



**CITY OF PUNTA GORDA
OFFICE OF THE CITY ATTORNEY
M E M O R A N D U M**

To: Gregory B. Murray, City Manager
Pamela Davis, Chief of Police
From: David M. Levin, City Attorney
Date: June 7, 2021
Subject: Indecent Speech as Prohibited by City Sign Code

At the outset, it is important to note that the First Amendment, as applied to States by the Fourteenth Amendment, has never been thought to give absolute protection to every individual to speak whenever and wherever he pleases, or to use any form of address in any circumstances that he chooses. See, Cohen v. California, 91 S.Ct. 1780 (1971).

The U.S. Supreme Court in Chaplinsky v. New Hampshire, 62 S.Ct. 766 (1942) stated, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words"

The City's new Sign Code prohibits outright any sign which contains obscene language or graphics. Section 11.4(a)(42), Punta Gorda Code defines the term "obscene" to mean "language or graphics that depict or describe sex or sexual organs in a manner appealing to, or intended to appeal to the average viewer/reader's visceral sexual (prurient) interests, and taken as a whole, lacks any justification from a political, literary, artistic, or scientific value."

Note, the definition of "sign" under the new Sign Code includes, "any device, structure, item, thing, object, fixture, painting, printed material, apparel and accoutrements, or visual image using words, graphics, symbols, numbers, or letters designed or used for the purpose of communicating a message or attracting attention." As defined, flags are included in the definition of signs as are hats and other worn accessories.

The new Sign Code also prohibits any sign containing "fighting words" and/or "indecent speech," as those terms are defined in the Sign Code, ***provided*** the language or graphics of such signs are "legible from any public right-of-way or within any public space ***and*** which can potentially be viewed by children under the age of 17. This provision includes signs or flags in or on any vehicle, vessel or on any apparel and accoutrements." (Emphasis Added).

Section 11.4(a)(20), Punta Gorda Code defines "fighting words" as "words or graphics which by their very utterance have a direct tendency to incite immediate breach of the peace ***by the person to whom, individually, the remark is addressed.*** The test is whether persons of common intelligence would understand such words would be likely to cause an ordinary addressee to fight. Fighting words include, but are not limited to, defamatory remarks made to private citizens and epithets based on the addressee's race, color, religion, disability, national origin, ethnicity or sex." (Emphasis Added).

As noted by the U.S. Supreme Court in Chaplinsky v. New Hampshire, 62 S.Ct. 766 (1942), "fighting words" are "face-to-face words plainly likely to cause a breach of the peace by the addressee." The Court also suggested that whether or not words may be considered as "fighting words" may depend upon the context of the speech. For example, the Court noted, "The English language has a number of words and expressions which by general consent are "fighting words" when said ***without*** a disarming smile."

A sign which is not addressed to a particular person, but which may tend to incite a viewer to immediate breach of the peace, is ***not*** a sign containing "fighting words." The sign must be addressed to a particular person.

Section 11.4(a)(32), Punta Gorda Code defines "indecent speech" as "language or graphics that depict or describe sexual or excretory activities or organs in a manner that is offensive as measured by contemporary community standards."

In contrast to "fighting words" which may depend upon the context of the use of such words, "indecent speech" is speech which, in and of itself is offensive. In FCC v. Fox TV Stations, Inc., 129 S.Ct. 1800 (2009), the U.S. Supreme Court noted that it may make no sense to distinguish between "literal and nonliteral uses of offensive words." For example, the Court noted with regard to the "F-Word," "the word's power to insult and offend derives from its sexual meaning." Thus, the mere use of the "F-Word" constitutes indecent speech irrespective of its context.

As noted above, the new Sign Code does not prohibit all signs containing "indecent speech." Only signs containing indecent speech which are legible from any public right-of-way or within any public space ***and*** which can potentially be viewed by children under the age of 17, are prohibited.

In Sable Communications of California, Inc. v. FCC, 109 S.Ct. 2829 (1989), the U.S. Supreme Court noted, "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."

Accordingly, signs which are legible from any public right-of-way or within any public space which can potentially be viewed by children under the age of 17, and which contain well-recognized offensive references to excretory and sexual organs and activities, such as the "F-Word," are clearly and constitutionally prohibited by the City's new Sign Code.