

## Issue Paper for Discussion with Supervisors, Planning Commissioners, and Staff.

### zMOD's Recent Signs Ordinance Threatens a Proliferation of Damaging, Incompatible Signs in Residential Districts<sup>1</sup> (The Ordinance Should Be Amended Now.)

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**1. Introduction.** On 17 Jul, I emailed supervisors and planning commissioners a paper<sup>2</sup> explaining that the current zMOD signs ordinance, adopted in Mar 2019, allows huge incompatible signs that easily will permanently damage residential districts. On 31 Aug, I sent the paper to each supervisor a second time with a message that I would call to request an appointment to discuss the issues. Those calls were made on 10 Sep. The following concise summary of the issues discussed in the 17 Jul paper is intended to provide a sharper focus on the risks to communities and to highlight mitigation opportunities.<sup>3</sup> The objective is prompt resolution of the issues.

The two principal issues are:

- The current ordinance allows an unbelievable 114 sq ft of signage for all non-residential uses in R districts, including 20 sq ft of electronic display and colored light illumination. Such signs clearly are not compatible with residential communities.
- The ordinance also allows 12 sq ft of permanent signage for residential uses, that is, 12 sq ft of permanent, 24x365, signage in the front yard of every home.

Few disfigurements are more capable of degrading the quality of a residential neighborhood than signs, and every non-residential use in the county now, by right, may implement the intrusive signs allowed by the ordinance.<sup>4</sup> Given the county's practice of grandfathering nonconforming signs, these signs will scar their neighborhoods for many years to come. The previous ordinance made an effort to appropriately limit signs and their annoyance. The current ordinance threatens communities with irreparable damage.

**2. Standards for Non-Residential Uses:** The current signs ordinance (Article 12 of the zoning ordinance) allows non-residential uses<sup>5</sup> in every R district 114 sq ft of signage as follows:

- Any number of building-mounted signs not to exceed 50 sq ft in combined area, plus
- One freestanding sign of 40 sq ft and 8 ft tall, plus 24 sq ft of minor signs.<sup>6</sup>

<sup>1</sup> This paper is available on line at <https://holmesrun.org/2020/10/03/signs-ordinance-requires-amendment/>.

<sup>2</sup> The 17 Jul paper distributed to supervisors and planning commissioners is available at [https://holmesrun.files.wordpress.com/2020/08/20200623\\_zmod\\_signs.h.pdf](https://holmesrun.files.wordpress.com/2020/08/20200623_zmod_signs.h.pdf)

<sup>3</sup> This paper is a revision of the original dated 21 Sep. Section 4 has been rewritten to provide a more concise description of staff's response to the 2014 U.S. Supreme Court decision. Other changes are editorial.

<sup>4</sup> All non-residential uses in R districts have the right to implement the current signs ordinance with the exception that some individual uses may have signage restrictions imposed by their development conditions. Where development conditions state simply that signage shall be in accordance with Article 12, the use presumably has the right to implement the full range of options in the ordinance. If development conditions specify, as an example, the locations of signs, the use presumably would have the right to implement all options in the ordinance to the extent feasible within the location constraints. With this understanding, this paper speaks of existing and future non-residential uses having the right to implement the signs allowed by the ordinance. Many older non-residential uses operate without permits and development conditions. They were established prior to the time of permits.

<sup>5</sup> zMOD's consolidated draft of a new zoning ordinance identifies more than 35 non-residential uses in R districts. They include private schools, offices, churches, and funeral homes.

<sup>6</sup> The ordinance defines minor signs as signs that are designed to be easily moved, may not be illuminated, and require no permit. They may be permanent.

The freestanding sign may include up to 20 sq ft of electronic display with messages changing every 8 seconds, 24x365. All signs except minor signs may be illuminated by colored light varying in both color and intensity.

With very few exceptions, signs of such size and clamor have no place in residential districts. Virtually no one would accept them in the front yard of the house across the street from their home. Yet every non-residential use in every R district in Fairfax County may implement these signs today by right, and the damage to neighborhoods will be permanent. When the ordinance eventually is amended to disallow these incompatible signs, all such signs that were permitted between Mar 2019 and that date inevitably will be allowed to remain as nonconforming signs. The damage to neighborhoods therefore will be irreparable. It follows that the ordinance should be amended as soon as reasonably possible.

Exhibit 1 on page 5 shows a 38 sq ft, 8 ft tall, 5 ft wide freestanding sign with a 20 sq ft electronic display panel whereon the message changes every 8 seconds. The sign is installed in a residential district opposite low-rise apartments on Leesburg Pike in Falls Church just east of Seven Corners. It was permitted in July 2019 presumably under the terms of the current signs ordinance, which was adopted just 4 months earlier.

The previous signs ordinance (pre-Mar 2019), provided a range of standards for non-residential uses effectively based on the scale of the use (sizes of buildings and properties).<sup>7</sup>

- Uses in buildings resembling single-family detached dwellings were limited to one sign of 6 sq ft, that is, signage one-nineteenth (1/19) the area now allowed on these sites by the current ordinance.
- Larger uses such as convenience centers and funeral chapels were allowed one freestanding sign and one building-mounted with a combined area of 20-25 sq ft. - about 1/5 the area currently allowed.
- Large-scale uses such as country clubs, airports, and churches were allowed 90 sq ft.

Electronic display and colored light illumination were not allowed by the previous ordinance.

Exhibit 2 provides a summary of standards, previous and current, for non-residential uses in R districts. The current ordinance introduced characteristics wholly incompatible with residential communities - enormous signs, electronic displays, and colored light illumination.

**3. Standards for Residential Uses.** Exhibits 3 and 4 on page 6 summarize the sign standards for residential uses, that is, the standards for household living in R districts. Unless otherwise noted, permits are/were required for none of the signs listed in the two exhibits.

The principal concern is the 12 sq ft of yard signs allowed by the current ordinance. The signs are allowed to be permanently installed, 24x365, which threatens a proliferation of signs that would be incompatible with the character of residential districts. In the previous ordinance (Exhibit 3), time limits for signs were specified for every permitted residential use except signs identifying subdivisions and real estate signs. With these two exceptions, permanent signs were not allowed for residential uses.

All yard signs should be time limited. Staff has argued that enforcing limits on the time durations of residential signs is tedious for the county and unreliable in practice. That may be so, but a standard limiting display durations, for example 20 days at a time and not more than 60 days in a year, should be established nonetheless. The standard will empower neighbors to walk across the street and ask offenders to take down their signs. Respectful neighbor-to-neighbor enforcement is the best kind. But without a standard there is no opportunity for neighborhood enforcement.

It's not clear why zMOD allowed all non-residential uses real estate signs as large as 32 sq ft in the current ordinance (third row of Exhibit 4). Twelve square feet is the maximum allowed for multifamily units, it should be sufficient for real estate uses in R districts. A small point for now.

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<sup>7</sup> See Section 6.1 of Footnote 1.

**4. Staff Report's Response to the Reed Decision.** The stated primary purpose of the Mar 2019 signs ordinance amendment was to expunge standards based on contents of messages displayed on signs and to replace them with content-neutral standards. A 2014 U.S. Supreme Court decision, *Reed v Town of Gilbert (Reed)*, ruled that sign regulations based on content violate the First Amendment right to freedom of speech. The court ruled that signs may not be regulated based on "communicative content", "the message a speaker expresses."

The staff report for the Mar 2019 amendment,<sup>8</sup> at the bottom of page 3, argues that, in light of *Reed*, "uniformity of sign provisions among land uses is more appropriate"<sup>9</sup> than the then-existing standards, some of which were based on land use. Staff stated that, in their opinion, land-use-based standards could raise concerns vis-à-vis the content neutrality requirements of *Reed*.

The Mar 2019 ordinance amendment eliminated land-use dependencies among the standards for non-residential uses in R districts simply by allocating the same types and amounts of signage to all of the uses. A total of 114 sq ft of signage with electronic display and colored light illumination was permitted for all golf courses, country clubs, and airports as well as for all small private schools and child care centers embedded in neighborhoods. The response certainly resolved any concern about the standards possibly violating *Reed*, but it created insurmountable issues regarding compatibility of signs with neighborhoods.

Section 6.1 of Footnote 1 describes the standards for non-residential uses in the previous ordinance. Some of those standards were based on location. For example, uses in structures similar to single-family-detached homes were allowed only one sign no larger than 6 sq ft, and uses principally outdoors were limited to a total of 20 sq ft of signage. Other standards may at first appear to be based on land use. Airports were allowed 90 sq ft of signage, and country clubs and universities were allowed the same. But on closer examination it is clear that the previous ordinance effectively was based on the scale of the use - large signs for large buildings and properties and relatively small signs for small-scale sites. Standards based on scale clearly would not violate *Reed*. At the same time, they would not allocate the same types and amounts of signage to all sites occupied by non-residential uses.

It is important to recognize that *Reed* did not prohibit standards based on land use. Nor did the Mar 2019 staff report argue that land-use-based standards would violate *Reed*. One example of a content-neutral standard based on land use is the regulation in the previous signs ordinance stating that signage standards for transit (WMATA) facilities would be decided on a case-by-case basis directly by the Board of Supervisors - a sensible content-neutral standard based on land use. Moreover, the county should recognize that some standards for R districts in the current ordinance are land-based. For example, they allow 114 sq ft of signage for non-residential uses and only 12 sq ft for residential uses. The standards in Row 2 of Exhibit 4 are additional examples of current regulations based on land use.<sup>10</sup>

**5. A Potential Plague of Electronic Signs.** The previous signs ordinance included no provision for electronic signs. However, in the 2012 timeframe, the county had allowed them in a few instances under the condition that

<sup>8</sup> Staff Report for Mar 2019 signs ordinance amendment is available at <https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zmod/signs.pdf>

<sup>9</sup> Emphasis by author.

<sup>10</sup> The zMOD consolidated draft of zoning standards allows home-based businesses (HBBs) outdoor signs. Currently, for the sake of neighborhoods, HBBs expressly are not allowed signs. Leslie Johnson, the Zoning Administrator, has argued that the signs now cannot be disallowed because the 2014 *Reed* decision prohibits sign regulations based on land use. The logical next step in Ms. Johnson's argument is that signs for HBBs cannot be limited to only 12 sq ft while the other land uses in R districts, non-residential uses, are allowed 114 sq ft. By this extension, all HBBs are entitled to 114 sq ft of signage plus electronic displays and colored light illumination - a potential disaster for neighborhoods. If the county concludes that signs cannot be regulated by land use within R districts, the only option is to allow all uses a sign in accordance with a minimal standard, one that would be compatible everywhere.

the display did not change more frequently than once a day. But then they allowed exceptions to the once-per-day rule for a number of sites at the same time trying to enforce the rule with a church in Vienna. The church took the county to court under the Religious Land Use and Institutionalized Persons Act, which prohibits zoning rules that place undue burdens on religious institutions. The church won.

In 2019, the county used the March ordinance amendment as an opportunity to establish formal standards for electronic signs and elected to allow 20 sq ft display areas with messages changing as frequently as every 8 seconds, 24x365, by right for every non-residential use in R districts.

An alternative would have been to prohibit any further deployment of electronic displays in R districts. A simple test of the compatibility of electronic displays is to ask ourselves whether we would accept such displays in front of the house across the street from our homes. The answer for the vast majority of residents is "NO." Over a period of years, there may be a few exceptional cases in the county where electronic displays would substantially benefit a community and could be accommodated. Perhaps. But clearly they should not be allowed in R districts by right for all non-residential uses as they are today.

The source of the decision to allow colored light illumination is not clear. Perhaps the story is similar - once in the past it was allowed in a few cases and then was elevated to a by-right "feature" for all non-residential uses in the Mar 2019 amendment. Like electronic displays, colored light illumination should not be allowed by right in R districts.

**6. Conclusion.** The current signs ordinance has the potential to seriously damage residential districts, and, given the county's practice of allowing nonconforming signs, the damage will be permanent and irreparable. As soon as reasonably possible the signs ordinance should be amended to protect communities from a proliferation of incompatible signs.

- In lieu of the 114 sq ft of signage allowed for all non-residential uses, a series of standards should be established suitable for pairing with sites ranging from small-scale uses embedded in neighborhoods to large-scale uses more isolated from immediate neighbors. The previous ordinance provides a place to start.
- The current allowance for electronic displays and colored light illumination by right should be revoked and consideration given to the limited circumstances, if any, under which either or both of the devices would be beneficial to communities and possibly allowed by special permit/exception.
- Time limits should be established for the yard signs currently allowed for residential use.

Time is of the essence. To the extent that existing non-residential uses implement signs allowed by the current ordinance, neighborhoods will bear the scars for many years. No option for removing offensive signs will be available. Policies should be established now to protect communities while the ordinance is being amended.

- A special permit should be required for any expansion of existing signage by an existing non-residential use in an R district. The public notification, review, and hearing process required for special permits will mitigate proliferation of incompatible signs. A similar requirement certainly should be included in the amended signs ordinance.
- The Board and the BZA should be tasked to make a formal, documented, case-by-case determination that the signs allowed by development conditions for each new special exception and each new special permit would be compatible with the affected neighborhood. The current ordinance gives both boards the authority to further limit signs.
- Administrative permits for non-residential uses in R districts should be suspended until after the ordinance has been amended.

Effective options exist for addressing the issues. The challenge is in getting started now.

**Exhibit 1. A Freestanding Sign Similar to the One Allowed for Non-Residential Uses in R Districts by the Current Signs Ordinance (1)**



(1). The sign is 8 ft high by 5 ft wide and has an area of 38 sq ft (vs the 40 sq ft allowed by the ordinance). It is located on the south side of Leesburg Pike opposite low-rise apartments in a residential district just east of Seven Corners in Falls Church.

**Exhibit 2. Summary of Standards for Non-Residential Uses**

(Section 12-208 of previous ordinance, Sections 12-105, 12-202, & 12-203 of current ordinance)

Standards	Previous Ordinance (1)	Current (Mar 2019) Ordinance
• Signs for small-scale uses	1 freestanding <u>or</u> 1 on bldg. - 6 sq ft max.	Signs for all uses and locations: 1 freestanding - 40 sq ft <u>and</u> Any number on bldg. - 50 sq ft <u>and</u> Minor signs - 24 sq ft. (3) Total of 114 sq ft.
• Signs for mid-scale uses	1 freestanding - 12-15 sq ft <u>and</u> 1 on bldg. - 12 sq ft. Max 20-25 sq ft combined.	
• Signs for large-scale uses	1 freestanding - 40 sq ft <u>and</u> Any number on bldg. - 50 sq ft. Total of 90 sq ft.	
Illumination	White light only.	Any color light.
Electronic display	Not allowed by ordinance.	Allowed, 20 sq ft max.
Permit required	Yes.	Yes, except minor signs require no permit.

- (1). The previous sign standards listed in the table are summaries. The previous ordinance included a few exceptions not important to this discussion. For example, R&D centers were allowed any number of building-mounted signs not to exceed in square feet the length of building frontage in feet. See Section 6.1 of Footnote 1 for details.
- (2). The previous ordinance did not allow electronic display. See Section 5.
- (3). In lieu of the 24 sq ft standard, the ordinance allows 32 sq ft of minor signs for uses located on major thoroughfares. Moreover, Section 12-105.7 allows an additional 16 sq ft of minor signage near a building or site entrance for the purpose of providing "access to the use," for example, directional signs. In total then, all non-residential uses in R districts may display 130 - 138 sq ft of permanent signage, 23 times the signage allowed by the previous ordinance for small-scale uses. For consistency with the Footnote 1 document, the discussion in this paper is based on a maximum of 114 sq ft.

**Exhibit 3. Summary of Standards for Residential Uses - Previous Ordinance**  
(Sections 12-103.3, 12-201.3, 12-201.4)

<b>Purpose of Sign</b>	<b>Maximum Area</b>	<b>Allowed Duration of Display</b>
Identify residential subdivision entrances (1)	30 sq ft at each major entrance	May be permanent.
Real estate for sale/rent	4 sq ft for single family dwelling 12 sq ft for multifamily unit 32 sq ft for property > 20 acres	Remove 7 days after settlement.
Construction of new developments	60 sq ft	Remove 14 days after completion, 2 years max.
Construction/renovation of a single-family dwellings	4 sq ft	Remove 7 days after completion, 6 months max.
Off-site directional signs for yard sales and real estate	3 sq ft	For yard sales, max 2 weekends/year. For real estate, no limit specified.
Political signs at polling places	None specified	24 hours.
Civic/educational campaigns	16 sq ft	14 days.
Special events (e.g., grand openings) (2)	20 sq ft	14 days.
Farmers' markets and produce stands (3)	32 sq ft	During event only.
Sales of seasonal products, e.g., fireworks	32 sq ft	21 days.
Political campaign signs, offsite (4)	32 sq ft	Remove 15 days after election, 75 days max.

- (1). Sign permit required
- (2). \$100 bond required to assure removal of signs.
- (3). Temporary special permit and \$100 bond required.
- (4). Sign permit and \$100 bond required.

**Exhibit 4. Summary of Standards for Residential Uses - Current Ordinance**  
(Sections 12-202 and 12-105)

<b>Purpose of Sign</b>	<b>Maximum Area</b>	<b>Allowed Duration of Display</b>
Identify residential subdivision entrances (1)	30 sq ft at each major entrance.	May be permanent.
Real estate for sale/rent	6 sq ft for single family dwelling 12 sq ft for multifamily unit 32 sq ft for property > 20 acres <b>32 sq ft for non-residential uses</b>	Removed 7 days after settlement.
Construction of new developments	60 sq ft	Remove 14 days after completion, 2 years max.
Construction/renovation of a single-family dwellings	4 sq ft	Remove 7 days after completion, 6 months max.
Rental office in multifamily development (1)	4 sq ft	May be permanent.
<b>Yard signs</b>	<b>Any number of signs not to exceed 12 sq ft total, 4 sq ft max per sign.</b>	<b>May be permanent.</b>

- (1). Sign permit required.