FORT MYERS BEACH
LOCAL PLANNING AGENCY (LPA)
Town Hall – Council Chambers
2523 Estero Boulevard
Fort Myers Beach, Florida
May 11, 2010

AGENDA **[all time frames are informational and approximate]**

9:00 AM

I. Call to Order
II. Pledge of Allegiance
III. Invocation
IV. Minutes **5 minutes**
A. Minutes of April 13, 2010

V. Administrative Agenda
A. Appointment of member as liaison to Town Council M&P meetings and for CIP process monitoring **10 minutes**
B. Appointment of member as liaison to Lee County LPA **10 minutes**
C. Discussion of concepts related to sign regulations **60 minutes**
VI. Adjourn as LPA and reconvene as Historic Preservation Board
VII. Administrative Agenda
A. HPB budget request **15 minutes**
VIII. HPB Member Items or Reports **10 minutes**
IX. Adjourn as Historic Preservation Board and reconvene as LPA
X. LPA Member Items and Reports **10 minutes**
XI. LPA Attorney Items **5 minutes**
XII. Community Development Director Items **5 minutes**
XIII. LPA Action Item List Review **10 minutes**
XIV. Public Comment
XV. Adjournment

Next Meeting: **June 8, 2010, 9:00 AM**

MINUTES
FORT MYERS BEACH
Local Planning Agency

Town Hall – Council Chambers
2523 Estero Boulevard
Fort Myers Beach, FL 33931

Tuesday, April 13, 2010

I. CALL TO ORDER

Meeting was called to order at 9:08AM by Chairperson Joanne Shamp. Other members present:

Carleton Ryffel
Charles Moorefield
Rochelle Kay
John Kakatsch- excused absence
Bill Van Duzer-excused absence

Staff present: Dr. Frank Shockey
LPA Attorney, Anne Dalton

II. PLEDGE OF ALLEGIANCE and INVOCATION

Rochelle Kay

III. MINUTES

A. Minutes of March 23, 2010

Motion: Ms. Kay moved to accept the minutes, as recorded.
Seconded by Mr. Ryffel;
Vote: Motion passed 4-0

IV. ADMINISTRATIVE AGENDA

A. Discussion of LDC Chapter 34, Article IV, Division 26 (Parking Regulations), preparation for future hearing on amendments

Ms. Shamp advised the new members that this has been up for discussion for some time. She asked Dr. Shockey for an introduction and he brought forth the main points for discussion, mainly that a couple of options had been drafted for LPA consideration, and otherwise generally making the language consistent. He referred to page 2, the parking plan, and explained the differences between parking for 1 and 2 family homes and parking in parking lots. On page 3, options for parking lot layout and walkways for pedestrians there. On page 4, options involve disabled parking

spaces in an unpaved lot and he read some examples from the draft, as well as the options he referred to on page 5. He also pointed out that the resolution of the seasonal parking lots is as they had discussed before wherein the LPA agreed that having a one-time, 3 year permit for a "seasonal parking lot" be removed and replaced by a clearer provision that would allow the seasonal lot to operate each year for up to 8 months, with additional landscaping standards that would kick in after a period of 5 years.

Mr. Ryffel began the discussion with a question for Dr. Shockey about the 5 yr. time frame. He also asked about the right, lower column on page 6, B5, wherein it refers to a "live-work unit." Dr. Shockey explained that it is a zoning category for a living unit that its occupant uses for certain limited business purposes in a residential area. The changes to the parking regulations that are being discussed would not alter this category.

Ms. Kay asked if buffering is not required until the 5 yr. timeframe. Dr. Shockey said that the language does not absolutely require this until the 5 yrs. have passed. Ms. Kay felt that 5 years is a long time. Ms. Dalton added that there is a reference on page 10 which stipulates that "the director may require visual screening…" before that timeframe. She said that page 11 discusses the 5 year period and suggested that the LPA adjust this, if desired. Ms. Kay said that she would like to see this happen no later than the 3 years because 5 years seems more permanent.

Mr. Moorefield asked about ADA requirements for surfaces on unpaved parking. Dr. Shockey explained that it basically is up to the individual operator to comply with the requirements to accommodate the disabled until they do construction that would count as "alterations" and require compliance. Ms. Dalton added that the operator might allow an extra space to allow wheelchairs access even if they did not do more. She also said that she has researched this and could find no place in Florida that has similar requirements for unsurfaced parking areas. Mr. Moorefield opined that this is over-restrictive and therefore counterproductive to getting business to the beach.

Ms. Shamp asked if there are any implications in their choice of the options on page 2, regarding the 1 and 2 family dwelling units, to future desire to control pervious/impervious surfaces, storm water management, etc. Dr. Shockey said that the building permit process is flexible enough to require the necessary site plans to review this and doesn't feel that the parking plan is directly related to those issues. Ms. Shamp asked about page 3 options 1 and 2, to which Ms. Dalton answered that her preference would be Option #2, considering the safety issue. She also asked about item B on page 5, "Peak parking demands of the different uses must occur at different times" for joint use of parking spaces, and what it meant. Dr. Shockey explained this and how it is determined by traffic analysis and studies to look at the times and patterns for the parking, determining whether these could be used by several businesses whose patrons would use the spaces at different times. Ms. Shamp also did not like the 5 year timeframe and would prefer the 3 year time.

Ms. Shamp recognized that the members did not have too much input for change and suggested that there be further discussion about the 3 different options and the 5 year timeframe. Starting with page 2, there was discussion about including Option #1, "all uses" for the working plan or Option #2, "all uses except single family and 2 family dwelling units." There was a consensus for Option #2.

On page 3, the group discussed walkway Option #1, "walkways must be provided which accommodate safety pedestrian movement" and Option #2 which adds "from vehicles to building entrances and other walking destinations…" Option 1 had 1 vote; Option 2, 3 votes. Mr. Moorefield asked if there was some other way to make an aisle rather than parking curbs and feels that Option #1 is too vague but #2 is too restrictive; there was discussion about these options.

Mr. Ryffel wondered why the aisles wouldn't be sufficient for walking since having to add a separate walkway would take away more space. He agrees that Option #2 is too strict and feels that staff should have more discretion on getting people from one place to another. Ms. Dalton suggested that this topic be discussed further when more of the members can be present as it seems to need more consideration; Mr. Ryffel and Ms. Shamp agreed.

Dr. Shockey stated that the ADA does require that the access way for disabled from the parking space to the premises may not require the person to walk or wheel behind parked vehicles.

The next item was page 4 with 2 options regarding disabled spaces in unpaved lots. Option #1 includes outlining spaces in blue; Option #2 addresses signs and parking by permit only, and the possibility of an Option #3, which would basically stipulate that "spaces must comply with all applicable accessibility requirements of law…" No show of hands for Option #1. There was short discussion about the differences. Ms. Dalton's choice would be #2 and Dr. Shockey advised that #3 would eliminate having to rewrite the code if the requirements of state law changed in the future. Option #2 had 3 members in favor and Option # had 1 in favor.

Another area for discussion is the 5 year vs. the 3 year limit and discussion took place about the time periods and what is required to dress up the sites. There was general consensus among the members present that the 3 year requirement is preferred, but this will be discussed further at the hearing.

The chair noted a member of the pubic was present and asked if he had any comment. The gentleman stated he would reserve comment until the hearing.

V. ADJOURN AS LPA/RECONVENE AS HPB

Motion: Mr. Ryffel moved to adjourn as LPA and reconvene as the HPB.
Seconded by Ms. Kay;

Vote: Motion passed 4-0.

Ms. Kay called the meeting to order at 10:00 AM. She said that the presentation of the next plaque will be at the beach school on either the 22nd or 26th of April, at lunch hour.

Ms. Kay advised that she talked with Theresa regarding the vistas on San Carlos Blvd. and there is no word yet as to the grant. Theresa will attend the HAC meeting on April 20th to discuss the grant process and funding for the signs.

Dr. Shockey advised that it is budget time now and any items the committee would like to see added should be forwarded to him for consideration. The order "wish list" has 17 plaques on it for recognition, at a cost of about $70.00 each, plus something for the brochure, for a total of about $1500.00 minimum. Dr. Shockey suggested that the vistas can be requested as a capital improvement in the budget process, and that may allow funds to come from a different source than the general fund.

Motion: Ms. Shamp moved to adjourn as the HPB and reconvene as the LPA.
Seconded by Mr. Ryffel.
Vote: Motion passed 5-0.

VI. ADJOURN AS HPB/RECONVENE AS LPA

Ms. Shamp called the meeting to order at 10:10 AM with same members still present.

VII. LPA MEMBER ITEMS AND REPORTS

Mr. Ryffel had nothing to report.
Mr. Moorefield had nothing to report.
Ms. Kay had nothing to report.
Ms. Shamp had nothing to report.

VIII. LPA ATTORNEY ITEMS

Ms. Dalton expressed good wishes to Mr. Van Duzer on behalf of all present and was pleased to say that his operation was a success. Ms. Shamp echoed these feelings and added that he is sorely missed by the group and all of them look forward to his returning very soon to stir things up on the beach once again. The LPA especially looks forward to hearing his famous words "I probably shouldn't say this, but…" as a sign that he is well again.

IX. COMMUNITY DEVELOPMENT DIRECTOR ITEMS

Dr. Shockey also agreed with these sentiments for Mr. Van Duzer and wished him a speedy return.

X. LPA ACTION ITEM LIST REVIEW

- Small scale amendment-hearing April 19 at 6:30 PM; Ms. Kay
- Gulf View- vacation hearing-TBD
- LPA Membership-Ms. Shamp; 2nd hearing on April 5th
- COP expansion on the beach-work session on April 14 at 11:00 AM and then joint meeting on May 5th at 9:00 AM to discuss. There was discussion about items on the agenda for the work session; Ms. Shamp will put this together. Mr. Ryffel asked for copies of the notes from prior discussion about this and open containers on the beach as he had some problems with some of the language proposed for this. It will be added to the discussions.
- Refuse containers-Dr. Shockey reported that this is going to the first hearing on April 19th; Ms. Kay
- Resolution 2010-0001 (Hooters)-May 3 at 9:00 AM

Continued Hearings

- Shipwreck – October 12

Future Work Activites

- ROW-Residential Connections; TBD
- Storm water; TBD
- Seasonal Parking-moves to a hearing on May 11; Dr. Shockey
- HPB budget request to Council; May 11-Ms. Kay
- Resolution for HPB Budget-next meeting

XI. PUBLIC COMMENT

Mr. Lee Melsick addressed the meeting. He commended the LPA for endorsing the refuse container code amendments and hopes that they can convey that to the council on Monday. He said that the Civic Association feels this is a very important amendment.

Mr. Melsick also announced that the Civic Association and the Yucatan Restaurant are joining in a so-sponsorship to raise money for the fireworks.
Public comment closed.

Next meeting dates are May 5, which is a joint workshop with council, at 9:00 AM. The following will be on May 11 at 9:00 AM; Mr. Moorefield requested an excused absence for May 11. The next meeting is June 8, 2010. Mr. Ryffel will be temporary vice chair in Mr. Van Duzer's absence.

Motion: Mr. Moorefield moved to appoint Mr. Ryffel as temporary Vice Chair until the return of Mr. Van Duzer.
Seconded by Ms. Kay;
Vote: Motion passed 4-0.

Ms. Dalton advised that Council is considering adding a new LPA member and there is currently 1 applicant, Mr. Kosinski.

XII. ADJOURNMENT

Motion: Mr. Ryffel moved to adjourn.
Seconded by Mr. Moorefield;
Vote: Motion passed 4-0.

Meeting adjourned at 10:35 AM.

Next meeting May 11, 2010 at 9:00 AM.

Adopted _____ with/without changes. Motion by _____
(DATE)

Vote:_____ _____

- End of document

Frank Shockey

From: Anne Dalton, Esquire [adalton@daltonlegal.com]
Sent: Thursday, May 06, 2010 8:12 AM
To: JCKosinski@cs.com; Carleton819@aol.com; gabe4v@aol.com; bvanduzer@comcast.net; shampj@aol.com; moorefieldcharles@yahoo.com
Cc: Frank Shockey
Subject: [Fwd: FW: More coordination needed between Lee County planning agencies, former growth official says]

Dear Planning Board members:

Dr. Joe Grubbs is the liaison from the City of Fort Myers Planning Board to Lee County LPA. At our meeting yesterday afternoon, he gave a thorough report of his attendance at the Lee County LPA meeting. These reports are going to be a monthly staple of our meetings, and it looks like the County LPA liaison will be attending the City's LPA meetings, although not every month.

As you may know, the County is starting its Evaluation and Appraisal Report cycle at this point and has hired a local consultant to assist the County with Comp Plan changes as well as the accompanying changes to its Land Development Regulations that will affect the entire county and all of its municipalities.

These reports from our Planning Board member are going to be a significant assistance to the City LPA's work. I would heartily recommend that the Town's LPA appoint a liaison to the County's LPA to build another bridge (no pun intended) and help both the County and the Beach to become less parochial in their planning efforts.
--
Anne Dalton, Esquire
2044 Bayside Parkway
Fort Myers, FL 33901
(239) 337-7900

---------- Original Message ----------
Subject: FW: More coordination needed between Lee County planning agencies, former growth official says
From: "Tom Babcock" <Tom@fortmyersbeachfl.gov>
Date: Thu, May 6, 2010 6:05 am
To: "Council" <council@fortmyersbeachfl.gov>
"Frank Shockey" <frank@fortmyersbeachfl.gov>
shampj@aol.com

To My Planning Friends,
If you have not seen the following article in today's NewsPress, please read and consider whether the Town should be participating in joint planning efforts suggested by Wayne Daltry. Tom

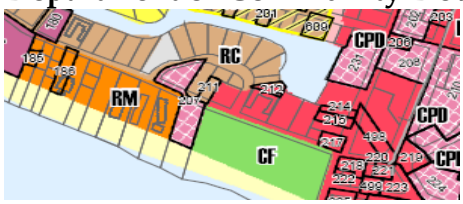
http://www.news-press.com/apps/pbcs.dll/article?AID=/201005051035/NEWS0101/100505022
<http://www.news-press.com/apps/pbcs.dll/article?AID=/201005051035/NEWS0101/100505022>

Tom Babcock, Councilman, Town of Fort Myers Beach

Please Note: Florida has a very broad public records law. Most written communications to or from Fort Myers Beach officials regarding Town business are public records available to the public and media upon request. Your email communications and your email address may be subject to public disclosure.

From: Tom [mailto:tom@fortmyersbeachfl.gov]

Town of Fort Myers Beach
Department of Community Development



MEMORANDUM

To: Local Planning Agency

CC: Anne Dalton, LPA Attorney

From: Frank Shockey, Community Development Director

Date: May 6, 2010

RE: Issues involved in local government regulation of signs

At the joint LPA and Town Council meeting on May 5, the need to revise the Town's sign ordinance (codified as Land Development Code Chapter 30), was discussed briefly and Council's expectation that this activity be near or at the top of staff and the LPA's priorities was made clear. Although actual draft language for your consideration is not fully ready, at this point it is useful to introduce the members of the LPA to some of the important concepts that are involved in regulating signs.

Signs are speech. What this means is that when a local government regulates signs, the regulations must meet different, higher standards in order to pass muster against a variety of challenges, than do most other forms of land development regulation. A typical land development regulation is afforded deference by courts, but where restrictions on speech, such as sign regulations, are concerned, this is no longer true. This is not an area of regulation in which it would be wise to test the boundaries of what it is permissible to regulate; nor is it an area in which recycling another community's timeworn regulations (under the assumption that those regulations have been challenged and tested) is advisable.

Some of the important concepts to become familiar with are:

- the distinction between commercial and noncommercial speech

- the "content" of speech, and neutrality with regard to content
- the "viewpoint" of speech, and neutrality with regard to viewpoint
- the ideal of a "substantial governmental interest"
- the issue of "prior restraint" upon speech
- the problem of giving individuals or boards "unbridled discretion" to approve or deny signs

I have selected the attached articles and chapters as fairly comprehensive overviews of these and some other related concepts. They are not specific advice about how we should proceed here in Fort Myers Beach, but they can help us to understand the issues that are involved in regulating signs so that we can proceed thoughtfully and carefully. **What we want to achieve by means of the sign ordinance is not more important than ensuring that the ordinance achieves it in a way that will be effective and legally defensible**.

Professor Mandelker is a law professor at Washington University who frequently consults with local governments who must defend their sign regulations against attacks by the outdoor advertising industry and other organizations with similar interests. James Claus and the other members of his family firm have worked on behalf of sign manufacturers and commercial property owners' interests, seeking a fuller recognition of the worth of signs to businesses. Professor Jourdan is a law professor who teaches land use planning law at the University of Florida.

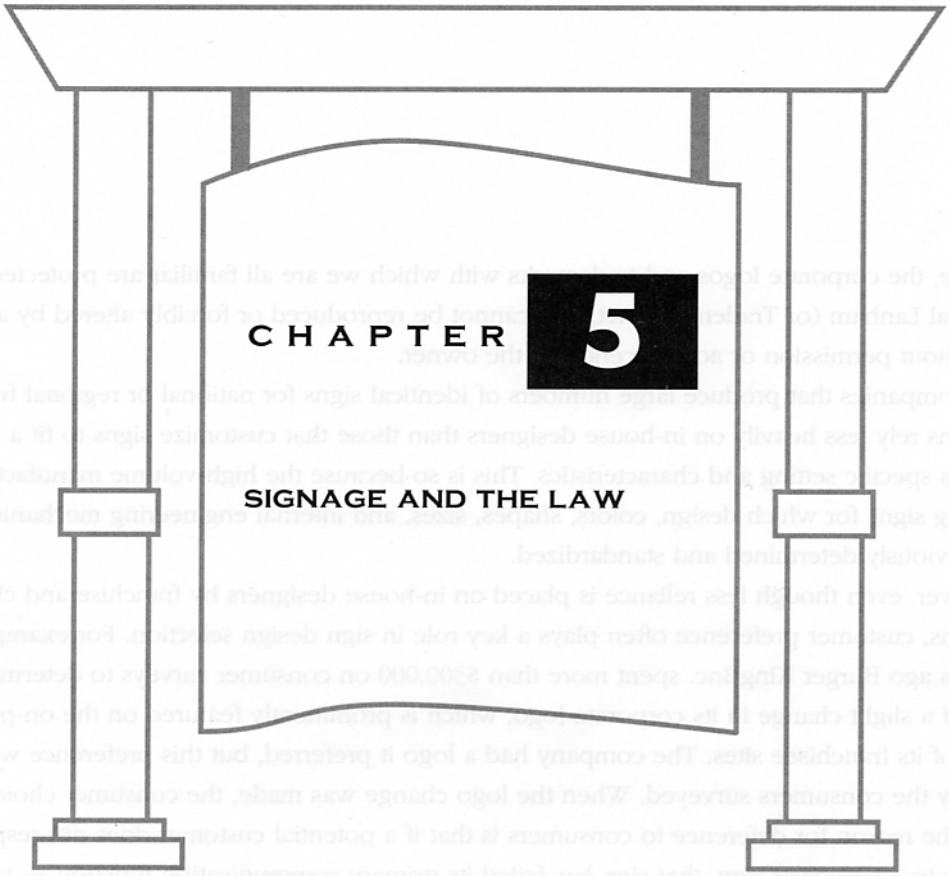
These articles and chapters are fairly dense and technical. LPA members should not be alarmed that these are difficult concepts and will take time to understand fully. At the May 11 meeting we should discuss these issues and try to work toward understanding them. Afterward I can seek additional materials to help hone everyone's understanding as we move forward. Once draft ordinance language is prepared as a starting point, the discussion and hearings can move productively toward forming and then implementing the LPA's policy recommendations, and the Town Council's policy decisions.

THE VALUE OF SIGNS

A GUIDE FOR PROPERTY APPRAISERS, BROKERS, LEGAL PROFESSIONALS, SIGN USERS AND MUNICIPAL PLANNERS

R. James Claus, Ph.D.
Susan L. Claus
Thomas A. Claus

The Signage Foundation for Communication Excellence, Inc.
Sherwood, OR



CHAPTER 5

SIGNAGE AND THE LAW

Legal issues arising from signage regulation generally focus on the First, Fifth, or 14th Amendments to the U.S. Constitution, and sometimes more than one Amendment is involved. Table 2 summarizes these issues as they relate to the three Amendments.

Table 2. First, Fifth, and 14th Amendments

Constitutional Amendment	Related Signage Issues
First Amendment • Freedom of Expression	-Restraints on commercial and noncommercial communications -Content control -Censorship
Fifth Amendment • Just Compensation	-Amortization -Abatement -Takings
14th Amendment • Due Process • Equal Treatment	-Discriminatory code administration, interpretation, and application

Although many questions regarding commercial communication and how it differs from other forms of communication are still not settled, for the commercial property appraiser, general knowledge regarding current judicial trends is very helpful. Several landmark cases should be noted for purposes of understanding basic legal principles and providing a conceptual framework upon which to base analyses and decisions.

The First Amendment

The First Amendment prohibits Congress from establishing any law that curtails the right to speak: "Congress shall make no law abridging the freedom of speech...." Subsequently, the U.S. Supreme Court ruled that this prohibition was also applicable to state and local governments through the 14th Amendment.

Although this command appears to be straightforward enough, the founding fathers neglected to clarify how to go about preventing abuses of the right to free speech or, for that matter, which kinds of speech were deserving of protection and which were not. Consequently, the U.S. Supreme Court over the years has produced a shopping list of balancing tests and speech categories. However, written or pictorial advertising on signs was not foremost in either mind or law until 1942, when the "commercial speech doctrine" made its appearance. To understand what happened then, and where it has led today, some background is in order.

Background

Prior to 1942, it did not occur to litigants to characterize their advertisements as "commercial speech" because advertising was thought of as an occupation, not a form of expression. Then in 1940, a New York City entrepreneur distributed a leaflet, which on one side advertised the exhibit of a scrapped navy submarine he owned, and on the other side protested the city's denial of wharfage facilities. He divided his leaflet in this way to avoid the city's **sanitary** code, which disallowed distribution of advertising handbills in the streets, but did permit distribution of political messages. The police put a stop to his promotional efforts, and he sued the city, charging that its sanitary regulation violated the due process clause of the 14th Amendment (*not* the First Amendment).

The U.S. Supreme Court found that his printed protest amounted to an attempt to dodge the sanitary code and held that his usage of the streets for advertising purposes was unlawful.[55] In its opinion, the Court did not address commercial speech or the First Amendment, but only the issue

[55] *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

of whether commercial conduct could be regulated by legislatures. However, its holding that commercial advertising receives no constitutional protection originated the distinction between commercial and noncommercial speech. This holding held sway until 1976, when the Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[56]

In *Virginia State Board*, a state regulation prohibited pharmacists from advertising the prices of drugs. Consumers of prescription drugs brought suit against the state, charging that the advertising ban violated the First Amendment, and denied them the benefit of learning the prices of drugs from advertisements. The core question was whether an advertisement, unaccompanied by any political expression, receives protection under the First Amendment. The Court responded that it did. Justice Harry Blackmun, writing for the majority, explained why.

First, Justice Blackmun noted that the profit motivation of a speaker did not remove speech from the protection of the First Amendment. Second, he stated that the public needed commercial information as much as, if not more than, it needed political information. Third, he posited that the success of a democracy and a free economy required that commercial information be freely disseminated and readily available. Fourth, he concluded that the First Amendment prohibited the government from preventing the flow of commercial information in order to affect the public's decision.[57]

The opinion further observed that "time, place, and manner" restrictions on commercial speech are permissible if the restrictions

1. are justified without reference to the content of the speech;
2. serve a significant government interest; and
3. leave open ample alternative channels for communication of the information.[58]

In the context of this three-pronged test for constitutionality, "**time**" refers to when a message may be displayed, "**place**" refers to where the message may be displayed, and "**manner**" refers to how the message may be displayed. The phrase "**without reference to the content of the speech**" means that the government cannot put time/place/manner limits on the message based upon what the message says or who is saying it, unless the message contains false or misleading

56 425 U.S. 748 (1976).

57 "Our pharmacist does not wish to editorialize on any subject...philosophical or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations, even about commercial matters. The idea he wishes to communicate is simply this: 'I will sell you X prescription drug at Y price'." Justice Blackmun, *Virginia State Board*, 425 U.S. at 771.

58 *Virginia State Board*, 425 U.S. at 771.

information, or otherwise proposes, an imminent threat to public health, safety, or welfare. The U.S. Supreme Court has ruled that those latter forms of expresssion are without First Amendment protection.

While the case granted First Amendment protection to commercial speech, the protection was weakened because the Court observed in a footnote that "commonsense differences" between commercial and noncommercial speech made commercial speech more regulable.[59] As a result of this judicial aside, in several cases following *Virginia State Board*, the Court drew on the "commonsense differences" footnote to afford commercial speech something less than full First Amendment protection.[60]

In 1980, a four-pronged balancing test was devised to determine whether a state regulation banning advertising violated the First Amendment. The case, *Central Hudson Gas & Electric Corp v. Public Service Commission*, 447 U.S. 557 (1980), arose from a challenge of a New York state law that totally prohibited public-utility advertising. The state asserted that such advertising would increase consumer demand, thereby leading to increased energy consumption, which directly contradicted the state's interest in energy conservation. The balancing test used to decide the issue is as follows:

1. The court must first ask if the commercial speech at issue concerns "lawful activity" and is not "misleading." (If the answer here is negative, then no protection is afforded, and the inquiry is ended.)
2. The court must ask if the government interest served by the regulation is substantial. (If the answer here is negative, then the First Amendment will be seen as invalidating the regulation, because speech should not be limited for insubstantial reasons.)

If the answer to both of the first two questions is affirmative, the court must then determine the following:

3. Does the regulation directly advance the government's interest?
4. Is the regulation no more extensive than necessary to serve that interest?

[59] *Virginia State Board*, 425 U.S. at 771–772 n.24.

[60] See, for example, *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). The Court opined that if commercial speech were granted full First Amendment protection, the protection granted to other forms of speech would be diluted and the First Amendment "devitalized." Ibid., p. 449.

In applying this test to the facts of the public-utility case, the Court found that the ban failed the fourth requirement because the state could achieve its goal by requiring that the utility include in its advertisements information regarding energy conservation. And while still paying deference to the "commonsense differences" between commercial and noncommercial speech, the Court clearly articulated more scrutiny of restrictions on commercial speech than the deferential standards of "reasonable" or "rational," or "not arbitrary and capricious," which normally had been applied to test the validity of government regulation of purely economic interests.

First Application of *Central Hudson*: Distinguishing Between On-Premise and Off-Premise Signs

At its first opportunity to apply the *Central Hudson* test and analysis, the Supreme Court experienced some difficulty. The case was *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981). There were many issues, and the resolution produced five separate opinions.

The crux of the case was the constitutionality of the city's sign ordinance, which permitted on-premise signs while banning off-premise signs, or outdoor advertising. The primary reasons advanced by the city for its ban on outdoor advertising structures were (1) they significantly degraded the attractiveness of the community, and (2) they compromised traffic safety. The ban included both commercial and noncommercial speech.

While none of the five opinions garnered a majority of the Court's members, the justices could agree unanimously that it was constitutionally permissible for a community to allow on-premise commercial signs but prohibit off-premise commercial signs. Such discriminatory treatment against off-premise commercial signage was viewed by the Court as a legitimate exercise of police powers to reduce sign clutter (or improve "aesthetics") and to promote traffic safety.[61] Nevertheless, the Court ruled 6–3 that the city's sign ordinance was unconstitutional overall, although the six justices in the majority couldn't agree why.

Two justices simply found that the ordinance failed the *Central Hudson* test because the city had not conclusively shown that the city's interest in aesthetics and traffic safety was substantial enough to justify a prohibition of signs in commercial and industrial areas. The other four justices joined in a plurality opinion that noted two flaws: (1) The ordinance favored commercial over noncommercial speech because commercial speech could be displayed by on-premise signs while noncommercial speech could not; and (2) the ordinance discriminated among various noncommercial messages by

[61] While the opinion states that promotion of traffic safety is a legitimate exercise of police powers, it was not a controlling factor in *Metromedia*, because all the litigants agreed there was no evidence that the off-premise signs complained of by the city caused traffic accidents. However, Justice White did address the issue by finding that the record was inadequate to show any connection between "billboards" and traffic safety, and therefore, the ban did not directly advance the city's interests in traffic safety. *Metromedia*, 453 U.S. at 510.

creating exceptions for some, but not all, such messages. Justice Byron White summed up his opinion by stating:

> It is apparent...that the ordinance distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content. Whether or not these distinctions are themselves constitutional, they take the regulation out of the domain of [content neutral] time, place, and manner restrictions.[62]

Further Guidance from the Court

Two cases following *Metromedia* provided additional guidance on parts three and four of the *Central Hudson* test.

In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the Court specified a more precise standard required by the third part of the test: Regulation of commercial speech must be "no more extensive than necessary to achieve the substantial governmental interest," and the "means [must be] narrowly tailored to achieve the desired objective."[63] While the Court did not go so far as to require the least restrictive means of regulation, it is implicit in the holding that more than mere reasonableness will be required.

In *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), the Supreme Court rejected a claim that the city's ban on commercial news racks was justified by the city's legitimate interests in the safety and attractive appearance of its streets and sidewalks, particularly since the ban would remove only 62 commercial news racks while leaving 1,500–2,000 noncommercial news racks (those dispensing only "newspapers") in place. The Court found that the benefits to be derived from the ban were "minute" and "paltry," given the city's supposed goal of achieving a reduction in the total number of news racks.

The Court also rejected the city's claim that its ban was justified because of the "low value" of commercial speech, finding as follows:

> In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertions that the "low value" of commercial speech is sufficient justification for its selective and categorical ban on news racks dispensing "commercial handbills." [64]

62 *Metromedia*, 453 U.S. at 516–517.

63 *Board of Trustees*, 492 U.S. at 480.

64 *Discovery Network*, 507 U.S. 410 at 428.

The Court also discussed the "reasonable fit" test:

> [The] regulation need not be absolutely the least severe that will achieve the desired end, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.[65]

Finally, the Court determined that the ban could not be considered a valid content-neutral regulation of "time, place, and manner" because the very basis for the regulation was the difference in content between commercial and noncommercial news racks.

Where the Law Stands Today: *Central Hudson* Altered; *Virginia State Board* Strengthened

In 1996, the Supreme Court delivered its most significant pronouncement on the status of commercial speech since its *Virginia State Board* decision 20 years earlier. The Court established that the First Amendment **does protect commercial speech**.

In *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court unanimously struck down a state law that prohibited the advertising of retail liquor prices except at the place of sale. The state argued that the ban was a necessary extension of its interest in reducing alcohol consumption among all drinkers.

The justices found it difficult to agree on the reason to strike down the law — the decision consists of an eight-part plurality opinion. Nevertheless, taking all the opinions together, the result expresses a significant change in how the Court views the First Amendment status of commercial speech, together with a willingness either to apply a more stringent test than *Central Hudson* or to apply *Central Hudson* with "special care." [66] Justice John Paul Stevens wrote:

> In recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity....[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.[67]

[65] Id. at 417, n. 13.

[66] "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Central Hudson*, 447 U.S. at 557, 566.

[67] *44 Liquormart*, Justice Stevens, 517 U.S. at 500–503.

Justice Clarence Thomas argued that when a government regulation works to keep information from the public in order to control the public's choices or conduct, the *Central Hudson* test is inapplicable. Adhering to the principles of *Virginia State Board*, Justice Thomas stated that (1) a democracy and free-enterprise economy require well-informed citizens free to make independent decisions, (2) the First Amendment protects the circulation of commercial speech, and (3) regulations which suppress information are not permissible, even if they pass a balancing test.

Additionally, Justice Thomas predicted that given the fourth prong of the *Central Hudson* test, there would almost always be a speech-neutral alternative available to advance a state's interest, and for that reason alone, restrictions on commercial speech would rarely, if ever, pass constitutional scrutiny.[68]

Before *44 Liquormart*, the *Central Hudson* balancing test arguably sanctioned the suppression of truthful commercial speech. After *44 Liquormart,* it seems clear that the government may no longer manipulate the marketplace by suppressing truthful speech about a legal product when less-restrictive, or speech-neutral, alternatives are available to further the government's goal. This point is illustrated in the Court's latest decision on commercial speech regulation, *Lorillard Tobacco Co., et al. v. Reilly,* 121 S. Ct. 2404 (2001).

In *Lorillard,* the Court struck down a Massachusetts law that imposed severe location restrictions on signs advertising tobacco products in an effort to discourage tobacco use by minors. Applying the *Central Hudson* test, the Court acknowledged that Massachusetts had a substantial, and even compelling, interest in preventing children from using tobacco. Notwithstanding this interest, however, the Court found that the regulations failed to meet *Central Hudson's* "reasonable fit" requirement because the state's effort to discourage underage tobacco use unduly impinged on advertisers' "ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." (Id. at 2427.) The Court further noted that "[I]n some geographical areas, these regulations would constitute nearly a total ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers". (Id. at 2425.)

Although the Court's rulings in *44 Liquormart* and *Lorillard* are not specifically attributed to the application of strict scrutiny, they come very close. Thus, for the present, it appears reasonably safe to assume that when judging the validity of **content-based** bans on commercial speech, the Court will apply *Central Hudson* with sufficient "special care" as to be the practical equivalent of strict scrutiny, thereby effectively equating the First Amendment status of commercial speech with that of noncommercial speech in such instances.

68 *44 Liquormart,* 517 U.S. at 508–513.

The Fifth Amendment

The Fifth Amendment contains two separate guarantees for property rights: the *due process* clause and the *takings* clause.

The due process clause — "No person shall...be deprived of life, liberty, or property, without due process of law" — protects citizens from government action that arbitrarily deprives them of a fundamental right and applies to both the act itself and the procedures incidental to the act.

The public taking clause — "... nor shall private property be taken for public use, without just compensation" — is designed to prevent the government from forcing individuals alone to bear public burdens that more fairly should be borne by the citizenry at large. Although these provisions were first intended to apply to the federal government only, for more than 100 years, the Supreme Court has interpreted the due process clause to make them applicable to the actions of state and local governments.

The Supreme Court has long held it permissible for local governments to divide a jurisdiction into zones, segregating one use from another, even if the zoning resulted in adverse economic consequences for affected land owners.[69] However, the regulation of land use through zoning may at times diminish value to the point that a "taking" has occurred. Compensation is most likely to be required for zoning or other land-use regulations, when the government action results in total or near total destruction of land value, or when the governmental regulation serves no valid public purpose.[70]

When signage is affected by a "taking," it is generally the result of a change in a law or regulation, which makes a previously legal and conforming sign suddenly illegal. Often the economic harm is substantial, yet many times this harm is not willingly recognized by governmental authorities. On-premise signage has suffered more from this lack of recognition than off-premise signage, largely due to federal legislation mandating just compensation for those property owners and interests most directly affected by the Highway Beautification Acts of the 1950s, 1960s, and 1970s.

69 The seminal case is *Village of Euclid v. Ambler Realty,* supra, Chapter 1.

70 See *City of Monterey v. Del Monte Dunes, supra,* Chapter 1. See also *Lake Nacimiento Ranch Co. v. San Luis Obispo,* 841 F. 2d 872, 877 (9th Cir. 1987), which held that the court may review the owner's investment expectations when determining if a regulation denies an owner economically viable use to the extent that a taking has occurred; and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), which held that a compensable taking occurs if there exists no rough proportionality or nexus between the regulation as it impacts the landowner and the government's asserted interest.

71 See *National Advertising Co. v. City of Denver,* 912 F. 2d 405 (9th Cir. 1990), upholding a city ban limited to off-premise commercial signs.

Off-Premise Signs/Outdoor Advertising

As discussed in Chapter 1, it is constitutionally permissible for either the federal government or a state or local government to require the removal of an outdoor advertising structure.[71] The First Amendment does not come into play unless the removal (or severe restriction) violates **content neutrality** requirements.[72]

The government's reason for removal may be related to the Highway Beautification Acts or pursuant to a state or local government exercising its police powers to promote public health, safety, and welfare — generally perceived in signage regulation as related to aesthetics or traffic safety, or both. It follows, of course, that if a government can completely ban off-premise or outdoor advertising signs, it can also severely restrict the signs it allows to remain. Generally, such restrictions limit sign size, height, numbers, and placement.[73]

What is **not** permissible under federal statutes is the failure to pay just compensation for the removal of off-premise signage as part of compliance with the Highway Beautification Acts or pursuant to any other acquisition involving federal funding. The relevant federal legislation is the "Uniform Relocation Assistance and Real Property Acquisition Policies Act" of 1970 (commonly called the 1970 Removal and Rehabilitation Act).[74] In pertinent part, Subchapter III, the "Uniform Real Property Acquisition Policy," 42 U.S.C. Section 4652, provides as follows:

> (a) Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put.

72 See *Metromedia, Inc. v. City of San Diego, supra.* Courts have followed *Metromedia* by striking down off-premise sign regulations that make distinctions among forms of noncommercial speech or that allow exceptions for certain commercial messages, but not a general exception for noncommercial messages. For example, in *National Advertising Co. v. Town of Babylon,* 900 F. 2d 551 (2d Cir. 1990), the Court struck down an ordinance that impermissibly discriminated against noncommercial speech. In contrast, regulations that exempt all noncommercial speech from a general ban on off-premise signage or that do not include noncommercial messages in the definition of signage have been upheld. For examples, see *Major Media of the Southeast v. City of Raleigh,* 792 F. 2d 1269 (4th Cir. 1986); and *City of Cottage Grove v. Ott,* 395 N.W. 2d 111 (Minn. Ct. App. 1986).

73 See *National Advertising Co. v. City of Raleigh,* 947 F. 2d 1158 (4th Cir. 1991), holding that an ordinance enacted to promote aesthetics and safety by severe restriction of size of outdoor structures is a legitimate exercise of police powers, even if the effect of the ordinance is to prohibit all such advertising. See also *National Advertising Co. v. Village of Downers Grove,* 561 N.E. 2d 1300 (Ill. App. 1990), upholding size and height limits for billboards in certain districts; *City of Sunrise v. D.C.A. Homes Inc.,* 421 So. 2d 1084 (Fla. 4th DCA 1982), upholding an ordinance restricting off-premise signs to one per subdivision; *Outdoor Systems, Inc. v. City of Mesa,* 997 F. 2d 604 (9th Cir. 1993), upholding an ordinance restricting off-premise signs to certain designated locations; *Messer v. City of Douglasville,* GA, 975 F. 2d 1505 (11th Cir. 1992), upholding an ordinance barring billboards in historic districts; and *Rzadkowolski v. Village of Lake Orion,* 845 F. 2d 653 (6th Cir. 1988), upholding restriction of off-premise signs to industrial zones.

74 Pub. L. No. 91-646, 84 Stat. 1894 (1971). (Codified as amended at 42 U.S.C., section 4601, et seq.)

(b) (1) for the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right of obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term.

Many states have enacted statutes implementing the language of the above provision.[75] On the other hand, some states have simply refused to acquire billboards in federally funded acquisition or condemnation projects, asserting either that the sign is not a "structure" or that the sign owner is not a "tenant" as defined by Subchapter III of the Uniform Act. These states restrict compensation to relocation expenses, per Subchapter II of the Uniform Act which provides for payment of certain minimum relocation costs and related expenses of a "displaced person." [76]

Federal courts that have addressed these issues say that the phrase "structures, or other improvements located upon real property" is broad enough to generically include billboards, and that any lawful occupancy (including a leasehold interest) qualifies a sign owner as a "tenant."[77]

In state cases that distinguish between real property and personal property when determining compensation, classification of a particular outdoor advertising structure depends upon the facts of each individual case. Therefore, no absolute rule can be articulated for any state that outdoor advertising structures are either real property or personal property, or a trade fixture that is real property while in place, but personal property upon removal by the tenant.[78]

[75] For example, Colorado, Georgia, Iowa, Maine, and Montana statutes impose the rule only with regard to federally funded acquisitions, while Alabama, Alaska, Arizona, Delaware, and Hawaii impose the rule without limitation.

[76] The following cases have held that the term "structures" in the Uniform Act does not include billboards: In Minnesota, *State v. Card*, 413 N.W. 2d 577 (Minn. Ct. App. 1987) held that the "sign owner was entitled to receive relocation costs, but state not required to condemn signs." In North Carolina, *National Advertising Co. v. North Carolina Department of Transportation*, 478 S.E. 2d 248 (N.C. Ct. App. 1996) held that "if the owner is allowed to remove any...permanent improvement or fixtures from the property, the value thereof shall not be included in the compensation award, but the cost of removal shall be considered as an element to be compensated."

[77] See *United States v. 40,000 Acres of Land in Henry Co.*, 427 F. Supp. 434, 440, 441 (W.D. Mo. 1976); and *Whitman v. State Highway Commission*, 400 F. Supp. 1050 (W.D. Mo. 1975).

[78] Canada does not offer the same legal protections to signage as the United States. For example, while the Canadian government may offer compensation for the "public taking of private property," often in amounts more liberal than provided by U.S. compensation schedules, compensation is not legally required. Instead, Canada generally will offer compensation as a goodwill gesture or ethical obligation. This is not to say that the United States does not often act for similar reasons. But regardless of whether it is the right thing to do, in the United States, compensation must be paid per federal mandate.

On-Premise Signs

Compensation for regulatory downsizing, removal, or ban of a previously legal sign, or for condemnation of a site and its accompanying signage, is relatively new to on-premise signage. However, as it becomes more and more apparent that on-premise business signs contribute significantly to business success, it may also become more and more apparent — at least to the courts — that municipalities seeking to retroactively render a sign nonconforming or "take" a sign in a condemnation proceeding may owe compensation to the owner for provable consequential loss of business revenues and diminution of real property value.

Many community officials and administrators either fail or refuse to take into account the contributory value of a sign to its site when considering the economic impact of downsizing or outright loss of a sign. The following case offers one example.

Condemnation Proceedings: Caddy's v. Hamilton County, Ohio *(a lower court case, no West Law cited)*

In the more traditional condemnation case under eminent domain theory, where an on-premise business sign accompanies the demise of a commercial building or other improvement on the subject site, it is increasingly likely that the sign may be considered separately for purposes of assigning a value and paying compensation accordingly. The case of *Caddy's v. Hamilton County, Ohio*, is one such example. This case was decided by jury trial in a lower court in Hamilton County, Ohio — a state that recognizes the visibility component of a commercial site as a partial real-estate interest.

In *Caddy's*, the business's building was to be taken under exercise of eminent domain to make way for a municipal stadium. The county tax assessor placed a value of $1.3 million on the land and building and no value on the business's signage, which had been "grandfathered" in and was highly visible to adjacent streets and highways.

Because Caddy's very distinctive, 3,000-square-foot wall murals and roof sign were nonconforming under present codes, they could not be duplicated on the replacement buildings used by the county as comparable relocation sites. Neither did the comparable relocation sites have equal or similar exposures to the freeway. Therefore, if income levels were to be maintained after relocation, alternate forms of commercial communication, such as outdoor advertising or television and radio commercials, would have to substitute for the lost on-premise signage visibility to potential customers.

During trial on the issue of just compensation for lost visibility, expert testimony established that the cost of visibility replacement in the form of outdoor advertising was $180,000 per year. This

number was based on how much the subject signs would have rented for, had they been outdoor advertising instead of on-premise signage.

Using a capitalization rate of 10%, the jury awarded $1.8 million for the value of the lost on-premise signage — an amount which, if invested at 10% interest per annum, would permit the owner, annually, to afford the cost of off-premise (or outdoor advertising) exposures for a new location lacking on-premise signage visibility.

The jury also awarded $1.3 million for the real property and building. Thus the combined award gave the owner sufficient money to not only replace land and building, but also protect the former income stream with funds, which, if prudently invested, would annually cover replacement advertising expenses without adversely affecting sales volume.

Amortization in "Regulatory Takings" Context

Under a retroactively applied sign code, in order to avoid paying compensation for the removal of a previously conforming sign, many communities have resorted to **amortization** — a term with multiple meanings. To effectively address its impact in signage regulatory terms, one must first understand what is meant by the term, and what is not.

History

Under old English common law, the word "amortize" was used to describe alienation of property held by a fictitious entity (or in *mortmain*). In general usage today, the term refers to the payment of a debt or other liability through use of installment payments. For debts incurred to purchase an asset, at the end of the amortization or payback period, the asset is owned free and clear, and cannot be legally taken away without payment of compensation, unless by voluntary consent of the owner (a gift). Further, in the case of an **appreciable** asset (at least in theory), the owner will recapture his or her initial investment, **plus** any appreciation that may have accrued during ownership, upon a sale or a government taking of the asset.

As an accounting procedure, amortization also means writing off an expense by prorating it over a certain period. This occurs generally in the case of a **depreciable** asset (such as a car used for business purposes). Under tax codes, the cost of the asset may be recovered over its theoretical life through downward adjustments in reportable income. At the end of the depreciation period, the asset may or may not be worth more than its original cost; however, whatever the original cost, during the asset's depreciable life, again theoretically, it has been fully recovered. Further, once the asset's economic life is over, it is usually replaced by a similar asset, which is then depreciated for tax purposes all over again. Anyone acquiring the asset during its depreciable life may continue

the depreciation schedule. The cycle of savings continues until the taxpayer/owner **voluntarily** terminates his or her business need for depreciable assets.

In the land-use (or zoning) and regulatory context, the term amortization carries none of the more common associations. One succinct definition in this regard was provided by a Delaware court in 1984: "...simpl[y]...the amortization of a nonconforming use contemplates the compulsory termination of the nonconformity at the expiration of a specified period of time — the time period, in theory, being equal to the useful economic life of the nonconformity."[79]

Thus, because legal, political, or "fairness" concerns make it impractical for previously conforming signage to be summarily terminated, the governing body attempts an intermediate approach. The offending sign (or land use) is allowed to continue for a **reasonable** time, supposedly mirroring the sign's remaining life, during which time it is assumed the sign owner (portrayed as an investor) will recoup initial capital expenditures (costs to obtain and place the sign), and that such recoupment is sufficient compensation for not only the loss of a previously conforming sign, but also the cost to remove (or downsize) it.

Police Power Issues: Abatement vis a vis Amortization

Generally, actions undertaken on an emergency basis to protect public health or safety are deemed "abatement" actions, and are predicated upon a perceived **imminent** threat to the public; that is, the use is dangerous (or a nuisance) per se. In abatement proceedings, a use may be immediately terminated without preliminary hearing and, in some cases, without subsequent compensation.[80]

On the other hand, signage regulation that takes away a previously conforming sign is seldom predicated upon a dangerous situation or nuisance per se, although restrictive sign regulation is sometimes defended as necessary to promote public safety (usually traffic safety).

In the context of signage regulation, amortization is the end product of an extraordinary exercise of police power. It begins with the initial permit, followed by a period of conformity to the existing code, and ends with what is essentially a unilateral avoidance of a permit agreement by a public body, without recourse for the affected sign owner or user. The owner is even required to absorb the cost of removal. If the sign remains after becoming illegally nonconforming, the sign owner will be subjected to a penalty, which is sometimes severe. The possibility of large fines and/or

79 *New Castle v. Rollins Outdoor Advertising, Inc.*, 459 A. 2d 541 (Del. Ch. 1983), revd. 475 A. 2d 355 (Del. Sup. 1984).

80 See *Mugler v. Kansas*, 123 U.S. 623 (1887).

incarceration for failure to comply in a timely manner with a sign code is particularly harsh when the code is **retroactively** applied to a previously legal activity.[81]

Compensation for Loss Due to Exercise of Police Power: Federal Law vis a vis State Law

Outside of signage-regulatory or zoning contexts, amortization theory is utilized to stimulate investment, **not** to calculate compensation for confiscation of property or infringement of a property right. Despite this dichotomy, many public officials and land-use planners hold strongly to their conviction that the theory makes sense. Additionally, many of these individuals believe the concept is legally defensible at both state and federal court levels, despite the fact that the Highway Beautification Acts and the 1970 Removal and Rehabilitation Act do not permit amortization as part of compensation for a loss of signage due to a federal program or receipt of federal funding.[82]

Several states (such as Arizona, Colorado, Georgia, New Hampshire, and Minnesota) specifically reject amortization of signs that become nonconforming following a change in the code. In these states, when a governmental body wishes to restrict or remove a presently conforming sign, the owner must be monetarily compensated. In other states, specific statutes or case law make the use of amortization problematic, at least in specific circumstances.[83]

Other states (such as Arkansas, Connecticut, Florida, Maryland, and New York) apparently approve of amortization as a form of compensation for lost signage. However, the legislative trend in states that have thoroughly investigated the issue is to restrict amortization as appropriate compensation for sign downsizing, displacement, or removal by means of retroactive enforcement. Thus, before undertaking any legal analysis of an amortization statute or issue, one must first determine which law is applicable — state, federal, or both. (Amortization is revisited in Chapter 6.)

[81] See also *Ackerly Communications of Massachusetts Inc. v. City of Cambridge*, 88 F. 3d 33 (1st Cir. 1996) where a zoning ordinance, in conjunction with state law, permitting nonconforming on-premise signs containing noncommercial messages to remain standing, while requiring removal of nonconforming off-premise signs containing noncommercial messages, was held in violation of the First Amendment; *Metromedia*, supra.

[82] For the most part, the 1978 amendment to the Highway Beautification Act put an end to amortization of billboards on all interstate and federal-aid primary highways throughout the nation, not because it preempted state law, but because every state was required to amend its own outdoor advertising regulations in order to retain full federal funding (see U.S.C. section 131(g)). Violations of the Highway Beautification Act are sanctioned by denying federal highway construction and maintenance funds to the offending jurisdiction.

[83] For example, in California, the enforced removal of signage may be enjoined in cases where substantial harm to the primary activity as zoned will occur because of topographical constraints or other factors which impair the activity, including loss of adequate signage. See [California] Business and Professions Code 5499; also see, *Denny's Inc. et al. v. City of Agoura Hills*, 66 Cal. Rptr. 2d 382 (Cal. App. 1997).

The Accessory-Use Doctrine and On-Premise Signs: A Corollary to the Fifth Amendment

Most land-use zoning seeks to place limitations upon the uses of real property, either by specific delineation or exclusion, elimination, or revocation. The end result is the creation of a zone in which clearly defined primary or principal uses, together with lesser or accessory uses, may lawfully occur. Accessory uses are almost always necessary to the success and full enjoyment of designated primary uses. Burdensome limitation or restriction of an accessory use may result in failure of a site as a whole.

Off-premise signs often are widely viewed as significantly degrading the attractiveness of communities, particularly in the case of large outdoor structures. Thus, communities often seek to ban off-premise signs in all zones, and generally succeed without running afoul of the First Amendment.[84]

By contrast, on-premise signs, although regulated, are never completely banned, because it is evident to most that they are a practical and commercial necessity for the business or business site to which they are attached. In all incorporated American towns and cities, businesses and their on-premise signs are located in zones or districts that generally are designated as commercial and provide for supporting or accessory uses, of which sign use is one.

The separation of uses into "principal" and "accessory" is grounded in the **accessory-use doctrine** — a well-established legal precedent premised upon recognition that it is not possible to plan for every use that may occur on a given site. Therefore, the local government will first establish a primary-use zone, and secondarily, and in general terms, address incidental or accessory uses that commonly accompany the primary use. Customarily, the accessory-use provisions will permit all uses that are necessary to, or commonly appear with, the designated primary use, and that are not specifically prohibited elsewhere in the regulatory scheme.

The landmark case establishing the application of the accessory-use doctrine to on-premise signage is *United Advertising Corp. v. Borough of Raritan.*[85] The opinion was written by Justice William P. Brennan before his appointment to the U.S. Supreme Court.

Although this case dealt with a New Jersey statute regulating billboards, Justice Brennan's opinion established an important point regarding on-premise signs. The on-premise sign (referred to by

[84] Although regulations based on the distinction between on-premise signs and off-premise signs are content-based, courts accept as rational a local determination that on-premise signs are an inseparable part of the business use of a piece of property, while off-premise advertising is a separate use unto itself that may be treated differently from on-premise signage. Therefore, efforts to ban off-premise signs are generally acceptable under First Amendment content analyses, as a valid exercise of police powers in the protection of community aesthetics.

[85] 11 N.J. 144, 93 A. 2d 362 (1952).

Justice Brennan as a "business" sign) is part of the business, or, in other words, an accessory use. Brennan wrote:

> The business sign is in actuality a part of the business itself, just as the structure housing the business is part of it, and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard.[86]

In arguments over whether compensation should be paid for the retroactive downsizing or removal of a formerly legal sign, the accessory-use doctrine may be invoked as a legal tool to assist in the establishment and recovery of monetary damages.

The 14th Amendment

In regard to on-premise signage regulation, the 14th Amendment commonly enters the picture at the permit counter. To pass constitutional muster, the permitting or licensing procedure (or conditional-use or variance-request procedure) must, at a minimum, be structured to assure easy understanding of objectively based requirements. In addition, the permitting process must provide reasonable application fees, a speedy decision on the application by the permitting authority, and recourse to automatic and swift appeal of any denial. A failure to provide any of these minimum procedural requirements can give rise to a claim that the process violates the due process clause of the 14th Amendment.

Because a sign is essential to communicating a business's presence and effective competition in the marketplace, in some circumstances a failure to provide minimum due process requirements can give rise to a "prior restraint" issue. Prior restraint occurs when the right to communicate is subject to the prior discretionary approval of a government official that may be exercised to censor speech. A prior restraint issue may arise under both the First and 14th Amendments.

To the degree that decisions about sign regulation are not based solely on objective quantitative criteria, the prior restraint question is always potentially present in the sign-permitting process. This potential makes it incumbent upon the official to act pursuant to clearly defined standards that (1) strictly limit the official's discretion, and (2) guarantee resolution of application issues within a short period of time.

86 Id. at 365.

In *Freedman v. Maryland*, 380 U.S. 51, 59 (1965), the Supreme Court ruled that an ordinance establishing a prior restraint had to provide the following procedural safeguards:

1. The decision whether to issue a permit must be made within a specific brief period.
2. The scheme must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.
3. A censorship scheme must place the burden of instituting judicial proceedings and proving that the expression is unprotected on the censor.[87]

Although the Supreme Court has not yet applied the prior restraint doctrine to a specific sign application or permit issue, several lower courts have applied the doctrine in the context of sign regulation. For example, in *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F. 3d 814 (9th Cir. 1996), the Court struck down an ordinance where the permitting official was given unbridled discretion to approve or deny a sign permit. In that case, the only standards for granting a sign permit were, "[the sign] will not have a harmful effect upon the health or welfare of the general public...[and] will not be detrimental to the aesthetic quality of the community."

In *North Olmsted Chamber of Commerce, et al. v. City of North Olmsted*, 86 F. Supp. 2d 755 (N.D. Ohio 2000), the Court determined that the city's ordinance lacked sufficiently narrow, objective, and definitive standards. Therefore, the ordinance gave government decision-makers unfettered discretion in issuing a permit, and further, did not provide any of the procedural safeguards required by the U.S. Supreme Court when a prior restraint is found. (See *Freedman*, supra.) In summary, the Court found that "a system of prior restraint that fails to provide procedural safeguards does not comport with the Constitution." (Id. at 778.) For this, and also violations of content-neutrality and equal-protection requirements, the Court found the ordinance unconstitutional in its entirety.

Federal Trademark Law: Equal Protection for All (The 1958 Lanham Act)

The federal Lanham Trademark Act (15 U.S.C., section 1051, et seq.) protects federally registered names, marks, emblems, slogans, and colors, if included in the registration. The first clause of Section 1121 (b) of the Lanham Act reads as follows:

87 See also *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), holding that "[a] law subjecting the right of free expression in publicly owned places to the prior restraint of a license, without narrow, objective, and definite standards, is unconstitutional, and a person faced with such a law may ignore it and exercise his First Amendment rights." Pages 150–151.

No state or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

While it is well accepted that a governing entity may regulate signs (subject to constitutional protections), the plain language of the Lanham Act prohibits federal, state, and local governments from requiring alteration of a registered trademark or copyrighted slogan, as registered.

An oft-cited case addressing the question is *Sambo's of Ohio v. City Council of Toledo*, 466 F. Supp. 177 (N.D. Ohio 1979). In *Sambo's*, the plaintiff enterprise initially sought and received a minor zone change to operate a newly constructed restaurant; it then requested a sign permit for that restaurant. The city would only issue a permit if Sambo's agreed to change its registered trade name; this decision was based on the city's assertion that the name represented racial discrimination. The Court determined that the city's effort to require an alteration of a federally registered trade name on alleged racial grounds was unwarranted, overly broad, and in violation of **both** First Amendment guaranteed rights and the Lanham Act.

In finding against the city, the Court noted that if the registered name had to be changed on the sign, it would also prevent the plaintiff from advertising or using the name in other media advertising or even inside the restaurant. The Court further declared that one cannot have freedom of speech if only innocuous utterances are permitted. (Id. at 180.)[88]

A more recent case involving Section 1121 of the Lanham Act is *Blockbuster Video Inc. & Video Update v. City of Tempe (AZ)*, 141 F. 3d 1295 (9th Cir. 1998). In this case, the city required that mall signage conform to certain color schemes as set out in a comprehensive sign plan approved by the city in concert with shopping center owners. One of the plaintiffs, Video Update, had trademark colors that did not comply with the city's color scheme, and the city denied a sign permit unless the business agreed to change its red letters to white. The other plaintiff, Blockbuster Video, received permission to display its torn-ticket logo as registered, but

88 See also *Texas v. Johnson*, 491 U.S. 397, 414 (1989), stating that "[o]ne bedrock principle underlying the First Amendment is that government cannot prohibit expression of an idea simply because society finds [it] offensive or disagreeable."

did not receive approval to install its other registered mark — a blue awning.

In a majority opinion, the Court held that a municipality may not enforce zoning regulations if those regulations require the alteration of a registered mark. In reaching this decision, the Court reasoned that if the law recognizes that the function of a trademark is to convey, via a symbol, recognition of a commodity by potential customers, then it must have a uniform appearance, not only in design, but also in color.[89] Further, the Court stated, if customers were to see a store with a pink and white sign instead of the nationally recognized blue and yellow torn theater ticket, they might think that the store was not a real Blockbuster store. (Id. at 1300.)

With respect to Blockbuster's request to construct its blue awning, the Court did not extend protection under the Lanham Act to the request, finding that "[a] zoning ordinance may, however, **preclude** the display of a mark...[p]recluding display of a mark for zoning purposes is permissible; requiring alternation of a mark is not." (Id. at 1300; emphasis added.)

Although the Ninth Circuit Court deferred to what it believed was the "plain meaning" of the Lanham Act in the Blockbuster case, a correct interpretation of the Act is not yet settled, as evidenced by a case arising in the Western District of New York — *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F. 3d 12 (2d Cir. 1999).

In this case, the Second Circuit Court relied extensively on legislative history and determined that Congress never intended that section 1121(b) should interfere with uniform aesthetic zoning requirements, so long as the subject ordinance did not require actual alteration of the trademark. Therefore, the Court held that an ordinance limiting sign-color typefaces and decorative elements for aesthetic reasons was not in violation of the Lanham Act. In so ruling, the Court found that the subject regulations "simply limit color typefaces and decorative elements to certain prescribed styles [and thus]...have no effect on businesses' trademarks....limit[ing] only the choice of an exterior sign at a particular location. As such, though entirely disallowing the use of a registered trademark in carefully delimited instances, these regulations do not require 'alteration' at all." (Id. at 15.)

While the two cases above differ on interpretation of the Lanham Act, they do agree on one point: Regulations that totally ban the display of registered trademarks or logos do not violate the Lanham Act. This is not to say, however, that such a prohibition could withstand judicial scrutiny under First Amendment content-neutrality requirements, particularly if the only articulated reason

89 For example, customers recognize a particular brand of insulation by its pink color; see *In re Owens-Corning Fiberglas Corp.*, 774 F. 2d 1116, 1127 (Fed. Cir. 1985).

for the prohibition was based on aesthetics. Unfortunately, neither *Blockbuster* nor *Lisa's Party City* raised or discussed First Amendment issues.[90]

Temporary Signs: A Class by Themselves

A common definition for a temporary sign is "a sign announcing special events or sales, the sale or rental of property, political positions, or other matters, and intended for use for a limited period of time." Temporary signs may be portable, such as a sandwich board, or attached, such as a window sign.

Local governments often enact special restrictions and prohibitions on such signs, generally based on the argument that the haphazard use of these signs is detrimental to several legitimate governmental interests, including aesthetics, and traffic and pedestrian safety. Although regulations may be struck down if a court finds they are irrational or overly restrictive, the present judicial trend is to permit restrictions if (1) they are reasonable on the grounds of safety and aesthetic objectives, and (2) they do not overly censor the free flow of marketplace information or, even more importantly, the expression of political opinion or belief.

Regulation of Real Estate Signs

In *Linmark Associates. Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Supreme Court held that a local government may not prohibit the use of temporary real estate signs in residential areas because such a prohibition unduly restricts the flow of information. This is not to say, however, that a local government may not place reasonable restrictions on the size, number, and location of real estate signs in furtherance of a legitimate interest (such as aesthetics). However, the government must convince the court that its regulations are necessary to achieve a legitimate governmental interest or its regulations were not aimed at curtailing information.

For example, in *South-Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F. 2d 868 (7th Cir. 1991), cert. denied sub nom. *Greater South Suburban Board of Realtors v. City of Blue Island*, 502 U.S. 1074 (1992), the Seventh U.S. Circuit Court of Appeals upheld restrictions on size, placement, and number of realty signs to protect the aesthetic interests of a wooded semi-rural village.

Conversely, in *Citizens United for Free Speech v. Long Beach Board of Commissioners*, 802 F. Supp. 1223 (D.N.J. 1992), the federal trial court held that an ordinance permitting "for sale" signs,

[90] While a ban of all trademark displays in a municipality may not violate the Lanham Act, it is unlikely that any municipality would undertake such a step, for to do so would seriously erode local business revenues, employment, and tax bases, and further, would incite massive legal challenges by affected businesses. Certainly, a First Amendment argument would be raised by the business community under such circumstances.

but prohibiting "for rent" signs during certain periods was invalid because the government presented no convincing evidence that the differing (or discriminatory) regulatory treatment achieved its claimed interest in aesthetics.

A similar aesthetic argument was raised by the city of Euclid, Ohio, to justify a city ordinance restricting real estate signs to window display only. The Sixth U.S. Circuit Court of Appeals struck down the ordinance based on its findings that the ordinance was neither narrowly tailored to achieve its claimed interest in aesthetics, nor did it provide an adequate alternative channel of communication. The decision distinguished the *South-Suburban* case by observing that Euclid's decision to restrict lawn signs was not motivated by a desire to improve the physical appearance of residential neighborhoods, but instead, was principally intended to stem the proliferation of real estate signs in some neighborhoods — a proliferation the city deemed as conveying "negative" messages about the city and its residents.[91]

While local government may not prohibit temporary real estate signs on private property, it may totally prohibit the posting of private signs on public property — either in the public right-of-way or attached to public property.[92] However, the prohibition should extend to all private signs, or the ordinance may run afoul of content-neutrality requirements and be subject to strict scrutiny.

Regulation of Political Signs

Local governments argue that since they can neither prohibit nor allow **all** signs, a sign ordinance needs to make distinctions among various categories in order to promote traffic safety, achieve aesthetic objectives, or reach other legitimate goals. The courts have yet to articulate a firm rule or standard that will apply in all cases concerning ordinances that characterize signs by their content or ideas. But in the area of politically based noncommercial speech, the Supreme Court offers substantial guidance in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

In *Ladue*, the plaintiff, Gilleo, was prohibited from displaying an antiwar sign on her lawn by a city ordinance that banned all residential signs except those within 10 exempted categories; her sign did not fit into one of these categories. The Court ruled that the ordinance violated the First Amendment rights of homeowners because (1) it totally foreclosed their opportunity to display political, religious, or personal messages on their own property via an important and distinct

91 *Cleveland Area Board of Realtors v. City of Euclid*, 88 F. 3d 382 (6th Cir. 1996); also see, *Sandhills Association of Realtors, Inc. v. Village of Pinehurst*, 1999 W.L. 1129624 (MDNC 1999).

92 See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

medium of expression — lawn signs, and (2) the city had failed to provide adequate substitutes for such an important medium.

Although the Court accepted the city's contention that the ordinance was a content-neutral time, place, and manner regulation and was only intended to prevent "visual clutter," the Court held that a prohibition on noncommercial speech at one's own home could not be sustained under even a minimal level of scrutiny, and expressed the opinion that the city could find "more temperate measures" to satisfy its regulatory goals.

For example, the Court noted that "[d]ifferent considerations might apply, if residents attempted to display commercial billboards on their property...." (512 U.S. at 50.) Therefore, the holding in *Ladue* does not disturb the rule articulated previously in *Metromedia* that communities may prohibit off-premise billboards, but permit on-premise signs, so long as on-premise signs are not restricted only to commercial messages.

With regard generally to political or election signs, an ordinance prohibiting such signs is clearly unconstitutional, and courts have struck down prohibitions on political signs that applied in both residential and other districts.[93]

Courts have also struck down sign ordinances that discriminated among different political messages. For example, in *City of Lakewood v. Colfax Unlimited Association*, 634 P. 2d 52 (Colo. 1981), the Colorado Supreme Court invalidated an ordinance that restricted the content of political signs to the candidates and issues being considered in an upcoming election, finding that the ordinance violated the principle that "[g]overnment may not set the agenda for public debate." (Id. at 62.)

There is some disagreement among courts regarding the placing of limits either on numbers of political signs that may be displayed or the time period they can be displayed. However, there seems to be consensus that reasonable time and number limits may be imposed as part of a "comprehensive" program to seriously address aesthetic issues.[94]

Courts have also upheld content-neutral time limits placed on all temporary signs. For example, in *City of Waterloo v. Markham*, 600 N.E. 2d 1320 (Ill. App. 1992), a state appellate court upheld an ordinance limiting temporary signs to 90 days against claims that the ordinance unnecessarily restricted political speech and favored commercial over noncommercial speech.

While there is no definitive directive regarding time/place/manner regulation of temporary signs, one clear conclusion can be drawn from the above cases: Temporary on-premise signs containing

[93] See *Fisher v. City of Charleston*, 425 S.E. 2d 194 (W.Va. 1992).

[94] See *Collier v. City of Tacoma*, 854 P. 2d 1046 (Wash. 1993); and *Tauber v. Town of Longmeadow*, 695 F. Supp. 1358 (D. Mass. 1988).

both commercial and noncommercial messages must be allowed in residential areas, barring substantial proof by the government that the offending signs are detrimental to public health, safety, or welfare.[95]

Beyond Questions of Legality

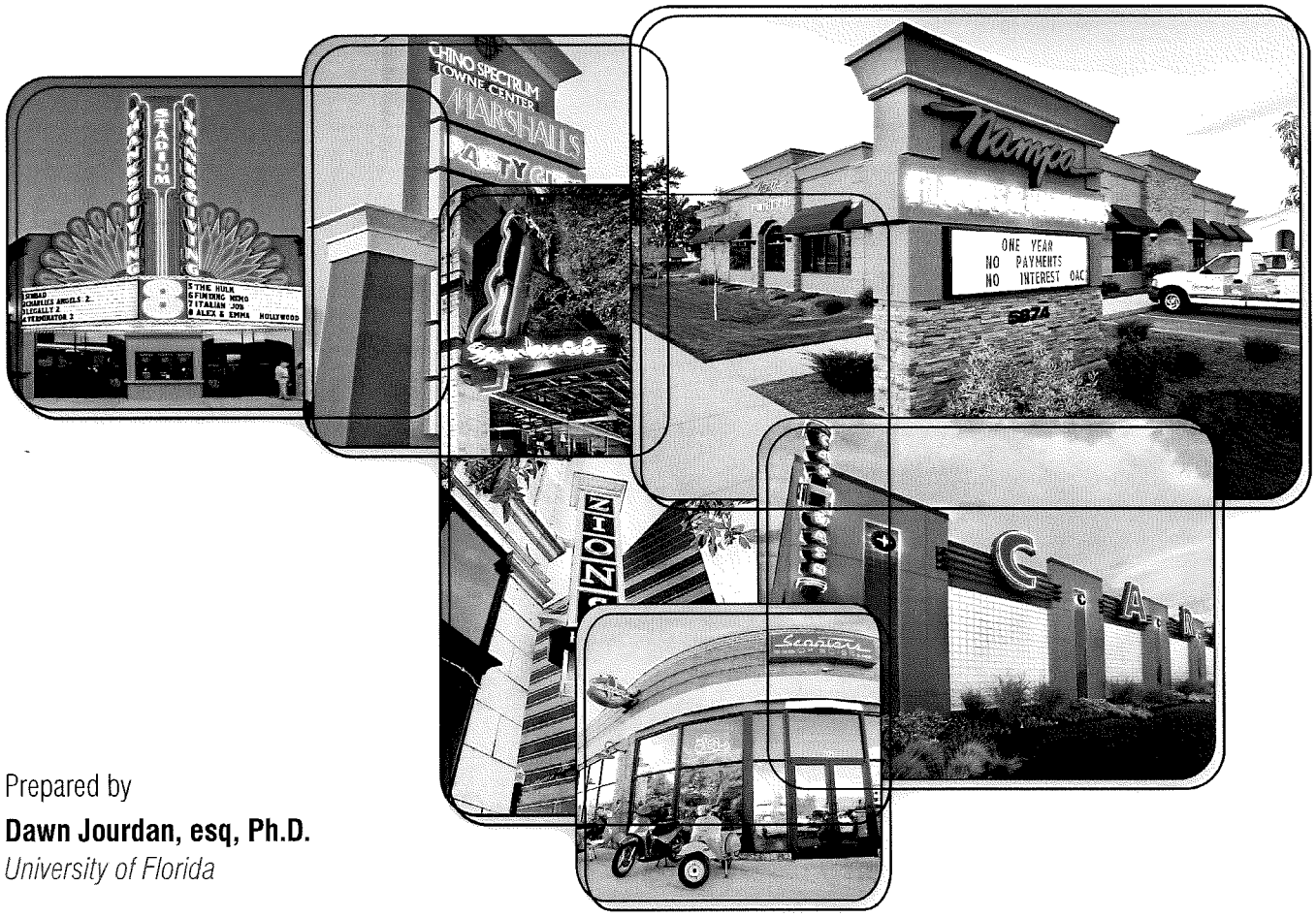
Despite the seemingly numerous cases involving legal rights and on-premise signs, this area has not been significantly litigated at the Supreme Court level. This is so because most legal controversies surrounding on-premise signage are grounded in state law, as opposed to outdoor advertising cases, which most often arise under federal law.

While it is very important for a commercial property appraiser to be aware of the legal framework in which he or she must work both on the state and federal level, it is more important that the appraiser become very familiar with sign regulation at the local level. It is here that the full spectrum of regulatory effects upon different sign categories first comes to light and must be addressed if one is to understand and account for the possible financial detrimental impact of the regulatory scheme on the client.

[95] In the First Amendment arena, the governing entity seeking to uphold a challenged restriction on commercial speech has the burden of proving that the restriction advances the government's interest in a direct and material way, and further, that the harms claimed to exist are real. A regulation will not withstand constitutional scrutiny if it only provides an ineffective or remote support for the government purpose, or does not alleviate an actual harm to a material degree. Mere speculation or conjecture by the government does not satisfy the burden. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995); and *Amelhin v. McClure*, 168 F. 3d 893, 998-99 (6th Cir. 1999).

Fundamental Legal Issues in the Regulation of On-Premise Signs

Legal Report



Prepared by

Dawn Jourdan, esq, Ph.D.
University of Florida

In Cooperation with
Urban Design Associates
College Station, Texas

Fundamental Legal Issues In the Regulation Of On-Premise Signs

An Introduction

The visual environment is a highly contested space. In particular, local governments and business owners often find themselves in conflict with respect to the regulation of on-premise commercial signs. Municipalities have widely begun to impose some level of regulation on this form of communication on grounds that certain types of signs interfere with public values relating to both aesthetics and traffic safety. These regulations sometimes fail to recognize the true value of signs to the businesses they advertise, as well as to the economic vitality of communities as a whole. More importantly, many of these sign codes fail to meet constitutional muster because they do not embrace the First Amendment protections to which on-premise commercial signs are entitled. This report seeks to review the legal underpinnings critical to the regulation of signage in an effort to develop a model sign code which is performance-based and which (1) embraces the value of signs to the health of the local business economy; (2) recognizes that signs are speech with inherent First Amendment protection; and (3) backs all efforts to regulate this type of speech with scientific evidence justifying the need for such provisions.

Local Government Efforts to Regulate Signage

Local governments have attempted to regulate signage for more than a century. Early efforts by municipalities to regulate signage were struck down by state courts. In *City of Passaic v. Patterson Bill Posting, Adv. & Sign Painting,* 62 A. 267 (N.J. Err. & App. 1905), a New Jersey court invalidated an ordinance which sought to regulate sign height and setbacks on the basis of improving community aesthetics. According to the court:

> Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the expertise of the police power to take private property without compensation. *Id* at 268.

At the time, the police powers of local governments in all realms of city planning were interpreted narrowly.

Zoning powers were expanded by the Supreme Court's 1926 decision in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 356, which permitted cities to engage in the regulation of those zoning activities which were to the benefit of the public's general health, safety, and welfare so long as there was a rational basis for such regulations. Pursuant to the rational basis standard of judicial scrutiny, a municipal regulation will be upheld as long as it is not arbitrary or capricious. This standard places an almost insurmountable burden of proof on the complainant to prove that there is no rational basis to support the government's regulation. Rational basis continues to be the standard of scrutiny applied to most zoning and land use regulations.

In 1954, the high court extended the reach of these objectives to issues of aesthetics. In *Berman v. Parker,* 348 U.S. 26, the Court stated, in dicta:

> The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. 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 (348 U.S. at 33).

While many continue to embrace the ruling in *Berman* as grounds for aesthetics-based regulation, including the regulation of signage, it is important to note that this case focused on aesthetic issues associated with urban renewal, not forms of communication protected by the First Amendment. This distinction is at the heart of a public policy divide which separates the signage industry from those government officials who regulate signage, and will be discussed in detail in the sections which follow.

The Problem with Street Graphics & the Law

The aforementioned distinction has long been unrecognized in planning practice and scholarship. Rather, the planning community has historically treated signage as a land use to be regulated by the traditional tools associated with zoning activities. In ***Street Graphics*** (1971), William Ewald and Daniel Mandelker proposed a scheme for regulating signage that has served as the primary resource used by communities seeking to impose signage regulation. They proposed a regulatory scheme that:

> [W]ill allow individuals and institutions the freedom to express their personalities and purposes—but within the framework of official guidelines that will insure that these expressions are compatible with the areas around them, appropriate to the activities to which they pertain, and clearly readable under the circumstances in which they are seen (Ewald et al., 1971, p. forward).

In this work, Ewald and Mandelker suggest: "The primary function of on-premise street graphics is to index the environment: that is signs should tell people where they can find what."

In a 2004 issue of Signline, however, Dr. James Claus explains how limited this perspective is, suggesting that an on-premise sign is equal in value to that of a handshake exchanged between business owner and customer. Dr. Claus contends that signs serve a number of critical functions beyond identification, as proposed by Ewald and Mandelker, including: memory building, induction of impulses to stop at a business, enhancement of the shopping experience, as well as informational and educational purposes. According to Dr. Claus, Ewald and Mandelker's model sign code sets forth a series of guidelines which fail to take into account the full nature and significance of signage for commercial enterprise. Indeed, the primary purpose of on-premise signs is to propose commercial transactions to viewers of their content, the sign. This is what makes this form of communication speech, rather than a land use to be regulated. The largest shortcoming of ***Street Graphics*** is that the work fails to embrace the long line of Supreme Court precedent which affords First Amendment protections to the commercial speech embodied in on-premise signs.

While Dr. Claus, among others, has sought to notify the planning community with respect to the problems inherent in ***Street Graphics*** and the sign codes it has inspired, additional efforts, such as the initiative currently underway as a part of this contract, are necessary in order to further the momentum of this effort. Specifically, the planning community will be reluctant to embrace a model sign code which calls for them to abandon the traditional form to which they have grown accustomed. UDA seeks to use the traditional form of the sign code as a template for creating a performance-based model sign code that embraces this new way of thinking about signs, i.e. as speech and not land use activities. Exploration of federal case law pertaining to the regulation of on-premise signs emanating from U.S. Constitutional law will serve as the legal basis for the proposed code.

Origins: First Amendment Protections Afforded to Commercial Speech

It was not until the relatively recent past that the U.S. Supreme Court recognized the application of First Amendment protections to commercial speech, including on-premise signage. In 1975, the nation's high court ruled that First Amendment protections attach to commercial advertisements. *Bigelow v. Virginia,* 421 U.S. 809 (1975). In Bigelow, the Supreme Court invalidated a State law which sought to prevent a newspaper from publishing an advertisement informing women where they might find a clinic willing to perform an abortion. The court rejected the State's primary argument that the regulation was a valid exercise of its regulatory powers due to the fact that the speech involved was commercial in nature. The high court disagreed with this proposition. Citing *Ginzburg v. U.S.,* 383 U.S. 463

(1966), the court held: "The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." The most important aspect of *Bigelow* was that the decision altered the Court's previous ruling in *Railway Express,* the last case that adjudicated speech under a rational basis standard. Bigelow paved the way for a long line of court precedent that recognizes the free speech rights which attach to commercial speech.

A year later, the Court considered a similar issue in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976). There, the VCC challenged a State law which deemed it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs. In this case, the Court recognized a reciprocal right for businesses to advertise and consumers to receive such information. The Court reiterated its previous holdings on the issue, stressing that commercial speech was entitled to no less First Amendment protection merely because of the economic nature of the communication. The Court went so far as to say that the free flow of commercial speech should be considered "...an instrument to enlighten public decision making in a democracy." *Id.* at 766. In dicta, the Court held that some commercial speech regulations may be appropriate provided that: (1) they are justified without regard to content; (2) serve a significant governmental interest; and (3) leave open ample alternative channels for communication. *Id.*

The following year, the high court struck down a local regulation which sought to prohibit the display of "for sale" signs in an effort to promote "stable, racially integrated housing" in *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977). The Court's opinion contained a significant discussion of evidence, finding that there was insufficient evidence to show that the restriction could, in fact, accomplish the intended purpose. Holding fast to precedent, the Court was quick to rule that this type of communication was guaranteed First Amendment protection. In this case, the Court ruled that the law was invalid because it took away the best alternative for communicating the sale of residential real estate. With respect to the significance of the governmental interest involved, the Court agreed with the municipality's assertion that the objective was important but stated that the governmental entity had failed to show the link between the ordinance and the stated objective. *Id.* Such restrictions, if not checked by the courts, are likely to have a chilling effect on protected speech.

Relying on the broad powers vested in them by State enabling legislation, cities are often quick to regulate on-premise signage like other land uses. This decision flies in the face of important jurisprudence which must be revisited. Due to their intended purposes, signs, including those displaying commercial messages, must be viewed as speech. This does not mean that this form of communication cannot be regulated by local government. What it does mean, however, is that great care must be taken by local governments to ensure that sign codes do not infringe upon the Constitutional protections afforded by the First Amendment.

Sign Regulation and the Evolution of the Central Hudson Test

In 1980, the Supreme Court rendered an opinion that had a deep impact on the regulation of commercial signage. In *Central Hudson Gas & Electric Company v. Public Service Commission,* 447 U.S. 557 (1980), the Court ruled that a New York statute which prohibited electric companies from advertising to promote the use of electricity was unconstitutional. Id. The Court laid out what is now referred to as the Central Hudson test:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id at 566. Based on the fourth prong of the test, the high court held that regulation was broader than necessary to achieve its intended purpose. *Id.*

The following year, the high court had the opportunity to apply the test developed in *Central Hudson* in another

matter. The final opinion rendered in *Metromedia*, however, failed to offer a clear application of the test. *Metromedia, Inc. v. San Diego,* 453 U.S. 490 (1981). Instead, the holding in the case has been the source of great confusion with respect to the regulation of signage. Interestingly, while the Court had the opportunity to apply the intermediate scrutiny standard of review set forth in *Central Hudson,* their analysis, as further detailed in Justice Brennan's concurring opinion, reveals that they opted to apply rational basis analysis in evaluating the constitutionality of the ordinance. *Id.*

The controversy centered on a San Diego ordinance which sought to ban off-premise billboards while exempting on-premise signs. Five separate opinions were issued by the Court in this case. The Court's final opinion was limited to the authority of cities to regulate billboards, a form of off-premise signs. The Court recognized that other methods of communicating ideas would require "a law unto itself" and that law must reflect the "differing natures, values, abuses and dangers" of each method. Id. It is critical that the planning community understand the limited nature of this opinion. Metromedia represents the law of billboards, little else.

In spite of this limitation, this decision is often heralded as the basis for an expansion of power which enables municipalities to regulate signage on the basis of traffic safety concerns. While that may be the law with respect to the regulation of billboards, the opinion does not offer any binding legal authority which connects the proposition to on-premise signs. The City of San Diego seemed to recognize this distinction in its ordinance, by choosing to exempt on-premise signs from the proposed ban.

With respect to *Metromedia*, it is also important to note that the decision has not led to the kind of clarity with which some courts try to ascribe to it. A federal district court in Florida eloquently discussed the limitations of this ruling.

> It is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of the law relating to sign regulations, beginning with the Supreme Court's leading decision on billboard regulations in Metromedia, Inc. v. City of San Diego, 45 U.S. 490, 570, 69 L. Ed. 2d 800, 101 S. Ct. 2882, (1981) (plurality) (Rehnquist, J., dissenting, who referred to the plurality decision as a "virtual Tower of Babel, from which no definitive principles can be clearly drawn") .... There is much variety and diversity of opinions in this area (in addition to sign ordinances, courts have reviewed First Amendment challenges to adult entertainment clubs, tobacco advertising and the noise volume of music concerts), suggesting that constitutional law on this subject is far from clear.

The ruling in *Edenfield v. Fane* represented the high court's next meaningful application of the Central Hudson test. *Edenfield v. Fane,* 507 U.S. 761 (1992). In Edenfield, the Court was asked to adjudicate the validity of a Florida law prohibiting CPAs from engaging in the personal solicitation of new clients. The Court ruled that the personal solicitation was commercial expression, entitled to First Amendment protections. The Court held that regulation of such expression is appropriate so long as is "tailored in a reasonable manner to serve a substantial state interest." *Id.* at 767. The Court, in applying the *Central Hudson* test to its evaluation of Florida's law, redirected the burden of proof to the regulator. Specifically, the Court ruled: "In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction." *Id.* at 770. Here, the Court ruled that the State had not met its burden of proof under *Central Hudson.*

The planning community must recognize that this decision represents a significant departure from broad level of deference afforded by the courts to decisions made by local government officials. Because of the holding in *Edenfield*, local governments must prove that any harm they seek to address with an ordinance is materially advanced by the proposed regulations. This ruling compels governments to do more than allege traffic safety or aesthetics concerns as they basis for signage regulations. As a result of *Edenfield*, courts will compel local governments to produce evidence that the ordinance directly accomplishes their stated goals, such as traffic safety or aesthetics. Local governments must be able to prove that on-premise commercial signs have an impact on traffic safety and the ordinance factually accomplishes an improvement in traffic safety. In the absence of such quantifiable proof, the constitutional legitimacy of sign codes stand on shaky ground.

The legacy of *Central Hudson* was again reinforced by the Court in *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993). Applying the four prong test, the U.S. Supreme Court overturned a city regulation which sought to prohibit the location of some commercial newsracks on city streets on the basis of aesthetics and safety concerns. In reviewing the case, the Court held that the city had failed to establish a reasonable fit between its legitimate interests in safety and aesthetics and the means chosen to serve those interests. *Id.* In the Court's view, the aesthetics and safety justification was not substantial enough to justify discrimination between permitted and unpermitted newsracks, both of which the high court deemed "equally unattractive." *Id.* at 425. In this opinion, the Court rejected two previously imposed jurisprudential requirements (1) that the regulation had to be the "least restrictive means" of achieving said goal and (2) that a rational basis was a sufficient justification for such regulations. *Id.* at 417. The Court also discounted arguments that the regulation should be allowed to stand as a content neutral time, place and manner restriction. Id. Here, the Court held that the ban was clearly content-based, seeking to eliminate only those newsracks that held commercial publications. *Id.*

Relying on the same line of precedents, the high court struck down a Rhode Island regulation which disallowed alcohol distributors from advertising the sale process of liquor in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). The alleged substantial state interest in the case was the promotion of temperance. Despite the fact that the State produced some evidence of the relationship between the advertisement of alcohol products and the problem it sought to solve, the Court held that the State failed to show that it had employed all other means of furthering temperance. The Court stated that a regulation of speech could not be allowed to stand if it regulated more speech than necessary to achieve its intended purpose. A complete ban of alcohol-related advertising was determined to be overly restrictive because the State could not produce direct evidence that a ban on this type of speech would produce a measurable improvement in the goal of promoting temperance. This case is also important because the opinion rejected past decisions where the Court had deferred to the government even when it had failed to prove compliance with Central Hudson. This is another key issue to be considered by regulators who seek to place restrictions on on-premise signage. Sign ordinances that do not provide evidence of compliance with *Central Hudson* can potentially be invalidated.

In 2001, the tobacco industry sued the State of Massachusetts for regulations which limited the industry's ability to advertise its products within 1,000 feet of schools and playgrounds and required all indoor advertising of such advertisements at least five feet off the floor. *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001). While the Supreme Court agreed with the State's Attorney General that the interest advanced by the regulation was legitimate at least in the case of the restrictions barring advertising near schools and playgrounds, it ruled that the regulations failed to satisfy the fourth prong of the Central Hudson test. *Id.* Specifically, the Court held that the burden imposed on the speech was disproportionate to any benefit that might be received from implementing the regulation. Id. This decision is particularly important as it denotes a possible future shift in the level of scrutiny applied to on-premise sign ordinances, as was projected by the Court in 44 *Liquormart,* shifting the applicable standard of review from intermediate to strict scrutiny in cases where signage regulations are content-specific. It is important to note that most sign codes are not limited to commercial signs, and thus they must comply with the non-commercial speech standards as well.

Time, Place and Manner Regulations

Unfamiliar with the *Central Hudson* test, the planning community often seeks to regulate signage with the same approach allowable for the regulation of other constitutionally protected land uses, like adult entertainment. Familiar with *Renton v. Playtime Theatres,* 475 U.S. 41(1986), cities seek to regulate signage using the "time, place, and manner" (TPM) test. This test is relevant to the regulation of signage. The TPM test is appropriately applied to ordinances which seek to regulate all types of signage in content and viewpoint-neutral fashion. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court held that content-neutral regulations on commercial communication are subject to intermediate level scrutiny which requires such a regulation to be narrowly tailored to further an "important governmental interest unrelated to the suppression of free speech and does not burden substantially more speech than necessary to

further those interests." *Turner Broadcasting Corp. v. FCC*, 520 U.S. 180 (1997). The Supreme Court relied on this test in its analysis of a sound amplification ordinance imposed by Rock Against Racism for a performance at an outdoor venue when it found that said ordinance sought to protect the community from a harm, i.e. noise pollution, "in a direct way." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). In Turner, the Court considered the evidence before it to determine if the regulation directly and materially advances the stated purpose, abandoning the generalized deference often associated with land use policies. This, coupled with the fact that most commercial signage regulations are also reviewed for compliance with the *Central Hudson* test in the case of as-applied challenges to sign regulations, places a new burden on localities to ground their sign codes in more than mere conjecture about traffic safety or aesthetics. In the future, the production of quantifiable evidence regarding these issues may be the only way that sign codes will survive such legal challenges.

Sign Regulation and the Public Forum Doctrine

The land use designation of the property where a sign is posted is relevant to the discussion regarding the regulation of signage. Property may be public or private. Public property includes those lands held and used primarily for some governmental purposes. The government has the authority to allow, regulate or even ban the placement of signage on public property. In 1984, the Court reviewed the constitutionality of a Los Angeles Municipal Code provision which prohibited the posting of signs on public property in *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The Court held that the regulation was a content-neutral and evenhanded approach that accomplished the goal of improving the city's esthetic interest. Id. In this case, the Court found that sufficient channels of communication had been left open by allowing the posting of such signs on private property. *Id.*

A different set of principles governs the regulation of signage displayed in private forums as was demonstrated by the high court's ruling in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Privately owned properties such as residences and businesses make up private forums. *Ladue* involved the challenge of a city sign ordinance which effectively barred private residential property owners from displaying all signs on their properties. The City of Ladue provided the same basis of justification for this ordinance as was offered in Vincent — an interest in reducing visual clutter. This ordinance was enforced against Gilleo for displaying a sign with an anti-war message in her window at her private residence. Here, the Court applied the time, place, and manner as this was a non-commercial speech case. The Court held that the ordinance went too far, finding that such interests could have been served by more temperate measures. *Id.*

The legal distinction between public and non-public forums must be fully understood by those who seek to regulate signage. Local governments may regulate the display of signs in public forums so long as they adhere to First Amendment jurisprudence. However, when it comes to non-public forums, the rational basis standard applies so long as viewpoint discrimination does not occur. See *Perry Education Assoc. v. Perry Local Educators' Assoc.* 460 U.S. 37(1983). As such, sign codes which attempt to regulate on-premise commercial signs, as well as other sign types, on private property must meet the heightened level of scrutiny established by Central Hudson and the cases that followed it.

Content v. Viewpoint Regulation

Local government officials can be confused by a distinction made by the Court between content and viewpoint-based regulations. Content-based regulations typically seek to limit all types of communication on an issue based on subject matter regardless of view-point. With respect to signs, content-based regulations include, for example, regulations which allow the display of electronic message centers but limit the moving copy to the inclusion of date, time, and temperature. Another example of a content-based sign regulation is a requirement that dictates the placement and removal of election signs within a certain time frame surrounding an election. The Supreme Court has not been called upon to consider these the constitutionality of these arguably content-based restrictions. As a general rule, content-based regulations may be permitted if they are adopted to control secondary effects of speech, not to suppress it. Little clarity exists on this issue beyond this general

principle. While this issue is unresolved by the courts, localities may be well advised to revisit any provisions of their ordinances which restrict the content of certain sign types.

A regulation which seeks to ban all signs which incite violence against any member of a particular community is viewpoint-based because it does not seek to ban other signs which do not seek to incite said violence. A regulation, such as the one drafted by the City of St. Paul in *R.A.V. v. City of State Paul*, 505 U.S. 377 (1992), will be deemed viewpoint based and will only survive judicial review if it complies with the standards applicable to the highest level of scrutiny. In *R.A.V.*, the City drafted a Bias Motivated Crime Ordinance which sought to prohibit the display of symbols known to arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id* at 377. The Court judged the ordinance to be facially-unconstitutional because it sought to prohibit speakers from expressing unpopular viewpoints. Id. The interest in this case, i.e. sending a message that the city does not condone hate speech or hate groups, was not deemed sufficient to justify the selective silencing of speech. While the Court agreed with the city on the principle that the ordinance served a compelling state interest, they suggested that "an ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect" *Id.* at 396. Cities must tread lightly when seeking to regulate either the content or viewpoint displayed on signs.

Signage Regulation and the Law of Amortization

Whenever the government seeks to require the removal of an on-premise sign, takings challenges come into play. Regulations which compel the removal of nonconforming signs often rise to the level of a compensable taking. Several recent state court rulings indicate that such takings can be expensive propositions (Claus, 2002). In *Caddy v. Hamilton County* (lower court case; no Westlaw cite), the jury awarded $1.8 to a business owner for the loss of on-premise signage when his property, including grandfathered signs, was taken via eminent domain proceedings (Claus, 2006). The jury awarded an additional $1.3 million dollars in just compensation for the value of the condemned real property and building (Claus, 2006). According to Dr. Claus (2002, p. 74):

> Thus the combined award gave the owner sufficient money to not only replace land and building, but also protect the former income stream with funds, which, if prudently invested, would annually cover replacement advertising expenses without adversely affecting land sales.

To avoid having to compensate sign owners for takings, some municipalities have developed amortization strategies which permit the continued use of nonconforming signs for a period deemed long enough to allow the owner to fully depreciate the investment. This strategy has been deemed appropriate if the term of amortization is reasonable. Reasonableness determinations involve consideration of the following factors, including initial capital investment, life expectancy, salvage value, and extent of depreciation, among others. *Georgia Outdoor Advertising Inc. v. City of Waynesville*, 900 F.2d 783, 786 (4th Cir. 1990); *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1274 (4th Cir. 1986). Such reasonableness determinations are becoming more difficult to prove due to the fact that these criteria fail to adequately reflect the true value of signs.

In *The Value of Signs*, Dr. Claus proposes an appraisal scheme, which he has employed with great success, to assist communities in understanding the real economic impacts of "taking" or amortizing signage (Claus, 2002). The Ohio Court of Appeals validated this approach in *City of Norwood v. Burton*, 164 Ohio App.3d 136 (2005), where Dr. Claus testified that the owner of a property next to a shopping mall was entitled to compensation for the loss of a sign in the amount of $500,000 to replace the value of the sign based on mere visibility (the City of Norwood had offered approximately $200,000). Damages awarded in such cases may exceed the value ascribed to visibility as some courts have also made cities pay damages to and the attorney's fees of affected property owners on the grounds that their civil rights have been violated. See *Ballen v. City of Redmond*, 463 F.3d 1020 (WA 2006); *Outdoor Systems Inc. v. City of Mesa*, 997 F.2d 604 (AZ 1993); *Dimmitt v. City of Clearwater*, 782 F. Supp. 586 (M.D. FL 1991); *XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F. Supp.2d 825 (N.D. OH 2004).

Because amortization is a costly proposition to both businesses that display signs and the communities which seek

to remove them, the planning community should consider new ways to solve the problems they typically ascribe to nonconforming signage. One effective method for bringing out of date or unsafe signage into compliance with new performance standards is for municipalities to adopt standards dealing with the abandonment of signs. Arguably, when a business closes and is not reopened by its original owner or a new enterprise for a substantial period of time, a sign has been abandoned. However, this approach is not foolproof. On-premise signs function primarily as speech. However, they are also an accessory land use tied to their physical location. Dr. Claus' appraisal approach could readily conclude that a temporarily unused sign located on a legally zoned commercial property adds value to that property and cannot be removed without compensation.

Egregious failure to maintain a sign to the point at which the sign becomes hazardous may also be viewed as abandonment. In such cases, it may be appropriate to require the replacement of out of date signage with new signs that comply with modern performance standards. In order to avoid takings challenges, communities must provide a clear definition of abandonment to ensure that this sort of provision is not employed in an arbitrary fashion.

In some instances the issue of non-conformity is solely due to communities having adopted highly restrictive ordinances that infringe on free speech rights pertaining to both commercial and non-commercial communications. In order to correct this problem, planners should modify sign ordinances to ensure that they are no more restrictive than necessary to serve the community's goals while enabling effective commercial speech. If localities do not change their approach to dealing with nonconforming signage, businesses may seek to retain and maintain non-conforming signs because the alternative, new code compliant signage, is too small and restricted to fulfill the primary purpose, commercial speech.

Signage Regulation and Prior Restraints

Most cities require those who seek to display on-premise signs to obtain a license to do so prior to construction or display. Requiring such review prior to the installation of a sign is a form of "prior restraint." The prior restraint occurs as a result of the fact that the speaker is restrained from communicating his or her message until the regulator approves the speech. Despite this limitation on speech, prior restraints are legal in certain circumstances so long as they comply with the safeguards established by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965).

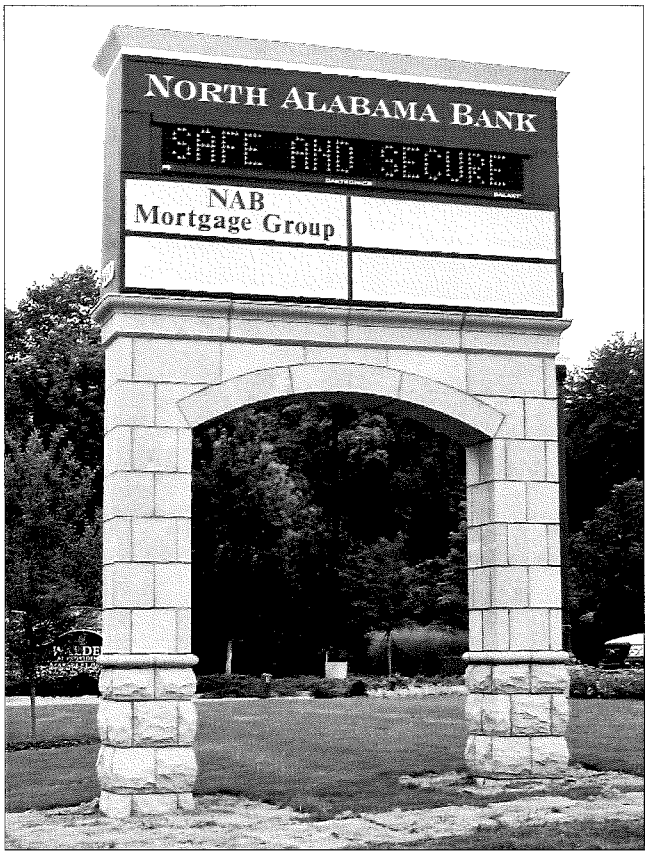
In order to survive a prior restraint challenge, a sign code must employ the safeguards outlined by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965). These include:

1. The municipality must bear the burden of taking the denial to a judicial proceeding;
2. Bear the burden of persuasion at the judicial proceeding;
3. Limit any restraint prior to the judicial determination to a specified brief period of time; and
4. Guarantee a prompt judicial determination.

Id. at 62. The Supreme Court has relied on the prior restraint doctrine to invalidate sign ordinances which failed to include adequate procedural safeguards set forth in *Freedman. Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Kolender v. Lawson*, 461 U.S. 352 (1983).

Vagueness and unbridled discretion are two related issues of concern in the context of sign regulation. A sign code will be considered vague if it fails establish clear requirements, or to set forth a clear process for obtaining permits to construct signs, a reasonable time period for decision making by the local zoning officer, and an adequate appeals procedure in the case a denial is issued. Generally, to survive a vagueness challenge "a statute must be sufficiently clear so as to allow persons of 'ordinary intelligence' a reasonable opportunity to know what is prohibited..." *Hoffman Estates v. The Flipside*, 455 U.S. 489, 498 (1982). The standard of review is heightened when the statute in question regulates speech which is protected by the First Amendment. In such cases, "an even greater degree of specificity and clarity of the law is required." *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986).

A sign code may also fail to meet legal muster if it gives unbridled discretion to local decision makers. For example, a review process will be deemed unfair when the decision maker may pass on permits for signage or censor the content of the commercial communication due to the absence of



Electronic Message Center Sign

objective standards for issuance of the permit or, in the alternative, the presence of standards that are not clear to "ordinary people," per the high court's ruling in *Hoffman Estates. Hoffman Estates, 455 U.S. at 498.* Returning to the issue of specificity, modern sign codes must outline objective standards upon which the approval or denial of permits and variances will be issued to provide guidance to both applicant and decision maker.

Federal Trademark Law

A short mention of federal trademark law is important to the discussion of sign regulation. The Federal Lanham Trademark Act, 15 U.S.C. §1051, et seq., was adopted by Congress in an effort to preserve and protect the integrity of federally registered names, marks, emblems, slogans, and colors. The Act specifically prohibits any unit of State or local government from requiring the alteration of such marks for display purposes. 15 U.S.C. §1121(b). This Act has prevented local governments from requiring businesses to change their names. *Sambo's of Ohio v. City Council of Toledo*, 466 F. Supp. 177 (N.D. Ohio 1979). The issue of color is a little less settled. While the 9th Circuit struck down an ordinance which attempted to require Blockbuster to use a color scheme that did not match its federally registered trademark in *Blockbuster Video Inc. & Video Update v. City of Tempe*, 141 F.3d 1295 (9th Cir. 1998), the 2nd Circuit issued a contrary opinion in *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F. 3d 12 (2d Cir. 1999). This split in jurisprudence reflects a more important and unresolved matter that the Supreme Court could one day be called upon to resolve: Does the Lanham Act protect colors in trademarks used in signs? Whether regulating colors on signs is a content-based regulation or a time, place and manner regulation, is a First Amendment issue, which, to the best of the author's knowledge has not been tested.

Guiding Principles for the Development of a Model Sign Code

The need for well-built and attractive on-premise commercial signage is clear. Businesses that do not have adequate signage, or that the public considers run-down or unattractive, will fail to compete in the local marketplace, potentially contributing to the destabilization of the local economy. Localities, as such, have an important role in drafting sign codes which guide businesses to craft signage. In preparing such codes, localities must tread carefully so that such regulations do not impede on the constitutional protections guaranteed to commercial speech. Localities must not treat signs, commercial or non-commercial, like traditional land uses because signs are, in fact, speech and entitled to an evolving set of protections defined by the courts. Sign code drafters must move beyond efforts to draft codes on the basis of general notions of safety and aesthetics which have little or no scientific backing. The scientific community is accumulating a significant amount of signage and its relationship to public and traffic safety. The inclusion of empirical research in signage regulation will provide the necessary basis for regulations which might otherwise be deemed to abrogate the rights afforded to this medium of communication by the Constitution.

Works Cited

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

See Ballen v. City of Redmond, 463 F.3d 1020 (WA 2006).

Berman v. Parker, 348 U.S. 26 (1954).

Bigelow v. Virginia, 421 U.S. 809 (1975).

Blockbuster Video Inc. & Video Update v. City of Tempe, 141 F.3d 1295 (9th Cir. 1998).

Caddy v. Hamilton County, lower court case; no Westlaw cite.

Central Hudson Gas & Electric Company v. Public Service Commission, 447 U.S. 557 (1980).

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

City of Ladue v. Gilleo, 512 U.S. 43 (1994).

City of Norwood v. Burton, 164 Ohio App.3d 136 (2005).

City of Passaic v. Patterson Bill Posting, Adv. & Sign Painting, 62 A. 267 (N.J. Err. & App. 1905).

Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F. 3d 814 (9th Cir. 1996).

Dimmitt v. City of Clearwater, 782 F. Supp. 586 (M.D. FL 1991).

Edenfield v. Fane, 507 U.S. 761 (1992).

Freedman v. Maryland, 380 U.S. 51 (1965).

Georgia Outdoor Advertising, Inc. v. Waynesville, 900 F.2d 783, 786 (4th Cir. 1990).

Ginzburg v. U.S., 383 U.S. 463 (1966).

Granite State Outdoor Adver., Inc. v. City of Clearwater, 213 F.Supp.2d at 1327 (11th Cir. 2003).

Grayned v. City of Rockford, 408 U.S. 104 (1972).

KEV, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986).

Kolender v. Lawson, 461 U.S. 352 (1983).

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977).

Lisa's Party City, Inc. v. Town of Henrietta, 185 F. 3d 12 (2d Cir. 1999).

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

Modjeska v. Berle, 373 N.E.2d 255 (N.Y. 1977).

Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F.Supp. 1068 (M.D.N.C. 1992), aff'd, 19 F.3d 11 (4th Cir.), cert. den. 513 U.S. 928 (1994).

North Olmsted Chamber of Commerce et al. v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000).

Outdoor Systems Inc. v. City of Mesa, 997 F.2d 604 (AZ 1993).

R.A.V. v. City of State Paul, 505 U.S. 377 (1992).

Renton v. Playtime Theatres, 475 U.S. 41(1986).

Sambo's of Ohio v. City Council of Toledo, 466 F. Supp. 177 (N.D. Ohio 1979).

Turner Broadcasting Corp. v. FCC, 520 U.S. 180 (1997).

United States v. O'Brien, 391 U.S. 367 (1968).

Village of Euclid v. Ambler Realty Co., 272 U.S. 356 (1926).

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976).

Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp.2d 825 (N.D. OH 2004).

Claus, J. (2001). "Judicial Scrutiny Under the First and Fourteenth Amendments: Impact on Sign Regulation" Signline: Issue 33.

Claus, J. (2002). "Prior Restraints in Sign Codes" Signline: Issue 36.

Claus, J., S. L. Claus, and T. A. Claus. (2002). "The Value of Signs" The Signage Foundation for Communication Excellence, Inc. Sherwood, OR.

Claus, J. (2004). "Street Graphics and the Law: A Flawed Perspective, Part 1" Signline: Issue 46.

Claus, J. (2004). "Street Graphics and the Law: A Flawed Perspective, Part 2" Signline: Issue 47.

Claus, J. (2006). "Eminent Domain and Compensation for Signage" Signline: Issue 49.

Ewald, W. R. and D. R. Mandelker. (1971). Street Graphics. The American Society of Landscape Architects Washington D.C.

SIGN REGULATION AND FREE SPEECH:
SPOOKING THE DOPPELGANGER

Daniel R. Mandelker*

Note: This article is Chapter 3 of a collection of essays, Trends in Land Use Law from A to Z, edited by Dean Patricia E. Salkin of the Local Government Center, Albany Law School, and published in 2001 by the Section of State and Local Government Law of the American Bar Association.

No area of land use law is more difficult than sign regulation. The difficulties arise from free speech law and how it affects the regulation of signs and the messages they contain. Bedeviled by a Supreme Court decision described as a "Tower of Babel,"(1) municipalities(2) must struggle to regulate signs without provoking free speech objections.(3)

This article examines this constitutional thicket to make sense of free speech doctrines that shape sign regulation. It first considers the rules courts apply when they review sign regulations for free speech violations. It then examines three problems in sign control that are especially contentious. These are the justification municipalities must have for regulating the aesthetics of signage, the content neutrality issue, and the problems that arise in regulating off-premise signs, often called billboards.

I conclude that federal and state courts have upheld municipalities when they regulate sign aesthetics despite the Supreme Court's failure to develop clear free speech principles for sign regulation. Content neutrality and the control of off-premise signage are more difficult issues, but municipalities can find ways to deal with these problems.

I. SETTING THE STAGE: FREE SPEECH PRINCIPLES

Sign regulation historically triggered objections that it is facially unconstitutional because aesthetic judgments are subjective. This argument is essentially a substantive due process objection that the aesthetic purposes of sign regulation are not legitimate. However, most state courts reject it by holding that "aesthetics alone" is a proper basis for land use regulation.(4) They also apply a presumption of constitutionality to sign regulation, as they do to all municipal regulation of economic interests. The presumption means a regulation is constitutional if it has a reasonable basis. For example, state courts apply the presumption to uphold regulations that govern the time, place and manner of sign display.(5)

This state law background is critical, because the judicial landscape changes when courts apply the free speech clause of the federal constitution.(6) They reverse the usual presumption of constitutionality, but the depth of the reversal depends on the type of speech affected.(7) One critical distinction is between commercial and noncommercial speech. In sign regulation, a message on a sign that promotes commercial products or services is commercial speech. All other messages are noncommercial, such as a message that has ideological or political content. Examples are signs that say "Abortion is Evil" or "Elect Grimsted to Congress."

Commercial and noncommercial speech enjoy different levels of constitutional protection. The courts apply a less demanding test to laws that affect commercial speech, including sign regulations, than they

apply to regulations that affect noncommercial speech. The landmark Supreme Court case on laws affecting commercial speech is Central Hudson Gas & Electric Co. v. Public Service Commission.[8] There the Court held that a regulation of commercial speech must meet a three-part test. If the speech concerns lawful activity and is not false or misleading, then it must (1) serve a substantial governmental interest, (2) directly advance the asserted governmental interest, and (3) be no more extensive than necessary to serve that interest.[9] Rumblings in the Supreme Court may suggest it may be willing to reconsider and perhaps tighten the judicial review standards adopted by Central Hudson,[10] but until it does so that case still controls.

The leading Supreme Court case that applied free speech principles to sign ordinances is Metromedia, Inc. v. City of San Diego,[11] the case described as a Tower of Babel. There a badly divided Court approved a ban on billboards contained in the city's comprehensive sign ordinance, but held it unconstitutional because it also contained provisions found to violate the free speech clause. The opinion that attracted the most support was a plurality opinion signed by four Justices, none of whom are still on the Court. Nevertheless, with some exceptions,[12] most courts continue to follow the free speech principles laid down in the plurality opinion.[13] Because the Metromedia plurality opinion has become so decisive, the discussion that follows relies on it as the basis for examining the free speech issues presented by sign regulation.

II. SOME COMMON SIGN REGULATION PROBLEMS

A. Regulating Aesthetics

Recall that Central Hudson requires municipalities to show that a regulation affecting commercial speech will serve a substantial governmental interest. Traffic safety and aesthetics are the two governmental interests municipalities usually assert, and the Metromedia plurality opinion approved both as a basis for upholding the city's ordinance. It seemed to accept traffic safety as a per se justification, noting the California Supreme Court held as a matter of law that an ordinance prohibiting billboards "designed to be viewed from streets and highways reasonably relates to traffic safety."[14] The plurality agreed, holding it would "likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers" and many courts that billboards "are real and substantial hazards to traffic safety."[15]

This holding is helpful when sign regulation prohibits signs visible from highways or improves traffic safety by restricting their size, height and spacing. Sign regulation deals with much more, however, and requires an aesthetic basis when traffic safety issues do not dominate. The California Supreme Court accepted aesthetics alone as a sufficient basis for upholding the San Diego ordinance, though it also noted that the aesthetic and economic justifications for the ordinance were identical because the state relied on its scenery to attract traffic and commerce.[16] The Metromedia plurality went further, holding it was not "speculative to recognize that billboards, by their very nature, wherever located and however constructed, can be perceived as an esthetic harm."[17] The Supreme Court later confirmed its holding that aesthetic interests justify sign regulation under the free speech clause by upholding an ordinance

prohibiting the posting of signs on public property that prohibited political signs.[18]

These decisions are a strong endorsement of aesthetics as a substantial governmental purpose that satisfies the free speech clause, but some important questions remain unanswered. Metromedia came up on a summary judgment motion, in a case where the parties stipulated facts that did not question the city's conclusion about aesthetic impacts. This history encourages sign companies to argue the Metromedia plurality did not consider what a municipality has to show to justify a sign ordinance when there is no such stipulation. When a sign company challenges a sign ordinance in court it may argue a municipality must show that its ordinance accomplishes an aesthetic purpose as applied to its signs. This argument would make it difficult to defend sign regulations because any one company's signs are not likely to have a significant effect on the aesthetics of a community.[19]

The Supreme Court has not accepted the argument that individualized proof of a law's aesthetic effect is required in commercial speech cases. In a case upholding a federal statute prohibiting radio stations in non-lottery states from broadcasting lottery advertising, it concluded an individualistic, as-applied analysis of the statute's effect on a particular radio station was inappropriate under Central Hudson. Instead, the validity of a regulation depends on "the overall problem the government seeks to correct."[20] The sign cases have followed this decision, holding that courts should test sign regulations by their effect on a broad category of speech, not by their effect on an individual plaintiff's signs.[21] These cases mean municipalities need only identify broad categories of signs whose aesthetic problems require regulation,[22] such as billboards.[23]

B. Viewpoint and Content Neutrality

1. The Supreme Court Cases

Laws must have a neutral effect on speech.[24] The typical sign ordinance is a time, place and manner regulation that does not present a neutrality problem.[25] A time, place and manner regulation is a law that regulates activities to protect governmental interests unrelated to speech. An example is an ordinance that contains limitations on the size, number and height of signs. Because they have a neutral effect on speech, time, place and manner regulations are usually constitutional under the free speech clause.[26]

There are two types of neutrality: viewpoint neutrality and content neutrality. Viewpoint neutrality means a sign regulation may not regulate a point of view. An example is a sign ordinance that prohibits any sign containing a message that opposes abortion. This kind of ordinance is not viewpoint-neutral and clearly violates the free speech clause.[27]

Content neutrality creates more difficult problems. Content neutrality means a sign regulation may not define the content of a sign. A sign ordinance that prohibits any sign that contains any message of any kind on abortion is an example. As a leading Supreme Court case put it, the "principal inquiry" in deciding content neutrality is "whether the government has adopted a regulation because of a disagreement with the message it conveys. The government's purpose is the controlling

consideration."[28] Any law that regulates content must satisfy a strict scrutiny test that requires narrow tailoring to meet a compelling governmental interest.[29] This test is more demanding than the Central Hudson that governs commercial speech. Neither may a law make distinctions based on content.

A content neutrality problem arose in Metromedia. Like many sign ordinances, the San Diego ordinance included a list of exempt signs defined by their content, such as signs that identified a property and its owner.[30] The plurality struck down all of these exemptions as content-based because it held the exemptions discriminated between different types of signs because of their content.[31]

Despite the Metromedia plurality opinion, the Supreme Court has not always applied the content neutrality rule to sign regulation. It appeared to require only viewpoint neutrality in a later case upholding an ordinance prohibiting the posting of signs on public property.[32] Then, in City of Ladue v. Gilleo,[33] the court held a sign ordinance violated free speech without relying on the content neutrality rule, although it clearly could have applied. The Court held invalid an ordinance that prohibited homeowner signs in residential areas with only a few exceptions, such as safety hazard signs. Gilleo posted a war protest sign in her window, and the city required its removal.

The Court agreed that municipalities have a valid interest in reducing visual clutter, but held they cannot do so by foreclosing an important and distinct medium of expression for political, religious or personal messages. The Court noted it had always had a special respect for individual liberty in the home and a person's ability to speak there. Justice O'Connor, concurring, complained that the Court should have decided the case by holding that the ordinance was not content-neutral.[34]

The status of the content neutrality requirement in sign regulation is also uncertain because of the judicial response in lower courts to the invalidation of the content-based exemptions by the Metromedia plurality. Some courts have followed the Metromedia plurality holding on this problem,[35] but some have not.[36]

Whether sign regulations must be both viewpoint-neutral and content-neutral has a critical impact on their constitutionality. Viewpoint neutrality is not a serious problem. No municipality is likely to adopt a sign ordinance, for example, which prohibits signs advocating the saving of whales. Content neutrality is more difficult. Municipalities have typically defined signs by their content because this makes sense. A directional sign, for example, is a sign that gives directions. Content neutrality means that this kind of definition is not constitutional.

2. The Regulatory Risk

Although the status of the content neutrality rule may not be entirely clear, its endorsement by the Metromedia plurality cautions that content neutrality is a problem in sign regulation. Content neutrality has an impact on sign regulation because disagreement with a message, as the Supreme Court put it, is not the only basis for finding a law content-based. The Metromedia plurality made it clear that content neutrality prohibits benign regulations that define signs by their message, though it did not discuss the implications of this holding.[37] It did so, as noted earlier, by striking down perfectly innocent sections

in the San Diego ordinance that exempted several signs that could contain various messages. The plurality holding on content-based exemptions, if still good law, makes it impossible to define signs by the messages they can display.[38] A federal district court case,[39] illustrates the risks municipalities take when they define signs by their content, and then use these content-based definitions as the basis for their regulations. The ordinance in this case took this approach, and the court angrily struck it down.

As a result, municipalities cannot authorize signs that are commonly used and that can be visually attractive additions to the urban landscape. Time and temperature signs are one example. Banks and other financial institutions often display them, and they are quite attractive when displayed in clocks in public squares. Nevertheless, a sign ordinance specifically authorizing the display of time and temperature signs risks invalidation as content-based.[40]

This review of content neutrality problems suggests, at the least, that municipalities must look carefully at their sign definitions. If they do so they will find they can make marginal changes in definitions that can achieve aesthetic purposes without violating the free speech clause. For example, an ordinance can regulate time and temperature and similar signs by defining "changeable copy" as "copy that changes at intervals of more than once every six seconds."[41] The ordinance can then authorize signs with changeable copy and specify where these signs can and cannot locate. This is a time, place and manner regulation that regulates time and temperature and any other moving sign without creating content neutrality problems.

3. Standing and Severability

The content neutrality problem and its threat to sign regulation is aggravated by the rules governing standing in free speech cases, and the rules governing the severability of unconstitutional sections in sign ordinances. These rules make it essential to review every requirement in a sign ordinance for free speech problems. Municipalities may believe that benign provisions in sign ordinances, such as time and temperature provisions, are not vulnerable. They may believe that the billboard companies who are their most likely antagonists cannot attack them, and that businesses benefitted by them will not object.

They should think twice. Usually, of course, a party may only assert constitutional violations of its own rights. The rule is different in free speech cases. In these cases the courts permit facial challenges to legislation if it unconstitutionally regulates protected speech though the plaintiff's speech is not protected.[42] Examples are a sign regulation that "chills" the First Amendment rights of others not before the court, and a sign regulation claimed to be invalid because it regulates content. These standing rules mean a billboard company can challenge a provision authorizing time and temperature signs by claiming it is content-based though it is not affected by it.

The facial vulnerability of a sign ordinance makes it more likely a court will hold it nonseverable. A court can invalidate an ordinance if it holds some of its sections unconstitutional if it believes the municipality would not have enacted what remains, and if the remainder of the ordinance cannot stand independently.[43] This risk is aggravated when plaintiffs can facially attack sections in sign regulations claimed to violate free speech law, even though they do not affect them. An ordinance is more difficult to sever if a court holds several of its sections unconstitutional.

Municipalities can attempt to encourage severability by including a clause stating a legislative intent that the remainder of an ordinance is constitutional if a court invalidates one or more sections. The difficulty is that courts may reject this statement of intent in sign cases because sign ordinances usually are highly interdependent. Severability then becomes difficult when a court holds that one or more sections violate the free speech clause, as the cases show.(44) The risk that a court will reject severability increases the stakes in sign ordinance litigation, because a municipality runs the risk it will lose the entire ordinance if a court strikes down even one section. This risk is all the more uncertain because severability is fact-intensive, and it is difficult to predict how any court will rule on this question.

C. Off-Premise vs. On-Premise Signs

1. The Metromedia Plurality Decision

The distinction between off-premise and on-premise signs is common in sign regulation. This classification originally distinguished different types of signs, as on-premise signs were usually wall or other signs attached to a building, while off-premise signs were freestanding. In addition, on-premise signs usually advertised goods and services sold on the premises, while off-premise signs usually advertised goods and services not sold on the premises. The term "billboard" is often used for off-premise signs, especially when they are adjacent to highways.(45)

Sign regulations picked up these differences by defining off-premise and on-premise signs to reflect the functions they serve. They defined on-premise signs as signs that advertise goods and services sold on the premises. They defined off-premise signs as signs that advertise goods and services not sold on the premises. The ordinance would then allow on-premise signs and prohibit off-premise signs. This type of ordinance does not prohibit off-premise signs that display noncommercial messages.

This kind of sign regulation came before the Supreme Court in Metromedia and caused problems under the free speech clause. The plurality opinion upheld a ban on off-premise signs although the ordinance allowed on-premise signs, but struck down the section that prohibited noncommercial messages on on-premise signs. The plurality believed this section improperly favored commercial speech over noncommercial speech.

The ordinance sections allowing on-premise but prohibiting off-premise commercial signs created a problem under the second Central Hudson test, which requires an ordinance to "directly advance" the interests it asserts. The problem was that allowing on-premise commercial signs while prohibiting off-premise commercial signs arguably undermined the city's aesthetic and traffic safety interests as on-premise signs can be as visually offensive and as dangerous to traffic. State courts had frequently considered this problem, but had held that this distinction was not a violation of equal protection.(46)

The Metromedia plurality upheld this distinction against free speech objections.(47) It noted that state courts and its own prior decisions had found it constitutional; that the city could decide that off-premise advertising presented a "more acute" problem than on-premise advertising; and that it would respect the city's decision to value on-premise commercial advertising more than off- premise commercial advertising. It also held a "commercial enterprise" has a stronger interest in identifying its place of

business, and the products or services available there, than it has in "advertising commercial enterprises located elsewhere."[48]

This holding is a strong endorsement of ordinances that prohibit off-premise but allow on- premise commercial signs. An important qualification, however, is the clear assumption that the San Diego ordinance prohibited only off-premise commercial signs.[49] The implication is the Court would have held the ordinance invalid as an unconstitutional restriction on noncommercial speech had it prohibited off-premise signs with noncommercial messages.

This implication is reinforced by the plurality's treatment of the provision in the ordinance that did not allow on-premise signs to display noncommercial messages.[50] The plurality held this provision unconstitutional because it decided the city could not prevent a business from displaying "its own ideas or those of others."[51] This particular problem is easily fixed if the ordinance allows on-premise signs to display noncommercial messages.[52] A more difficult problem arises if this holding means a municipality cannot disfavor noncommercial speech by prohibiting it on off-premise signs.

2. The Content Neutrality Problem

This discussion of the Metromedia plurality suggests a municipality that wants to prohibit off- premise signs faces a serious dilemma. It runs the risk a court will hold its ordinance unconstitutional if it prohibits all off-premise signs, including signs with noncommercial messages. A municipality can avoid this problem by defining an off-premise sign as a sign that "advertise a business, products or services not sold or offered on the premises on which the sign is located."[53] It then runs the risk a court will hold the definition unconstitutional because it is content-based.

The plurality in Metromedia did not address the definition problem, but objectors can argue this definition is content-based because it is necessary to look at a sign to decide whether the definition covers it. This argument will not succeed. The Supreme Court rejected it[54] and the lower courts have agreed.[55] Messer v. City of Douglasville[56] went even further, faced the content neutrality issue directly, and held a definition of off-premise signs similar to the one quoted above was content-neutral. It did not regulate speech according its viewpoint, which is forbidden; it regulated the sign based on its location; and it did not legislate a preference for either commercial or noncommercial speech. This is not a unanimous view, as the Supreme Court and some lower courts have held a regulation is content-based when the message conveyed determines whether the speech is subject to restriction.[57] These cases indicate an off-premise sign definition like the one quoted above is content-based. Another approach to the regulation of off-premise signs may be necessary.

3. Prohibiting Off-Premise Signs With Noncommercial Speech

An ordinance can solve the content neutrality problem by prohibiting signs with both commercial and noncommercial messages, but it will then face other free speech problems. Recall that the Metromedia plurality implied that an ordinance prohibiting off-premise signs with noncommercial messages would be unconstitutional.[58] Some courts have taken this position.

For example, in National Advertising Co. v. City of Orange,[59] the Ninth Circuit interpreted a sign ordinance to prohibit off-premise noncommercial and commercial signs and then found this prohibition unconstitutional. It held that noncommercial speech requires more protection than commercial speech, that merely treating commercial and noncommercial speech equally is not enough, and that regulations that are valid for commercial speech may be invalid for noncommercial speech.[60] Other courts have agreed,[61] or upheld off-premise sign prohibitions only when they were limited to signs displaying commercial messages.[62] Other cases upheld ordinances prohibiting off-premise signs with commercial or noncommercial speech only because they were limited to designated areas of the city, such as historic areas.[63] This view is not universal. Some courts upheld a prohibition on off-premise containing both commercial and noncommercial messages,[64] while the Eleventh Circuit eased the off-premise vs. on-premise distinction by holding that all noncommercial speech is on-premise.[65]

The constitutionality of prohibiting off-premise signs is even more confused after Discovery Network, Inc. v. City of Cincinnati.[66] There the Supreme Court struck down an ordinance that prohibited the display of commercial newspapers on newsracks but permitted the display of noncommercial newspapers. It held this distinction did not provide the "reasonable fit" between legislative purpose and the means to chosen to achieve that purpose which the third Central Hudson test requires.[67] The Court carefully limited its holding to the facts, however. It noted the city had regulated newsracks under an outdated ordinance enacted long before newsracks became a problem. The apparent purpose of that ordinance was to prevent visual blight caused by littering, not the harm associated with permanent newsracks. Neither had the city calculated the "costs and benefits" of burdening speech with a newsrack prohibition because it had not addressed newsrack problems by regulating their "size, shape, appearance, nor number."[68] The Court also said its holding was "narrow," and that it might be possible for a community to justify the differential treatment of commercial and noncommercial newsracks.[69]

This case is important to sign regulation because it considered the converse of the problem considered in Metromedia. By striking down an ordinance that treated commercial speech more severely than noncommercial speech, Discovery Network undermined the Metromedia plurality holding, that a sign ordinance may regulate commercial speech more restrictively. Discovery Network recognized this problem. It distinguished Metromedia in a footnote[70] because that case considered a distinction between off-premise and on-premise signs that "involved disparate treatment of two types of commercial speech." The footnote also emphasized the Metromedia plurality's holding that off-premise signs require regulation because they present more of a problem than on-premise signs.

These statements comfortably distinguished Metromedia, but the Court then confused its treatment of that decision. It continued its footnote with the puzzling comment that Metromedia did not consider a distinction between commercial and noncommercial off-premise billboards "that cause the same esthetic and safety concerns."It said this question was not presented in Metromedia because the San Diego ordinance banned all off-premise billboards "with only a few exceptions." This reading of Metromedia is incorrect.

How courts should deal with this confused reading of the Metromedia plurality is not clear. The Seventh Circuit has upheld restrictions on off-premise commercial signs that did not apply to noncommercial signs despite Discovery Network's suggestion that this distinction might be unconstitutional.[71]

4. An Alternate Solution

This discussion suggests that a regulatory distinction between off-premise and on-premise signs is difficult to make without creating problems under the free speech clause. Neither does this distinction make a useful classification between signs that do and do not present aesthetic problems.(72) On-premise pole signs can present as much of an aesthetic problem as off-premise commercial "billboards."

A better approach is to regulate freestanding signs in all locations. The key to a sign ordinance that can effectively do this yet withstand free speech objections lies in comments in Discovery Network. There the Court complained the city had not adopted time, place and manner regulations, such as regulations on "size, shape, appearance, or number," that could remedy the problems caused by newsracks.(73) Similarly, a content-neutral time, place and manner sign ordinance would not make the off-premise vs. on-premise distinction and would not distinguish between commercial and noncommercial speech. It would include a content-neutral definition of a sign(74) and would add time, place and manner regulations for different types of signs, including freestanding signs, no matter where they are.(75)

Regulations for freestanding signs could differ in different areas. For example, different regulations could apply in commercial and industrial than in residential districts.(76) The ordinance could also contain a special set of regulations for signs adjacent to highways and located in other areas that have special concerns, such as historic districts.(77) It could also prohibit freestanding signs in designated districts or along designated streets or highways. An ordinance of this kind would be a content-neutral regulation of freestanding signs that does not discriminate against noncommercial speech.

III. CONCLUSION

The Supreme Court has made it clear that the free speech clause applies to sign regulations. What it has not made clear is how municipalities can draft sign regulations that will survive constitutional attack as a violation of the free speech clause. This problem arises in part from ambiguities and confusions in Supreme Court decisions; a Court that cannot remember and apply its own precedent hardly deserves credibility.

Meanwhile, municipalities must try to interpret and apply Supreme Court guidelines that determine what the free speech clause requires. This is no easy task, but careful drafting should be able to produce effective sign regulations that are constitutionally correct. With practice, municipalities can spook the doppelganger.(78)

* Stamper Professor of Law, Washington University in St. Louis. The author has served as a consultant to municipalities which have had to defend their sign regulations from attack under the free speech clause. I would like to thank Professor Jules Gerard for his assistance.

FOOTNOTES

1. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569 (1981) (then Justice Rehnquist dissenting).

2. The term "municipalities" is intended to apply to cities, villages, towns and townships and counties. This article will hopefully encourage city planners and municipal attorneys to carefully review their sign regulations for free speech problems.

3. Readers should be aware that free speech law is from settled. This article considers some, but not all, of the uncertainties. For full treatments of the subject see Daniel R. Mandelker, Land Use Law §§§§ 11.12-11.21 (4th ed. 1997 & Supp. 2000), hereinafter cited as Land Use Law; Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, Federal Land Use Law Pt. II (updated annually), hereinafter cited as Federal Land Use Law. The Supreme Court may possibly provide more enlightenment when it reviews a case upholding state regulations prohibiting advertising for cigarettes near places where children are likely to be. Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000), cert. granted, 2000 U.S. Lexis 42 (U.S., Jan. 8, 2001).

4. See Land Use Law §§ 11.05.

5. Id., §§ 11.10.

6. State courts must apply the federal constitution, so federal free speech problems now tend to dominate sign litigation, even in state courts.

7. For definitions of commercial speech adopted by the Court see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (198) (expression related solely to economic interest of speaker); Bigelow v. State of Virginia, 421 U.S. 809, 822 (1975) (suggesting that commercial speech proposes a commercial transaction). Difficulties may arise when a publication contains both commercial and noncommercial speech. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993).

8. 447 U.S. 557 (1980).

9. The Court has made it clear that this test does not impose a less restrictive means requirement. Board of Trustees v. Fox, 402 U.S. 469, 480-81 (1989).

10. 44 Liquormart, Inc. v. State of Rhode Island, 517 U.S. 484 (1996). See Greater New Orleans Broadcasting Ass'n v. United States, 119 S. Ct. 1923 (1999) (Court refused to reconsider Central Hudson tests). See also Ackerley Communications of the Northwest v. Krochalis, 108 F.3d 1095 (9th Cir. 1997) (holding that later Supreme Court decision do not undermine Central Hudson tests).

11. 453 U.S. 490 (1981).

12. Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994). See also Lavey v. City of Two Rivers,

171 F.3d 1110 (7th Cir. 1999).

13. E.g., Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993); National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); National Advertising Co. v. Town of Babylon, 900 F.2d 551, 556-57 (2d Cir.), cert. denied, 498 U.S. 852 (1990); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988); Don's Porta Signs, Inc. v. City of Clearwater, 820 F.2d 1051 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988);

14. Metromedia, at 508.

15. Id., at 509.

16. Metromedia v. City of San Diego, 610 P.2d 407, 413 (Cal. 1980). For this reason, the court did not find a distinction between the economic and aesthetic basis for the sign regulation.

17. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981).

18. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (holding it is "well-settled" that government may exercise its police powers to regulate aesthetic values). See also id., at 806-07, holding a majority of the Justices in Metromedia had held that the city's aesthetic interests were enough to justify the ordinance.

19. See Suburban Lodge of America v. City of Columbus Graphics Comm'n, 2000 Ohio App. LEXIS 4701, at *12 (decided Oct. 12, 2000, appeal pending).

20. United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993), quoting Ward v. Rock Against Racism, 491 U.S. 781, 801 (1989).

21. Lavey v. City of Two Rivers, 171 F.3d 1110, 12115 n. 18 (7th Cir. 1999); Ackerley Communications of the Northwest v. Krochalis, 108 F.3d 1095, 1098 (9th Cir. 1993); Outdoor Systems, Inc. v. City of Lenexa, 67 F. Supp.2d 1231 (D. Kan. 1999); Suburban Lodge of America v. City of Columbus Graphics Comm'n, 2000 Ohio App. LEXIS 4701, at *12 (decided Oct. 12, 2000, appeal pending).

22. This task is difficult when municipalities attempt to micromanage sign control by identifying limited types of signs for regulation that do not present a substantial aesthetic interest that

justifies regulation. See, e.g., Burkow v. City of Los Angeles, 119 F. Supp.2d 1076 (C.D. Cal. 2000) (invalidating ordinance prohibiting display of "for sale" signs in car windows). Compare Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986) (county justified ordinance prohibiting display of portable signs). Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), was an as-applied attack on a city ordinance prohibiting the display of temporary signs on public property. The Court analyzed the constitutionality of the ordinance by considering its impact on the broad category of poster signs as represented by the signs the plaintiff displayed. Id. at 807.

23. Billboards, or off-premise signs, would seem to be a "broad" category of signs after Metromedia that present substantial aesthetic problems that municipalities can regulate, see, e.g., National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990). For a dissenting view see Adams Outdoor Advertising of Atlanta, Inc. v. Fulton County, 738 F. Supp. 1431 (N.D. Ga. 1990) (invalidating prohibition of off-site signs because not supported by studies).

24. See Federal Land Use Law, §§ 6.04.

25. The Supreme Court first used this term in Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding ordinance that required permit and payment of fee for a parade),

26. See Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 906 (1984).

27. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding ordinance prohibiting posting of temporary political signs on public property).

28. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Despite this holding, the Supreme Court recently had difficulty determining exactly what content neutrality is in a case in which it struck down a law prohibiting picketing at abortion clinics. Hill v. State of Colorado, 120 S. Ct. 2480, 2492-95 (2000). See also Id. at 2505-06 (Scalia, J., dissenting, arguing that Ward test is not exclusive, and that a law whose purpose is unrelated to content is content-based if it singles out content for its prohibition).

29. See United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

30. Metromedia, at 514. In addition, "[a]ny piece of property may carry or display religious symbols, commemorative plaques of historical societies and organizations, signs carrying news items or telling time or temperature, signs erected in discharge of governmental function, or temporary political campaign signs." Id.

31. Id. Included was an exemption of for sale signs, though the Court had previously held an ordinance prohibiting these signs was unconstitutional. Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977). The plurality in Metromedia also noted that signs with other commercial messages were not allowed. Justice Burger, dissenting, believed that plurality's holding on exempt signs "trivialized" the First Amendment. Metromedia, at 465.

32. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 (1984) (noting "general principle" that free speech clause only requires viewpoint neutrality).

33. 512 U.S. 43 (1994). See also City of Painesville Bldg. Dep't v. Dworken & Bernstein Co. L.P.A., 733 N.E.2d 1152 (Ohio 2000).

34. Id. at 59.

35. Dimitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993) (ordinance limiting permit exemptions to governmental flags); National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.), cert. denied, 498 U.S. 852 (1990); National Advertising Co. v. Town of Niagra, 942 F.2d 145 (2d Cir. 1991); National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) (exemptions similar to those invalidated in Metromedia); Village of Schaumburg v. Jeep Eagle Sales Corp., 676 N.E.2d 200 (Ill. App. 1996) (flags). See also Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994) (striking down exemptions in state outdoor advertising law but refusing to apply Metromedia).

36. Lavey v. City of Two Rivers, 171 F.3d 1110, 1116 (7th Cir. 1999) (exemptions fully justified; city need not develop voluminous record to justify such common-sense exemptions); Messer v. City of Douglasville, 975 F.2d 1505, 1512-13 (11th Cir. 1992) (exemptions are only from permit requirements and are more limited), cert. denied, 508 U.S. 930 (1993); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445-47 (N.D. Ill. 1990) (holding that majority of Justices in Metromedia found the exemptions constitutional), aff'd without opinion, 989 F.2d 502 (7th Cir. 1992). See also National Advertising Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir.), cert. denied, 498 U.S. 852 (1990) (exemption of "for sale" sign).

37. See Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994), for a contrary view.

38. For a colorful example involving an attorney see Young v. City of Roseville, 78 F. Supp.2d 970 (D. Minn. 1999) (regulation of flags held content-based). Other examples are cases invalidating ordinances regulating political signs. See, e.g., Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1994).

39. North Olmsted Chamber of Commerce v. City of North Olmsted,86 F. Supp. 2d 755, 766 (N.D. Ohio 2000) (discussing, e.g., directional, informational and organizational signs).

40. See Flying J Travel Plaza v. Transportation Cabinet, Dep't of Highways, 928 S.W.2d 344 (Ky. 1996) (invalidating prohibition of signs with flashing, moving or intermittent lights except time, date, temperature or weather signs with limits on cycling).

41. This is the definition suggested in Daniel R. Mandelker & William R. Ewald, Street Graphics and the Law 89 (rev. ed. 1988), hereinafter cited as Street Graphics.

42. For a discussion of facial challenges the court allowed in a free speech case that considered a sign regulation see North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755,

(N.D. Ohio 2000). Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), rejected a facial challenge based on regulatory overbreadth in a sign ordinance case. See also Federal Land Use Law §§ 6.05.

However, a plaintiff must have suffered an injury the litigation can redress before it can argue it can bring a facial challenge. See Harp Advertising Ill., Inc. v. Village of Chicago Ridge, 9 F.3d 1290 (7th Cir. 1993) (plaintiff did not have standing because size limit on signs prevented display of its billboards, and plaintiff did not challenge size limit).

43. E.g., Mayor of Boston v. Treasurer & Receiver General, 429 N.E.2d 691, 695 (Mass. 1981). Severability is a matter of state law.

44. Ackerley Communications of Massachusetts, Inc. v. City of Cambridge, 135 F.3d 210 (1st Cir. 1998); Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994); National Advertising Co. v. Town of Niagra, 942 F.2d 145, 149 (2d Cir. 1991) (deleting 11 provisions would make the ordinance look like a gutted building); Revere Nat'l Corp. v. Prince George's County, 819 F. Supp. 1336 (D. Md. 1993); Metromedia, Inc. v. City of San Diego, 649 P.2d 902 (Cal. 1982) (finding ordinance nonseverable on remand from Supreme Court). But see National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) (allowing severability).

45. Defining billboards as a separate category of sign is not entirely useful today. In the early days of outdoor advertising, billboards were those big and ugly freestanding signs located along highways, usually advertising national products and services. They were off-site because they were not located on a site where goods and services were made available. They are still there, but quite similar freestanding pole signs can be found today on business and other sites.

46. Metromedia, Inc. v. City of Pasadena, 30 Cal. Rptr. 731 (Cal. App. 1963), appeal dismissed, 376 U.S. 186 (1964); City of Lake Wales v. Lamar Advertising Ass'n, 414 So. 2d 1030 (Fla. 1982); Donnelly Adv. Corp. v. City of Baltimore, 370 A.2d 1127 (Md. 1977); State Dep't of Roads v. Popco, Inc., 528 N.W.2d 281 (Neb. 1995) (upholding distinction between on-premise and off-premise signs required by federal Highway Beautification Act); Summey Outdoor Adv., Inc. v. County of Henderson, 386 S.E.2d 439 (N.C. App. 1989); Landau Adv. Co. v. Zoning Bd. of Adjustment, 128 A.2d 559 (Pa. 1957). Contra, Metromedia, Inc. v. City of Des Plaines, 326 N.E.2d 59 (Ill. App. 1975).

47. Metromedia, at 503-12. A majority of the court affirmed this holding in Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810-12 (1984).

48. Id. at 512.

49. This assumption is confirmed by the California Supreme Court's decision to revise the definition of off-premise signs in the ordinance to include only signs with commercial messages. Id. at 494 nn. 1, 2. The city had contended, however, that the ordinance prohibited off-premise noncommercial signs. Id. at 494, n.2.

50. Id. at 512-14.

51. Id. at 513.

52. Wheeler v. Commissioner of Hwys., 822 F.2d 586 (6th Cir. 1987) (ordinance allowed signs relating to any "activity" on premises), cert. denied, 484 U.S. 1007 (1978); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987); City & County of San Francisco v. Eller Outdoor Advertising, 237 Cal. Rptr. 815 (1987) (also upheld exemptions in ordinance); Gannett Outdoor Co. v. City of Troy, 409 N.W.2d 719 (Mich. App. 1987). It is helpful to include a provision in a sign ordinance allowing the display of noncommercial messages on any sign authorized by the ordinance.

An argument is possible that an ordinance is content-based if it defines on-premise signs as signs displaying commercial and noncommercial messages or any combination of these messages. But see National Advertising Co. v. City & County of Denver, 912 F.2d 405, 410 (10th Cir. 1990) (holding that Supreme Court has provided "ample guidance" on the common-sense distinction between commercial and noncommercial speech). Accord, Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986) (and holding that codification of these terms is unnecessary).

53. Allowing off-premise signs with noncommercial messages may be neither desirable for aesthetic reasons nor practicable. Preventing sign companies from replacing noncommercial with commercial messages can be difficult.

54. "We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." Hill, at 2492 (upholding statute prohibiting picketing with signs near health facility).

55. Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C. 1995 (sign in historic district). See also National Advertising Co. v. City & County of Denver, 912 F.2d 405, 410 (10th Cir. 1990) (upholding ordinance with definition of off-premise sign similar to that quoted in text because Supreme Court has provided "ample guidance" on the common-sense distinction between commercial and noncommercial speech).

56. 975 F.2d 1505 (11th Cir. 1992), cert. denied, 508 U.S. 390 (1993). Accord, Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987) (off-premises vs. on-premises distinction is not an impermissible regulation of content just because whether a sign is permitted at a given location is a function of the sign's message).

57. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993) (regulation of newsracks). See also Whitton v. City of Gladstone, 54 F.3d 1400, 1403 (8th Cir. 1995) (quoting Discovery Network in holding regulation of political signs invalid); Burkhart Advertising, Inc. v. City of Auburn, 786 F. Supp. 721 (N.D. Ind. 1991) (holding contrary to Messer). See also Ackerley Communications, Inc. v. City of Cambridge, 88 F.3d 33, 37 n.7 (1st Cir. 1996) (stating that in "commonsense terms" the distinction between off-premise and on-premise signs is "surely" content-based because "determining whether a sign must stay up or come down requires consideration of the message it carries"); National

Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 738 (1st Cir.) (explaining Discovery Network), cert. denied, 515 U.S. 1103 (1995).

58. The California court had narrowed the definition of off-premise sign to apply only to commercial signs to avoid constitutional problems. Metromedia, at 494 n.2. See also id. at 521 nn. 25, 26.

59. 861 F.2d 246 (9th Cir. 1988).

60. Id. at 148.

61. Jackson v. City Council of Charlottesville, 659 F. Supp. 470 (W.D. Va. 1987), aff'd in part & rev'd in part without opinion, 840 F.2d 10 (4th Cir. 1988). See also Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988) (commercial and noncommercial speech allowed on billboards in industrial districts).

62. Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999) (and rejecting argument that exemption of off-site signs with noncommercial messages was underinclusive); National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388 (N.C. App. 1982).

63. Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992) (historic district), cert. denied, 508 U.S. 1103 (1993); Major Media, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986) (off-premise signs confined to industrial areas, but all permitted signs could carry noncommercial messages). See also Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988) (prohibiting all off-premise commercial advertising signs except along highways).

64. See Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43 (4th Cir.) (though plaintiff had argued only that a prohibition on off-site commercial speech was invalid). See also Revere Nat'l Corp, Inc. v. Prince George's County, 1997 U.S. App. Lexis 17337 (4th Cir. 1997) (unpublished; most off-site signs banned).

65. Southlake Property Associates, Ltd. v. City of Morrow, 112 F.3d 1114 (11th Cir. 1997), cert. denied, 525 U.S. 820 (1998). This holding means an ordinance that prohibits off-premise signs will only prohibit commercial speech.

66. 507 U.S. 410 (1993). For discussion see Leading Cases: I. Constitutional Law, 107 Harv. L. Rev. 144, 225-35 (1993).

67. This requirement comes from Board of Trustees v. Fox, 402 U.S. 469, 480-81 (1989).

68. Id. at 417. The court also referenced the lower court decisions, which had held that the benefit of removing the 52 newsracks of the plaintiffs was "minute" and "paltry" while 1,500 to 2,000 newsracks

remained in place. Id. at 41-18.

69. Id. at 428.

70. Id. at 425, n20.

71. Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999). See also Suburban Lodge of America v. City of Columbus Graphics Comm'n, 2000 Ohio App. LEXIS 4701, at *12 (decided Oct. 12, 2000, appeal pending) (disregarding Discovery Network and upholding ordinance restrictions on on-premise signs).

72. See Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 513 n.1 (1st Cir. 1989) (noting that the off-site vs. on-site distinction does not distinguish between signs attached to buildings and freestanding signs).

73. See text accompanying notes 24-26, supra.

74. The definition should describe the physical elements of a sign, not its content. The following definition is one example:

A lettered, numbered, symbolic, pictorial, or illuminated visual display designed to identify, announce, direct, or inform that is visible from the public right-of-way.

Street Graphics at 91. The definition is broad enough to include both commercial and noncommercial speech, so the ordinance must be careful not to distinguish improperly between them.

75. One option is simply to place a size limit on all signs, such as 200 square feet. This size limit would effectively prohibit billboards on highways, which are much larger. A billboard company denied a sign permit because of this provision would have to attack the size limitation as a violation of free speech, which is not likely to be successful. See Land Use Law §§ 11.17.

76. Signs in residential areas present special problems. See City of Ladue v. Gilleo, 512 U.S. 43 (1994), discussed at note 30, supra.

77. See the ideas contained in the model ordinance in Street Graphics, ch. 7.

78. Readers who are interested in doppelgangers may wish to consult Edgar Alan Poe's short story, William Wilson. See also Amy Mandelker, The Haunted Poet: Essinin's "Man in Black" and Musset's "La Nuit de Decembre" in The Supernatural in Slavic and Baltic Literature 226- 245 (Amy Mandelker & Roberta Reeder eds., 1989).

LPA/HPB ACTION LIST FROM April 13, 2010

HEARINGS & OTHER TOWN COUNCIL COVERAGE

RESOLUTIONS TO TOWN COUNCIL

LPA Res. 2010- Small Scale Amendment	Kay	4/15/10	Presentation of Resolution to Town Council
LPA Res 2008-40 135 Gulfview	VanDuzer	TBD	Will be scheduled to Town Council after Vacation Ordinance
LPA Res. 2010- Hooters COP	Kay	5/3/10	Presentation of Resolution to Town Council
LPA Res 2009-24 COP Expansion On Beach	all	5/5/10	Discuss with Town Council at LPA/TC joint meeting
LPA Res 2010-01 Ord 09-09 Refuse containers	Kay	4/15/10	Presentation of Resolution to Town Council

CONTINUED LPA HEARINGS

SEZ2008-0003 & VAR2008-0002 Shipwreck		10/12/10	Hearing continued at applicant request

FUTURE WORK ACTIVITIES

Rights-of-way, residential connection	Shockey	TBD	First presentation of ordinance to LPA
LDC 6-13, 6-14 & 10-255 Stormwater	Shockey/Kay/VanD	TBD	Town Council/LPA eng. report workshop to be scheduled
LDC 6-34-2022 Seasonal Parking	Dalton/Shockey	5/11/10	First LPA Hearing
HPB Budget Request for Town Council	Kay	5/11/10	Prepare 3 year/long term budget proposal for HPB approval
Resolution for HPB Budget Request	Dalton	5/11/10	Prepare resolution to accompany budget request

NOTE: The International Property Maintenance Code should be used as reference material when LPA work involves modification to the LDC, primarily for changes to Chapter 6. ALL DATES AND TIMES ARE APPROXIMATE AND SUBJECT TO CHANGE WITHOUT NOTICE. JKS April 13, 2010

LPA/HPB ACTION LIST FROM April 13, 2010

NOTE: The International Property Maintenance Code should be used as reference material when LPA work involves modification to the LDC, primarily for changes to Chapter 6. ALL DATES AND TIMES ARE APPROXIMATE AND SUBJECT TO CHANGE WITHOUT NOTICE. JKS April 13, 2010