has thus failed to meet its burden to prove that the non-commercial-sign provision’s size restrictions on non-commercial signs, but not holiday signs, are narrowly tailored to further a compelling government interest. *See id.* at 171. The size restrictions of the sign ordinance fail strict-scrutiny review, and therefore the administrative penalties imposed by the city are based on an erroneous theory of law and must be reversed. *See Dietz*, 487 N.W.2d at 239.

Reversed.