



CITY OF RAPID CITY

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MEMORANDUM

TO: Public Works Committee
Legal and Finance Committee

FROM: Jason E. Green, City Attorney

DATE: February 23, 2004

RE: Signs in the Right of Way

The Council has asked me to further research the issue of realtor signs located in the public right of way. As has been previously discussed, it remains the opinion of the City Attorney's office that the City may not engage in content-based regulation of signs. The United States Supreme Court has clearly held that regulating the content of speech violates the First Amendment of the United States Constitution. In order to comply with the mandates of the Supreme Court and the First Amendment, government may regulate speech only to the extent that we regulate the time, the place, or the manner of the speech. For example, the City may prohibit people from making speeches in public parks between the hours of 10:00 p.m. and 7:00 a.m. However, the City may not prohibit people from making speeches about a certain topic such as abortion, the Presidential election, or the color of people's houses. Thus, an ordinance that would allow individuals to place signs in the public right of way only if those signs are in the nature of a "for sale" sign or a "realtor" sign would run afoul of the First Amendment. Should the City chose to allow signs to be placed in the public right of way, there can be no distinction made based upon the words that are on the sign. This is well settled law.

The City may regulate speech based on the time, the place, or the manner of that speech, including signs. However, any such regulations must also be consistent with the obligations of the City under state law. State law requires municipalities to hold public right of way in trust for use of the public at large and for uses consistent with a right of way easement.

Memo to Public Works and Legal and Finance Committee



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When the plat or map shall have been made out...and recorded ...every donation or grant to the public...shall be deemed a sufficient conveyance to vest the fee simple title of all such parcel or parcels of land as are therein expressed...for the uses and purposes therein expressed and intended, and no other use and purpose whatever. The land intended to be used for the streets, alleys, ways, commons, or other public uses shall be held in trust to and for the uses and purposes expressed or intended.

SDCL § 11-3-12 (emphasis added). This statute sets out the obligation of the municipality to hold public right of way easements in trust for the public at large and for uses consistent with a public right of way easement. The South Dakota Supreme Court has noted that this statute “appears to be intended to delineate the respective rights between the City and the public.” Holida v. Chicago and Northwestern Transportation Company, 398 N.W.2d 742 (S.D., 1986.) Black’s Law Dictionary defines public trust as “one constituted for the benefit either of the public at large or for some considerable portion of it answering a particular description.” In contrast, Black’s defines private trust as “one established or created for the benefit of a certain designated individual or individuals, or a known person or class of persons clearly identified or capable of identification by the terms of the instrument creating the trust, as distinguished from trusts for public institutions.” It is important to note that the Supreme Court has held that SDCL § 11-3-12 is intended to delineate the respective rights as between the city and the public, not the city and an individual. Thus, permissible uses of the public right of way include uses such as the placement of street signs, the placement of light poles, use by public utilities, public transportation facilities such as bus shelters and benches, and other similar uses that are for the benefit of the public at large rather than a limited number of individual persons.

Based upon all of these authorities, it remains my opinion that the City may not engage in any content-based regulation of signs of any nature. Furthermore, it is my opinion that the City is required to maintain public right of way for the benefit of the public trust, not for use by individual members of the public. Since this obligation is imposed upon municipalities by state law, it is my opinion that that obligation may not be altered by a municipality enacting an ordinance to the contrary.

cc: Mayor Shaw
Jim Preston
Marcia Elkins
Ted Vore
Mike Booher
Joel Landeen