

ORDINANCE NO. 2020-_____

AN ORDINANCE OF THE MAYOR AND TOWN COUNCIL OF THE TOWN OF CUTLER BAY, FLORIDA, AMENDING CHAPTER 3, “LAND DEVELOPMENT REGULATIONS,” ARTICLE III, “SIGN REGULATIONS,” OF THE TOWN CODE OF ORDINANCES TO PROVIDE FOR AMENDMENTS TO THE TOWN’S SIGN REGULATIONS RELATED TO INSURING CONTENT NEUTRALITY AND CONFORMANCE WITH APPLICABLE CASE LAW RELATING TO SIGN REGULATIONS; PROVIDING FOR CODIFICATION; PROVIDING FOR SEVERABILITY; PROVIDING FOR CONFLICTS; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town of Cutler Bay (the “Town”) finds and determines that the Town’s land development regulations are required to regulate signs as provided by Section 163.3202(2)(f), Florida Statutes; and

WHEREAS, the Town Council does not wish to censor speech, but rather to provide for the public welfare by regulating signage in the Town in a manner that enhances the aesthetics of the community, reduces visual pollution, provides clear information and minimizes distractions to drivers in the interests of traffic safety; and

WHEREAS, the Town Council desires to modify and update its regulation of signs in order to respond to caselaw including *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); and

WHEREAS, the Town finds and determines that the purpose and intent provisions of its signage regulations should be detailed so as to further describe the beneficial aesthetic, traffic safety, and other effects of the Town's sign regulations, and to reaffirm that the sign regulations are concerned with the secondary effects of speech and are not designed to censor speech or regulate the viewpoint of the speaker; and

WHEREAS, various signs that serve as signage for particular land uses are based upon content-neutral criteria in recognition of the functions served by those land uses, but not based upon any intent to favor any particular viewpoint or control the subject matter of public discourse; and

WHEREAS, the Town finds and determines that the sign regulations adopted hereby allow and leave open adequate alternative means of communications, such as newspaper advertising, internet advertising and communications, advertising in shoppers and pamphlets, advertising in telephone books, advertising on cable television, advertising on UHF and/or VHF television, advertising on AM and/or FM radio, advertising on satellite radio, advertising on internet radio, advertising via direct mail, and other avenues of communication available in the Town [*see State v. J & J Painting*, 167 N.J. Super. 384, 400 A.2d 1204, 1205 (Super. Ct. App. Div. 1979); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989); *Green v. City of Raleigh*, 523 F.3d 293, 305-306 (4th Cir. 2007); *Naser Jewelers v. City of Concord*, 513 F.3d 27 (1st Cir. 2008); *Sullivan v. City of Augusta*, 511 F.3d 16, 43-44 (1st Cir. 2007); *La Tour v. City of Fayetteville*, 442 F.3d 1094, 1097 (8th Cir. 2006); *Reed v. Town of Gilbert*, 587 F.3d 866, 980-981 (9th Cir. 2009)]; and

WHEREAS, in *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 135 S. Ct. 2218, 2221, 192 L. Ed. 2d 236 (2015), the United States Supreme Court, in an opinion authored by Justice Thomas, and joined in by Chief Justices Roberts, Scalia, Alito, Kennedy and Sotomayor, addressed the constitutionality of a local sign ordinance that had different criteria for different types of temporary noncommercial signs; and

WHEREAS, in *Reed*, Justice Alito in a concurring opinion joined in by Justices Kennedy and Sotomayor pointed out that municipalities still have the power to enact and enforce reasonable sign regulations; and

WHEREAS, Justice Alito further noted that in addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech [*see Pleasant Grove City v. Summum*, 555 U.S. 460, 467-469 (2009)], and that government entities may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots; and

WHEREAS, Justice Alito noted that the *Reed* decision, properly understood, will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate aesthetic objectives, including rules that distinguish between on-premises and off-premises signs; and

WHEREAS, under established Supreme Court precedent and Eleventh Circuit precedent, commercial speech may be subject to greater restrictions than noncommercial speech and that doctrine is true for both temporary signs as well as for permanent signs; and

WHEREAS, the Town finds and determines that a traffic control device, as defined herein, should be exempt from regulation under the Town's regulations for signage; and

WHEREAS, the Town finds and determines that the regulation of signs within the Town strongly contributes to the development and maintenance of a pleasing, visually attractive environment, and that these sign regulations are prepared with the intent of enhancing the environment and promoting the continued well-being of the Town; and

WHEREAS, the Town finds and determines that the regulation of signage for purposes of aesthetics has long been recognized as advancing the public welfare; and

WHEREAS, the Town finds and determines that, as far back as 1954, the United States Supreme Court recognized that "the concept of the public welfare is broad and inclusive," that the values it represents are "spiritual as well as physical, aesthetic as well as monetary," and that it is within the power of the legislature "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled" [in *Berman v. Parker*, 348 U.S. 26, 33 (1954)]; and

WHEREAS, the Town finds and determines that aesthetics is a valid basis for zoning, and that the regulation of the size and appearance of signs and the prohibition of certain types of signs can be based upon aesthetic grounds alone as promoting the general welfare [see *Merritt v. Peters*, 65 So. 2d 861 (Fla. 1953); *Dade County v. Gould*, 99 So. 2d 236 (Fla. 1957); *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970), *cert. dismissed*, 400 U.S. 878 (1970)]; and

WHEREAS, the Town finds and determines that these sign regulations further the character and ambiance of the Town, and reflect its commitment to maintaining and improving an attractive environment; and

WHEREAS, the Town finds and determines that the beauty of the Town's natural and built environment has provided the foundation for the economic base of the Town's development, and that the Town's sign regulations help create an attractive residential community for its residents; and

WHEREAS, the Town finds and determines that the goals, objectives and policies of its plans over the years demonstrate a strong, long-term commitment to maintaining and improving the Town's attractive and visual environment; and

WHEREAS, the Town finds and determines that, from a planning perspective, one of the most important community goals is to define and protect aesthetic resources and community character; and

WHEREAS, the Town finds and determines that the purpose of the regulation of signs as set forth in this Ordinance is to promote the public health, safety and general welfare through a comprehensive system of reasonable, consistent and nondiscriminatory sign standards and requirements; and

WHEREAS, the Town finds and determines that the sign regulations in this Ordinance are intended to lessen hazardous situations, confusion and visual clutter caused by proliferation, improper placement, illumination, animation and excessive height, area and bulk of signs which compete for the attention of pedestrian and vehicular traffic; and

WHEREAS, the Town finds and determines that these sign regulations are intended to protect the public from the dangers of unsafe signs; and

WHEREAS, the Town finds and determines that these sign regulations are intended to permit signs that are compatible with their surroundings and aid orientation, and to preclude placement of signs in a manner that conceals or obstructs adjacent land uses or signs; and

WHEREAS, the Town finds and determines that these sign regulations are intended to regulate signs in a manner so as to not interfere with, obstruct vision of or distract motorists, bicyclists or pedestrians; and

WHEREAS, the Town finds and determines that these sign regulations are intended to require signs to be constructed, installed and maintained in a safe and satisfactory manner; and

WHEREAS, the Town finds and determines that in meeting the purposes and goals established in these findings, it is appropriate to prohibit or to continue to prohibit certain sign types; and

WHEREAS, the Town finds and determines that the prohibition of the construction of billboards and certain other sign types, as well as the establishment and continuation of height, size and other standards for on-premises signs, is consistent with the policy set forth in the Florida Constitution that it shall be the policy of the state to conserve and protect its scenic beauty; and

WHEREAS, the Town finds that local governments may separately classify off-site and on-site advertising signs in taking steps to minimize visual pollution [*see City of Lake Wales v. Lamar Advertising Association of Lakeland Florida*, 414 So. 2d 1030, 1032 (Fla. 1982)]; and

WHEREAS, the Town finds and determines that a prohibition on the erection of off-site outdoor advertising signs will reduce the number of driver distractions and the number of aesthetic eyesores along the roadways of the Town [*see, e.g., E. B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1154 (5th Cir. 1970), *cert. denied*, 400 U.S. 878 (1970)]; and

WHEREAS, the Town finds and determines that in order to preserve, protect and promote the safety and general welfare of the residents of the Town, it is necessary to regulate off-site advertising signs, so as to prohibit the construction of off-site signs and billboards in all zoning districts, and to provide that the foregoing provisions shall be severable; and

WHEREAS, the Town hereby finds and determines that anything beside the road which tends to distract the driver of a motor vehicle directly affects traffic safety, and that signs, which divert the attention of the driver and occupants of motor vehicles from the highway to objects away from it, may reasonably be found to increase the danger of accidents, and agrees with the courts that have reached the same determination [*see In re Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762 (1961); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D.1978)]; and

WHEREAS, the Town finds and determines that the Town has allowed noncommercial speech to appear wherever commercial speech appears; and the Town desires to continue that practice through the specific inclusion of a substitution clause that expressly allows non-commercial messages to be substituted for commercial messages; and

WHEREAS, the Town finds and determines that, by confirming in this Ordinance that noncommercial messages are allowed wherever commercial messages are permitted, the Town will continue to overcome any constitutional objection that its ordinance impermissibly favors commercial speech over noncommercial speech [*see Outdoor Systems, Inc. v. City of Lenexa*, 67 F. Supp. 2d 1231, 1236-1237 (D. Kan. 1999)]; and

WHEREAS, the Town finds and determines that under Florida law, whenever a portion of a statute or ordinance is declared unconstitutional, the remainder of the act will be permitted to stand provided (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions

can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the legislative body would have passed the one without the other, and (4) an act complete in itself remains after the valid provisions are stricken [*see, e.g., Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990)]; and

WHEREAS, the Town finds and determines that there have been several judicial decisions where courts have not given full effect to severability clauses that applied to sign regulations and where the courts have expressed uncertainty over whether the legislative body intended that severability would apply to certain factual situations despite the presumption that would ordinarily flow from the presence of a severability clause; and

WHEREAS, the Town finds and determines that the Town has consistently adopted and enacted severability provisions in connection with its ordinance provisions, and that the Town wishes to ensure that severability provisions apply to its regulations, including its sign regulations; and

WHEREAS, the Town finds and determines that the Code's severability clauses were adopted with the intent of upholding and sustaining as much of the Town's regulations, including its sign regulations, as possible in the event that any portion thereof (including any section, sentence, clause or phrase) be held invalid or unconstitutional by any court of competent jurisdiction; and

WHEREAS, the Town finds and determines that there must be an ample record of its intention that the presence of a severability clause in connection with the Town's sign regulations be applied to the maximum extent possible, even if less speech would result from a determination that any provision is invalid or unconstitutional for any reason whatsoever; and

WHEREAS, the Town finds and determines that there must be an ample record that it intends that the height and size limitations on free-standing and other signs continue in effect regardless of the invalidity or unconstitutionality of any, or even all other, provisions of the Town's sign regulations, other ordinance code provisions, or other laws, for any reason (s) whatsoever; and

WHEREAS, the Town finds and determines that there must be an ample record that it intends that each prohibited sign-type continue in effect regardless of the invalidity or unconstitutionality of any, or even all, other provisions of the Town's sign regulations, other ordinance code provisions, or other laws, for any reason(s) whatsoever; and

WHEREAS, the Town Council makes the detailed findings set forth in Section 3-110 of the proposed ordinance revisions attached hereto as Exhibit “A”, which are incorporated herein by reference, as to the purpose, scope and intent of the Town’s sign regulations, and the substantial and compelling governmental interests that are advanced by these regulations; and

WHEREAS, the Town Council finds and determines that this Ordinance is consistent with all applicable policies of the Town’s adopted Comprehensive Plan; and

WHEREAS, the Town Council reiterates its desire that there be an ample and unequivocal record of its intention that the severability clauses it has adopted related to its sign regulations shall be applied to the maximum extent possible, even if less speech would result from a determination that any exceptions, limitations, variances, or other sign provisions are invalid or unconstitutional for any reason whatsoever; and

WHEREAS, the Town Council conducted a first and second reading of this Ordinance at duly noticed public hearings, as required by law, and after having received input from and participation by interested members of the public and staff, the Town Council has determined that this Ordinance is consistent with the Town’s Comprehensive Plan and in the best interest of the of the public health, safety and welfare.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF CUTLER BAY, FLORIDA, AS FOLLOWS:¹

Section 1. **Recitals.** The above-stated recitals are true and correct and are incorporated herein by this reference.

Section 2. **Amending Sign Regulations of the Town Code of Ordinances.**
The Town Council of the Town of Cutler Bay hereby amends Chapter 3, “Land Development Regulations,” by amending Article VIII, “Sign Regulations” of the Town Code, as provided in Exhibit “A,” which is attached hereto and incorporated herein by reference.

Section 3. **Codification.** It is the intention of the Town Council, and it is hereby ordained that the provisions of this Ordinance, including Exhibit “A,” shall become and be made a part of the Code of the Town of Cutler Bay; that the sections of this Ordinance may be re-numbered or re-lettered to accomplish such intentions; and that the word "Ordinance" shall be changed to "Section" or other appropriate word.

¹ Coding: ~~Strikethrough~~ words are deletions to the existing words. Underlined words are additions to the existing words. Changes between first and second reading are indicated with yellow highlighted ~~double strikethrough~~ and double underline.

Section 4. Severability. If any section, clause, sentence, or phrase of this Ordinance is for any reason held invalid or unconstitutional by a court of competent jurisdiction, the holding shall not affect the validity of the remaining portions of this Ordinance.

Section 5. Conflicts. All Sections or parts of Sections of the Code of Ordinances, all ordinances or parts of ordinances, and all Resolutions, or parts of Resolutions, in conflict with this Ordinance are repealed to the extent of such conflict.

Section 6. Effective Date. This Ordinance shall be effective immediately upon adoption on second reading.

PASSED on first reading on the _____ day of July, 2020.

PASSED AND ADOPTED on second reading on the _____ day of _____, 2020.

TIM MEERBOTT
Mayor

ATTEST:

DEBRA E. EASTMAN, MMC
Town Clerk

APPROVED AS TO FORM AND LEGAL
SUFFICIENCY FOR THE SOLE USE OF
THE TOWN OF CUTLER BAY:

WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
Town Attorney

First Reading:

Moved by: _____

Second by: _____

Second Reading:

Moved by: _____

Second by: _____

FINAL VOTE AT ADOPTION:

Mayor Tim Meerbott _____

Vice Mayor Sue Ellen Loyzelle _____

Council Member Robert “BJ” Duncan _____

Council Member Michael P. Callahan _____

Council Member Roger Coriat _____