

A G E N D A

SPECIAL JOINT WORK SESSION OF THE CITY COUNCIL & PLANNING AND ZONING COMMISSION OF THE CITY OF COTTONWOOD, ARIZONA, TO BE HELD MARCH 13, 2012, AT 6:00 P.M., AT THE COTTONWOOD RECREATION CENTER, COTTONWOOD ROOM, LOCATED AT 150 SOUTH 6TH STREET, COTTONWOOD, ARIZONA.

- I. CALL TO ORDER.
- II. ROLL CALL.
- III. ITEMS FOR DISCUSSION, CONSIDERATION, AND POSSIBLE DIRECTION TO STAFF:

Comments regarding items listed on the agenda are limited to a 5 minute time period per speaker.

1. DIRECTION CONCERNING THE STATE-MANDATED RE-ADOPTION OF THE CITY'S GENERAL PLAN.
 2. PROPOSED AMENDMENT TO THE COTTONWOOD ZONING ORDINANCE, ADDING A NEW SECTION 405. G. 11. ELECTRONIC MESSAGE DISPLAY SIGNS.
 3. PROGRESS REPORT ON THE IMPLEMENTATION OF THE CITY'S BICYCLE PLAN.
- IV. CALL TO THE PUBLIC--This portion of the agenda is set aside for the public to address the Council regarding an item that is not listed on the agenda for discussion. However, the Council cannot engage in discussion regarding any item that is not officially listed on the agenda for discussion and/or action (A.R.S. §38-431.02.A.(H).) Comments are limited to a 5 minute time period.
 - V. ADJOURNMENT.

Pursuant to A.R.S. § 38-431.03.(A) the Council may vote to go into executive session on any agenda item pursuant to A.R.S. § 38-431.03.(A)(3) Discussion or consultation for legal advice with the attorney or attorneys of the public body.

Members of the City Council will attend either in person or by telephone conference call.

The Cottonwood Recreation Center is accessible to the disabled in accordance with Federal "504" and "ADA" laws. Those with needs for special typeface print or hearing devices may request these from the City Clerk (TDD 634-5526.) All requests must be made 24 hours prior to the meeting.

City of Cottonwood, Arizona City Council Agenda Communication



 Print

Meeting Date:	March 13, 2012
Subject:	General Plan Re-Adoption Process
Department:	Development Services
From:	George Gehlert, Community Development Director

REQUESTED ACTION

Direction concerning the State-mandated re-adoption of the City's General Plan (required by 2015).

SUGGESTED MOTION

N/A

BACKGROUND

The City's current General Plan was ratified by the voters in 2004. The plan and the process behind its development was facilitated almost entirely in-house and took almost three years to achieve.

Additionally, there were considerable technical reports that were developed shortly before the process was initiated. They include the Cottonwood Housing Strategy, APS Focused Future (economic development) Study, Verde Valley Transit Study, Cottonwood Area Transportation Plan, 260 Access Management Plan, Verde Valley Regional Traffic Report, Airport Master Plan, Verde Valley Regional Open Space Study and the Verde River Watershed Study. Staff also conducted a City-wide land use inventory as part of this process. This combination provided a wealth of information on which to base the recommendations of the current plan document. Much of this information has not been updated. This is something the Commission and Council may want to discuss before embarking on this process.

Required Components: The State of Arizona (under ARS 9-461.5 thru 461.7) requires that the City "shall adopt a comprehensive, long-range general plan for the development of the municipality," which includes a statement of community goals and development policies. Additionally, the following plan elements are required for a City over 10,000:

- Land Use
- Circulation
- Open Space
- Growth Areas
- Environmental Planning
- Costs of Development

- Water Resources
- The State also requires that the Plan shall be coordinated with the State Land Department and include provisions which address the plan amendment process.
- Although required only for Cities of 50,000 or more, the plan may also include elements devoted to Conservation; Recreation; Public Services and Facilities; Public Buildings; Housing; Rehab and Redevelopment; Safety; Bicycling; and Neighborhood Preservation.

In addition to the seven primary elements identified above, the City's current General Plan includes elements for Housing and Economic Development, basically in recognition of our role as the market hub of the Verde Valley. A Recreation component was also included as part of the Open Space Element.

Public Involvement Process: The State also requires the City adopt procedures for effective, early and continuous public participation in the development of the General Plan (or any amendment thereof). Procedures must provide for:

- Broad dissemination of information and participation; and opportunity for submittal of written comments.
- Public hearings after effective notice. At least one hearing is required by the P&Z Commission and at least one by the City Council. At a minimum notice must be provided in the form of a legal advertisement 15-30 days prior to each.
- Open discussions and consideration of public comment.
- A 60-day review period prior to consideration of the final document by the P&Z Commission.
- Involvement by all affected agencies, including the NACOG, Yavapai County and all adjacent jurisdictions, the Arizona Commerce Authority and Department of Water Resources; and anyone else who requests inclusion.
- Cottonwood's General Plan also has a Plan Administration section which identifies a host of other agencies which must be included. The policy also requires that review of the General Plan appear as an agenda item at the P&Z Commission's regular monthly hearing throughout the review process; and public work sessions for the review of each element; open houses on the final document during the 60 day review process; and posting of related materials on the City's website. The policy also requires that all related information and comments are made available for public review.

Approval Process: The Plan must be approved by Resolution with a 2/3 vote of the City Council; and must also be ratified by a majority of the registered voters at the next regularly scheduled municipal election, or at a special election at least 120 days after Council adoption. Following ratification by the voters, the plan is copied to Yavapai County and the State Attorney General's office (for verification of compliance). The plan is in effect for 10 years. After that time, the Council can re-adopt the existing plan for another 10 years or adopt a new plan. The old plan stays in effect until a new plan is voted in.

Implementation: As a follow up to plan adoption, the State also requires the P&Z

Commission to make recommendations on tasks required for putting the plan into effect (special area planning, codes, capital improvement projects, etc.); as well as an annual progress report.

Tentative Re-Adoption Calendar

FEB-MAR Process Planning

APR-JULY Assembly of primary background and context information

JULY Outreach process to boards, staff, public.

JULY-SEPT Assembly of steering committee / stakeholders for review of process and elements

OCT Public survey process.

NOV-DEC Vision/goals workshops

Beginning in 2013, Staff anticipates a process of review/revisions to plan elements, area planning and related workshops. Ultimately, a final document would be subject to a 60-day agency and public review process; hearing review by the P&Z Commission and the City Council. Voter ratification is required by July 1, 2015.

JUSTIFICATION/BENEFITS/ISSUES

- Fulfills State requirements for re-adoption of the General Plan.
- Establishes formal community vision/goals regarding land use and development issues.
- There will be a considerable staff commitment required to accomplish this project.
- Could be additional costs associated with any required assistance (tech reports, etc.).

COST/FUNDING SOURCE

Given that the facilitation of this project is provided in-house, costs for this process should be minimal and contained within the Community Development budget. There may be additional costs for development of background information and/or public survey or notifications which may be addressed as part of the current budget proposal.

ATTACHMENTS:

Name:

Description:

Type:

No Attachments Available

City of Cottonwood, Arizona City Council Agenda Communication



 Print

Meeting Date:	March 13, 2012
Subject:	Proposed amendment to the Cottonwood Zoning Ordinance, adding a new Section 405. G. 11. Electronic Message Display Signs.
Department:	Development Services
From:	Charlie Scully, Planner

REQUESTED ACTION

Discussion and direction to staff.

SUGGESTED MOTION

No action required.

BACKGROUND

The Planning and Zoning Commission discussed electronic message display signs at their August 15, 2001 and October 17, 2011 meetings. Concerns were raised regarding night time lighting levels for these types of signs and the general effect on the character of Cottonwood. Further research was conducted to review other city and national standards regarding light output and related standards. The findings include the following:

- Sign regulations need to be content-neutral. If you allow exceptions for certain uses, such as government uses, temporary uses, time & temperature signs, gas station price signs, churches, schools or other non-profit or civic uses, then it becomes difficult to justify restrictions or prohibition of such signs for commercial uses. Either you restrict all such signs or you have to allow for general use.
- Interest in the use of LED type signs is likely to continue to grow as they become more affordable. Advances in the technology have resulted in more options for more uses. Around the country these types of signs are being used for retail stores, theaters, entertainment centers, car dealers, hotels, churches, schools, government facilities and others.
- New technologies have made it more cost-effective to use electronic LED-type signs capable of producing a range of computer controlled images and messages. Wireless controls allow the operator to change messages from inside the building.
- Cottonwood does not currently have a clear policy regarding the use and application

of these signs. There are general regulations regarding internal illumination and lighting levels for signs but specific regulations regarding electronic message display signs would help applicants and staff.

- This review does NOT include electronic billboards, off-premise signs, video display signs or large highway-oriented signs.
- The electronic message display can be limited to a percentage of a freestanding or wall mounted sign with a maximum overall size indicated. This would result in a reasonable yet effective size sign that is integrated into a larger freestanding or wall mounted sign without overwhelming the street environment.
- Such signs are recommended to be prohibited in the Old Town area due to incompatibility with the historic character.
- The question of light output, especially at night is one of the biggest concerns. Daytime levels are less of a concern as the maximum brightness tends to be self-regulating due to glare and cost. Night time light levels are intended to ensure adequate effective readability of the signs without nuisance spillover to other uses or properties.

SUMMARY OF PROPOSED AMENDMENT

Electronic Message Display signs are also called "Electronic Message Boards" and "Electronic Message Centers." Typically these signs are controlled by remote wireless technology from inside the building. They usually use LED lights for illumination. Some types only display messages with digital letters or numbers in a static or basic scrolling mode. A new generation of electronic signs can be programmed to produce a variety of graphic images with various types of movement. There are several key parts of ordinances for electronic message signs, including the following:

Definitions: Add new definitions for "Electronic Message Display," and "Time and Temperature Sign." Add revised definition for "Flashing Sign."

Display Time: Most jurisdictions permit screens to change in as little as 8 seconds. The length of time an image is displayed before changing is based on aesthetics and context.

Display Transitions: There are several key types of movement found with electronic signs (e.g., scrolling, fade, dissolve, etc.) These are described so as to provide a regulatory approach. Some transitional techniques have the effect of drawing more attention to the movement rather than the message. The proposed standards provide opportunity for signs to change while minimizing unnecessary movement that alters the local context.

Brightness: LED screens generally need to be bright enough in the daytime so as to be visible in contrast to the sunlight. As the night sky becomes darker after sunset, the automatic controls step the brightness level down to an adequate level to achieve a readable contrast. It does not need to be as bright as day time during the night to achieve a readable contrast.

Light Level Settings: Measurement of light output is in NITS, an industry standard for electronic LED lights. Documentation of both the daytime and nighttime light settings would be required. Light levels for signs are usually either a single-level on/off type setting or a multi-level scalable setting.

Sign Standards: A number of basic development standards are covered, such as height, size, and number.

Prohibitions: Such signs are recommended to be prohibited in the historic Old Town Area. In addition, electronic signs should be setback a distance from residential uses due to the light levels. Off-premise sign restrictions would apply.

Existing Sign Regulation:

The closest description in the existing ordinance describes "Flashing Signs." Currently, there is no distinction in the ordinance between warning signs, time and temperature signs, gas station price signs or electronic message signs. There is a trend to use more advanced types of message signs for many uses, including churches, schools, gas stations, drug stores, shopping centers, car dealers, and so on.

There is mixed data from various sources indicating concerns that rapidly changing illuminated message signs may be distracting and unsafe to drivers. At best the data is considered inconclusive. The regulatory issues have more to do with compatibility with surrounding development and aesthetic concerns. Careful attention needs to be given to regulations to ensure businesses have access to new technologies and the best opportunities for promoting their use while balancing concerns that such signs are not a nuisance and they present an attractive addition that is compatible with surrounding development.

Current Sign Regulations:

DELETE 405. E. 2.

- ~~2. Flashing Signs: Signs shall not be animated or have intermittent illumination or flashing lights, except that "time and temperature" signs such as used by banking institutions may be allowed by Conditional Use Permit.~~

New Definitions to Section 405 (Signs) B. Definitions:

NITS - Nits are the standard unit of brightness for electronic and digital signage. It is a measure of the light being emitted by the sign in contrast to footcandles which measure the brightness of the surface area or object that is being lighted.

SIGN, ELECTRONIC MESSAGE DISPLAY - An electrically activated changeable sign capable of displaying words, symbols, figures or graphic images and whose variable message and/or graphic presentation capability can be electronically programmed and changed by remote or automatic means Also known as an Electronic Message Center, typically uses light emitting diodes (LEDs) as a lighting source.

SIGNS, FLASHING: Signs that have flashing lights or intermittent illumination shall be limited to emergency or warning signs installed for traffic control, including signs that draw attention to speed limits, stop signs, fire stations, school zones and similar governmental or public uses.

SIGN, TIME AND TEMPERATURE: Electronic sign that provides intermittent data regarding the current time and temperature by means of digital numbers.

ADD NEW SECTION 405. (SIGNS) E. 14. Electronic Message Display Signs REGULATIONS APPLICABLE TO SIGNS IN ALL DISTRICTS:

14. Electronic Message Display Signs:

a.Purpose: These regulations provide standards and procedures for the safe and appropriate use of electronic message display signs. The regulations are intended to ensure the use of such signs will not have a detrimental effect on the surrounding area or the public welfare, and will be consistent with the purpose and intent of this Ordinance.

b.Modes: Such signs include the following modes of operations:

- (1)Static.** Signs which include no animation or effects simulating animation.
- (2)Fade.** Signs where static messages are changed by means of varying light intensity, where the first message gradually reduces intensity to the point of not being legible and the subsequent message gradually increases in intensity to the point of legibility.
- (3)Dissolve.** Signs where static messages are changed by means of varying light intensity or pattern, where the first message gradually appears to dissipate and lose legibility simultaneous to the gradual appearance and legibility of the subsequent message.
- (4)Traveling.** Signs where the message is changed by the apparent horizontal movement of the letters or graphic elements of the message.
- (5)Scrolling.** Signs where the message is changed by the apparent vertical movement of the letters or graphic elements of the message.

c.Standards: The following describes standards for the installation and use of electronic message display signs:

- (1)Electronic message display signs shall be permitted in the C-1, C-2, I-1 and I-2 Zoning Districts subject to Design Review approval. The use of electronic message display signs in a PAD Zone may be approved with the initial Master Development Plan or shall require a Conditional Use Permit. In any other zoning district this type of sign may be considered for commercial and institutional uses subject to obtaining a Conditional Use Permit and Design Review approval. The conditional use shall consider proximity to residential uses and compatibility with surrounding uses.**
- (2)Transitions:** There shall be no animation, travelling, scrolling, fades or dissolves between messages. Transitions between messages shall be instantaneous;
- (3)Display Time:** Electronic message display signs shall be permitted to change their message no more than once every eight (8) seconds;

- (4)Hours of Operation: As per Section 408. Outdoor Lighting Code, all outdoor illuminated signs shall be turned off at 10:00 p.m. or when the business closes, whichever is later;**
- (5)Electronic message display signs may be incorporated into freestanding signs or wall mounted sign subject to compliance with the general standards for signs in Section 405. Signs.;**
- (6)The area of the electronic display shall not be more than fifty (50) percent of the total area of the sign;**
- (7)The maximum height of the electronic message display components on a ground mounted sign shall be fifteen (15) feet in height;**
- (8)Electronic message displays signs are allowed adjacent to arterial and collector streets, as designated by the City of Cottonwood Street Classification Map;**
- (9)Electronic message displays signs shall not be located within 150 feet of any residence or residential zoning district;**
- (10)Only one electronic message display sign shall be allowed as part of a shopping center sign and only one such sign shall be permitted per street frontage for a shopping center;**
- (11)For individual uses, only one (1) electronic message display sign shall be permitted on the premises;**
- (12)Electronic message display signs must be spaced a minimum of 100 feet from other electronic message display signs or from flashing warning signs, including but not limited to, speed limit signs, school crosswalks, and fire stations;**
- (13)Gasoline price signs that provide electronic numbers shall be permitted for service stations and fueling centers provided the signs are in compliance with all other applicable sign standards;**
- (14)Time and temperature signs that provide electronic numbers only may be located in commercial districts. Display may change between time and temperature every 3 seconds. Such signs may be integrated with signs that identify the primary property use or they be installed as separate signs provided they do not exceed eight (8) square feet in area or fifteen feet in height; and**
- (15)Electronic message display signs shall be prohibited within the Cottonwood Commercial Historic District, which includes properties generally located in the Old Town**

Cottonwood area on Main Street.

d.Exemptions:

- (1) **Governmental signs, including emergency warning signs, traffic control signs, special event signs or similar applications using electronic message displays.**
- (2) **Electronic "Open" or "Closed" type signs displayed in windows of businesses.**

e.Lighting Intensity: Electronic message display signs typically require more intensive lighting during daylight hours so the contrasting light is readable. Unless the lighting level is only set at acceptable night time levels at all times, the brighter daytime lighting intensity must automatically re-set to a lower level for night time hours. To ensure compliance with this Section, the sign must have an automatic brightness control linked to ambient light levels.

(1) **Brightness.** Electronic message display signs shall be factory-certified to not exceed a maximum illumination of 500 nits during nighttime hours (between dusk and dawn) and a maximum illumination of 5,000 nits during daylight hours.

(2) **Certification:** Applications for sign permits shall include written certification from the sign manufacturer that the light intensity has been factory pre-set not to exceed the levels specified herein, and the intensity level is protected from end-user manipulation by the manufacturer: Photocell technology is used to vary the intensity of lighting depending on present-time level of ambient light (e.g. daytime, nighttime, or cloudy conditions).

(3) **Color range:** Electronic message display signs may be illuminated by single-color or full color lighting sources.

JUSTIFICATION/BENEFITS/ISSUES

REVIEW OF REGULATIONS IN OTHER CITIES:

Phoenix - Phoenix allows only **300 Nits** for night lighting of LED signs. 300 NITS night, 8 second minimum, 150 feet from residential.

Gilbert - Leaves it up to Design Review Board to determine based on the "nature and character of the uses surrounding the sign location, and traffic volume and speed in the area where the sign will be visible."

Mesa - Mesa allows up to 2,500 Nits for full color night lighting of electronic message signs.

Full color: **Night 2,500 Nits**; Day 7,000

Red: Night 1,125; Day 3,159

Changes less than one hour require Special Use Permit.

Maricopa County - Electronic Message Display Sign.
300 Nits max dusk to dawn.

Rural and Residential zones prohibited 10 PM to 6 AM

Four Levels of EMD Signs:

Level 1. Static message changes no more than once per 8 seconds.

Level 2. Allows "fade" and "dissolve" transitions.

Level 3. Allows "travel" and "scrolling" and graphic images to move but not video.

Level 4. Allows full video. transitions

Avondale - Variable Message Sign

0.3 foot candles greater than ambient brightness

Requires measurement by foot candle meter

8 second max change. Static image only

Prescott Valley - Electronic Information Center Sign.

2 square feet of sign per 1 linear foot of building frontage up to 200 sq.ft. max size.

Use Permit required

Commercial and Industrial Zones (C-1, C-2, C-3, M-1, M-2, PM)

Brightness not addressed.

Tucson - Electronic Message Center Sign.

"Multi-purpose facility" allows wall mounted LED with full movement or video type sign. **Definition refers to signs with movement and changes more than once per hour:**

ELECTRONIC MESSAGE CENTER: An electronic or electronically controlled message board, where scrolling or moving copy changes are shown on the same message board or any sign which changes the text of its copy electronically or by electronic control more than once per hour.

Tucson Lighting Code

501.5 LED, LCD, Plasma Screen and Similar Signs: Outdoor LED, LCD, Plasma and Similar signs shall comply with Sections 501.3.1 and 501.3.3. Further, they shall be limited to a maximum luminous intensity of **200 Nits** (candela per square meter), full white mode, from sunset to sunrise.

Oro Valley - Leases City owned portable electronic message sign for special events. Low-intensity LED lighting may be a component of a sign as specified in the sign code.

Show Low - Electronic Message Display

C-2, I-1, I-2 Zones

Static Message only. Change once per 60 Minutes. Otherwise Use Permit.

(b) The intensity of the LED display shall not exceed 4,690 nits (luminance equal to one candle per square meter) during daylight and **1,675 nits during the night.**

(c) The color of the display shall be amber only.

(d) Prior to the issuance of a Sign Permit, the applicant shall provide a written certification from the sign manufacturer that the light intensity has been factory pre-set not to exceed the levels specified in the chart above, and equipped with an automatic dimmer for night time use, and the intensity level is protected from end-user manipulation by password-protected software or other method as deemed appropriate by the Planning and Zoning Director.

Sedona - Prohibited, except time & temperature signs.

Flagstaff - Prohibited: Electronic Message Center Signs.

Seattle WA - 500 night, 5000 day

United States Sign Council - recommended sample ordinance:

The US Sign Council, an industry group, recommends 750 Nits in their model ordinance.

750 NITS one hour before sunset

8 second minimum commercial; 12 seconds residential zones

Prohibit scrolling, fading, dissolving and other moving effects

COST/FUNDING SOURCE

N/A

ATTACHMENTS:

Name:	Description:	Type:
Revised - Electronic Message Ordinance.doc	Revised Ordinance	Backup Material
3-13-12 Legal article signs.pdf	Legal Article Regarding Signs	Backup Material
EM Sign Article 1.doc	EM Sign Article	Backup Material

DELETE SECTION 405. (SIGNS) E. 2.

- ~~2. Flashing Signs: Signs shall not be animated or have intermittent illumination or flashing lights, except that “time and temperature” signs such as used by banking institutions may be allowed by Conditional Use Permit.~~

Add New Definitions to Section 405 (Signs) B. Definitions:

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14. Electronic Message Display Signs:

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- b. Modes: Such signs include the following modes of operations:
 - (1) Static. Signs which include no animation or effects simulating animation.
 - (2) Fade. Signs where static messages are changed by means of varying light intensity, where the first message gradually reduces intensity to the point of not being legible and the subsequent message gradually increases in intensity to the point of legibility.
 - (3) Dissolve. Signs where static messages are changed by means of varying light intensity or pattern, where the first message gradually appears to dissipate and lose legibility simultaneous to the gradual appearance and legibility of the subsequent message.
 - (4) Traveling. Signs where the message is changed by the apparent horizontal movement of the letters or graphic elements of the message.
 - (5) Scrolling. Signs where the message is changed by the apparent vertical movement of the letters or graphic elements of the message.
- c. **Prohibited Locations:**
 - (1) Electronic message display signs shall be prohibited within any historic preservation district, including the Cottonwood Commercial Historic District, which includes properties generally located in the Old Town Cottonwood area on Main Street.
- d. Standards: The following describes standards for the installation and use of electronic message display signs:
 - (1) Electronic message display signs shall be permitted in the C-1, C-2, I-1 and I-2 Zoning Districts subject to Design Review approval. The use of electronic message display signs in a PAD Zone may be approved with the initial Master Development Plan or shall require a Conditional Use Permit. In any other zoning district this type of sign may be considered for commercial and institutional uses subject to obtaining a Conditional Use Permit and Design

Review approval. The conditional use shall consider proximity to residential uses and compatibility with surrounding uses.

- (2) Transitions: There shall be no animation, travelling, scrolling, fades or dissolves between messages. Transitions between messages shall be instantaneous;
- (3) Display Time: Electronic message display signs shall be permitted to change their message no more than once every **sixty (60) seconds**;
- (4) Hours of Operation: As per Section 408. Outdoor Lighting Code, all outdoor illuminated signs shall be turned off at 10:00 p.m. or when the business closes, whichever is later;
- (5) Electronic message display signs may be incorporated into freestanding signs or wall mounted sign subject to compliance with the general standards for signs in Section 405. Signs.;
- (6) **Size:** The area of the electronic display shall not be more than **thirty (30) percent** of the total area of the sign, **and no electronic message display sign shall be more than twenty-four (24) square feet in area**;
- (7) The maximum height of the electronic message display components on a ground mounted freestanding sign shall be fifteen (15) feet in height;
- (8) Electronic message displays signs are allowed adjacent to arterial and collector streets, as designated by the City of Cottonwood Street Classification Map;
- (9) Electronic message displays signs shall not be located within **three-hundred (300)** feet of any residence or residential zoning district;
- (10) Only one electronic message display sign shall be allowed as part of a shopping center sign and only one such sign shall be permitted per street frontage for a shopping center;
- (11) For individual uses, only one (1) electronic message display sign shall be permitted on the premises;
- (12) Electronic message display signs must be spaced a minimum of 100 feet from other electronic message display signs or from flashing warning signs, including but not limited to, speed limit signs, school crosswalks, and fire stations; and

d. **Exceptions:**

- (1) Governmental signs, including emergency warning signs, traffic control signs, special event signs or similar applications using electronic message displays.
- (2) Electronic “Open” or “Closed” type signs displayed in windows of businesses.
- (3) **Gasoline price signs that provide electronic numbers shall be permitted for**

service stations and fueling centers provided the signs are in compliance with all other applicable sign standards. Current fuel prices and fuel types may be internally or electronically illuminated by means of LED, provided the light is low intensity. Any constant movement, blinking, flashing, high intensity, or animation caused by an LED is prohibited.

(4) Time and temperature signs that provide electronic numbers only may be located in commercial districts. Display may change between time and temperature every 3 seconds. Such signs may be integrated with signs that identify the primary property use or they be installed as separate signs provided they do not exceed eight (8) square feet in area or fifteen feet in height.

e. Lighting Intensity: Electronic message display signs typically require more intensive lighting during daylight hours so the contrasting light is readable. Unless the lighting level is only set at acceptable night time levels at all times, the brighter daytime lighting intensity must automatically re-set to a lower level for night time hours. To ensure compliance with this Section, the sign must have an automatic brightness control linked to ambient light levels.

(1) Brightness. Electronic message display signs shall be factory-certified to not exceed a maximum illumination of **three-hundred (300)** nits during nighttime hours (between dusk and dawn) and a maximum illumination of 5,000 nits during daylight hours.

(2) Certification: Applications for sign permits shall include written certification from the sign manufacturer that the light intensity has been factory pre-set not to exceed the levels specified herein, and the intensity level is protected from end-user manipulation by the manufacturer: Photocell technology is used to vary the intensity of lighting depending on present-time level of ambient light (e.g. daytime, nighttime, or cloudy conditions).

(3) Color range: Electronic message display signs may be illuminated by single-color or full color lighting sources.

Legal Issues in the Regulation of On-Premise Signs

By Alan Weinstein

This chapter examines the major legal issues that arise when local government enacts or enforces sign regulations. In the early years of sign regulation, a period that runs from approximately 1900 to 1960, the major legal question was whether the government's police power could be exercised to achieve aesthetic purposes. By the 1960s, this question had been answered in the affirmative by an overwhelming majority of states. Subsequently, the focus of judicial inquiry turned to three other legal issues that are possible when considering the validity of particular sign regulations:

- (1) First Amendment or free speech issues
- (2) Takings issues as defined by the Fifth Amendment or various state statutes
- (3) Enforcement and flexibility provisions within the regulation

These concerns remain the focus of most legal challenges to sign regulation.

We examine each of these issues in turn and then offer an analysis of the specific problems that may develop from the regulation of commercial on-premise signs. The chapter concludes with a discussion of how local governments might resolve these problems in ways that would address the needs of both government and businesses.

SIGN REGULATION AND POLICE POWER

Although local governments have regulated signs for more than a century, early sign cases focused on whether sign regulation was a valid exercise of the police power by local government. The first reported cases upholding local government regulation of signs appeared at the turn of the century, with decisions coming from both large cities (e.g., Chicago and St. Louis) and small towns (e.g., Windsor, Connecticut). These early decisions focused on the legitimacy of traditional police power rationales, such as the endorsement of public safety and the preservation of property values because the courts were troubled by the idea that aesthetic concerns could provide an adequate basis for sign controls.

Beginning in the 1940s, courts in several states, including California, Florida, and Louisiana, argued that sign regulations could also be justified by local interest in the promotion of tourism for economic advantage. Because this interest was intertwined with aesthetics, controlling signs, especially billboards, made an area more visually attractive to tourists. It helped push courts towards an acceptance of the modern idea that sign regulation could be justified primarily on aesthetics grounds.

Meanwhile, U.S. Supreme Court decisions on the extent of local governments' zoning and eminent domain powers provided support for the view that aesthetic and other "environmental" considerations provide a sufficient basis for government regulation. The Court gave aesthetics its first judicial recognition in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which upheld the right of municipalities to enact zoning ordinances for the purpose of promoting health, safety, moral, and general welfare objectives. In this landmark decision, the Court acknowledged that apartment houses could be excluded from single-family residential districts because their negative effects on the availability of sunlight and open space made them almost nuisance-like. Three decades later, in *Berman v. Parker*, 348 U.S. 26 (1954), an urban renewal case involving the power of eminent domain, the Court expressed very strong support for aesthetics-based regulations:

The concept of the 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).

Later, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), seven justices of the Supreme Court agreed that San Diego's interest in avoiding visual clutter was sufficient to justify a complete prohibition of commercial off-premises signs. The Supreme Court's support for aesthetics-based sign regulations was reaffirmed in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), in which the Court upheld a ban on posting signs on public property.

Meanwhile, similar developments were occurring in state courts so that, today, the courts in most states hold that aesthetics alone will support an exercise of the police power. Further, many state courts have made such rulings in regards to sign regulation, including California, Florida, Georgia, Illinois, Massachusetts, New Jersey, New York, and North Carolina.

An example of how much leeway such decisions extend to local government can be seen in *Asselin v. Town of Conway*, 628 A.2d 247 (N.H. 1993), where the New Hampshire Supreme Court upheld an ordinance that prohibited new signs that were internally illuminated, while "grandfathering" existing internally illuminated signs, based solely on aesthetic values.

The legal issues regarding sign regulation in most states, therefore, no longer involve questions of whether regulating signs for aesthetic purposes is within the police power, but whether the regulations comport with the First and Fifth Amendments and other constitutional and statutory constraints.

SIGN REGULATION AND THE FIRST AMENDMENT

First Amendment law is quite complex because the Supreme Court has not developed a single standard of scrutiny or analytical "test" for deter-

mining when government regulation of “speech” violates the Constitution. Rather, the Court will review government regulation of speech using several different “tests” that apply standards ranging from moderate to strict scrutiny. Thus, the Court would, for example, apply different tests to determine the constitutionality of each of the following local government sign regulations:

1. A ban on all on-premise commercial signs
2. A ban on only on-premise noncommercial signs
3. A rule limiting on-premise commercial signs to one per building
4. A rule imposing no specific limits in regard to on-premise commercial signs but requiring the property owner to submit a “signage site plan” for approval by a planning or design review committee
5. A rule obliging the property owner to submit the proposed sign “copy” for approval by a planning or design review committee

After examining the most important legal issues that arise under the First Amendment in the context of sign regulation, we discuss the changes that courts are currently making in their view of commercial speech regulation and discuss the effect these changes will have on the validity of the most common forms of local regulation of commercial on-premise signs.

Basic First Amendment Principles

Although the First Amendment speaks in absolute terms—“Congress shall make *no law* abridging the freedom of speech . . .” (emphasis added)—the Supreme Court has rejected a literal reading of the text. While government may not normally impose direct restrictions on the communicative aspects of speech, the Court has adopted the view that, under very limited circumstances, speech may be subject to narrowly proscribed regulations. As noted previously, there is no single test that the Supreme Court employs to determine how much government regulation of speech may be tolerated; rather, the Court chooses its analysis based on the manner in which government is attempting to impose regulations on speech protected by the First Amendment. Recent Court decisions have shown, however, that attempts to regulate the content of speech in any context will trigger the highest level of scrutiny. Thus, the question of whether a regulation is “content-neutral” has become the paramount concern of courts.

Content-neutrality, and other aspects of a regulatory scheme that are important in a court’s choice of which type of analysis to apply, and the nature of the various analyses are discussed below.

Is the regulation “content-neutral”? This is the single most crucial question that courts ask about any regulatory scheme affecting expression protected by the First Amendment. A content-neutral regulation will apply to a particular form of expression (e.g., signs or parades) regardless of the content of the message displayed or conveyed. The most common form of content-neutral regulation is so-called “time, place, or manner” regulation, which, as the name suggests, does no more than place limits on when, where, and how a message may be displayed or conveyed.

An example of a Supreme Court case involving a content-neutral time, place, or manner regulation is *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which upheld a New York City ordinance regulating concerts at a

band shell in Central Park. This case involved a regulation the city had enacted after receiving numerous complaints from concert goers about poor sound quality, and from other park users and nearby residents about excessive noise. The city found that a combination of inadequate sound equipment and incompetent sound “mixing” was the cause of both the poor sound quality and excessive noise. It determined that the best solution was to require the city’s Department of Recreation to provide the equipment and sound technicians for all concerts.

In judging the validity of this requirement, the Court stated that “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” Stated another way, “[t]he government’s purpose is the controlling consideration” in determining whether an ordinance really is content-neutral (491 U.S. at 791).

An example of an unconstitutional content-based regulation can be found in *Boos v. Barry*, 485 U.S. 312 (1988), where the Supreme Court struck down a District of Columbia regulation making it unlawful to display any sign that tended to bring a foreign government into “public odium” or “public disrepute” within 500 feet of a foreign embassy. This regulation was clearly unconstitutional, the Court found, because it sought to restrict “the direct impact of the speech on its audience” based solely on whether that speech was favorable or critical of the foreign government.

Courts are particularly hostile to content-based regulations that are also “viewpoint-based.” The regulation struck down in *Boos* serves to illustrate the distinction between content-based regulation and viewpoint-based regulation in First Amendment law. The critical distinction in the *Boos* decision is based on the fact that the ordinance regulated the “viewpoint” to be communicated: *pro*-foreign government signs were permitted, but *anti*-foreign government signs were prohibited. By contrast, a hypothetical content-based regulation would have prohibited all political signs or all signs making any reference to the foreign government, within 500 feet of the foreign embassy. Such a regulation would be “viewpoint-neutral,” but not “content-neutral,” since signs with nonpolitical messages could be displayed.

While some content-based regulations of speech are permissible, the Supreme Court has indicated that viewpoint-based regulations will rarely, if ever, be upheld. For example, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), seven members of the Court agreed that San Diego could prohibit “commercial” billboards but not “non-commercial” billboards, a distinction that is obviously content-based. But, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court invalidated a “hate speech” ordinance that made it a misdemeanor to knowingly display a symbol or message that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” As written, this ordinance made it a crime to engage in “hate speech” directed at some individuals or groups (e.g., Catholics, Asians, or women) but imposed no penalty for “hate speech” directed at others (e.g., homosexuals, communists, or “militias”). In the Court’s view, because only certain “hate speech” viewpoints were criminalized, the ordinance went “beyond mere content discrimination, to actual viewpoint discrimination.” The Court argued, “[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects” (505 U.S. at 391).



Marya Morris

Courts do allow local governments to distinguish between on-premise and off-premise signs, even allowing local governments to ban new off-premise signs entirely so long as on-premise signs are not restricted only to commercial messages. But regulations that differentiate among signs on the basis of the ideas or viewpoints communicated, or on sign content in general, are subject to strict scrutiny.

When will the courts apply strict vs. intermediate scrutiny? Normally, any time government makes regulatory distinctions based on the “content” of the regulated speech, courts will apply a very demanding analysis, known as “strict scrutiny.” By contrast, if the regulatory distinctions are “content-neutral,” a somewhat less-demanding analysis, known as “intermediate scrutiny,” applies.

The strict scrutiny test requires that a content-based regulation of speech must be justified by a *compelling* governmental interest and be *narrowly tailored*, sometimes stated as “use of the least restrictive means,” to achieve that interest. Moreover, a content-based regulation of speech is presumed to be unconstitutional (i.e., the normal presumption that a local government regulation is constitutional is reversed), so that government, rather than the party challenging the ordinance, bears the “burden of proof” and must affirmatively justify the regulation to the court’s satisfaction.

The intermediate scrutiny test requires that a content-neutral regulation of speech must be justified by a *substantial*—not a compelling—governmental interest and must be “narrowly tailored” to achieve that interest; however, the narrowly tailored requirement is not to be equated with the “least restrictive alternative” requirement sometimes applied in the strict scrutiny test. As stated by the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989): “Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government’s legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so” (491 U.S. at 798). Finally, the regulation must leave open “ample alternative avenues of communication.”

The strict scrutiny standard is applied, however, when a content-neutral regulation imposes a total ban on speech. Courts will apply strict scrutiny even to content-neutral regulations when the regulation imposes a total ban on a category of speech protected by the First Amendment. For example, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), a unanimous Supreme Court ruled that an ordinance banning all residential signs, except for those categories of signs falling within 10 exemptions, violated the First Amendment rights of homeowners because it totally foreclosed their opportunity to display political, religious, or personal messages on their own property.

The O’Brien standard for “incidental restrictions” on speech. Intermediate scrutiny has also been applied to regulations that are directed at the non-communicative aspects of speech but, in addition, have an indirect effect on the message being communicated. In such cases, the courts apply a four-part test formulated by the Supreme Court in *United States v. O’Brien*, 391 U.S. 367 (1968), to balance the government’s interest in regulating the noncommunicative aspect of speech against any incidental restriction on freedom of expression. The *O’Brien* test permits a government regulation that incidentally restricts speech if:

- (1) such regulation is within the constitutional power of government;
- (2) it furthers an important or substantial government interest;
- (3) the government interest is unrelated to the suppression of free expression; and
- (4) the incidental restriction on expression is not greater than what is essential to the furtherance of that interest.

As can readily be seen, the *O'Brien* test for incidental restrictions on speech and the intermediate scrutiny test for content-neutral time, place, or manner restrictions are almost identical, a fact that was formally recognized by the Supreme Court in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and reaffirmed in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

The “secondary effects” doctrine. Courts often apply the *O'Brien* test to judge the constitutionality of zoning ordinances that regulate sexually oriented businesses more severely than other, similar businesses. But what is the courts’ rationale for using the *O'Brien* test, rather than strict scrutiny, to judge an ordinance that appears to make content-based distinctions, such as zoning a cabaret presenting sexually oriented entertainment (e.g., topless dancing) more stringently than a cabaret featuring dinner theatre? The answer can be found in the so-called “secondary effects” doctrine, first announced by the Supreme Court in *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), which approved a Detroit “adult business” zoning ordinance that the city claimed sought to deter the negative secondary effects of sexually oriented adult businesses, such as neighborhood deterioration or crime.

In *Young*, the Court found that Detroit had demonstrated both that its ordinance was based on a substantial governmental interest unrelated to the suppression of speech and that sufficient alternative locations for sexually oriented businesses remained available. The Court reinforced its approval of the secondary effects doctrine 10 years later, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), declaring that the doctrine was “completely consistent with our definition of ‘content-neutral’ speech regulations” (475 U.S. at 48).

In the wake of the Court’s strong endorsement of the secondary effects doctrine, as applied to sexually oriented businesses, there were numerous attempts by local governments to justify a variety of restrictions of speech, including sign regulations, on the ground that the real aim of the regulation was control of negative secondary effects. One such effort, noted above, was the restriction on anti-foreign government signs that the Court struck down in *Boos v. Barry*, 485 U.S. 312 (1988). There, the District of Columbia argued that the restriction was enacted to prevent the secondary effect of violating “our international law obligation . . . to shield diplomats from speech that offends their dignity” (485 U.S. at 321). The Court disagreed that such a secondary effect could qualify as content-neutral because the government’s “justification focuses only on the content of the speech and the direct impact that speech has on its listeners” (485 U.S. at 320).

While *Boos v. Barry* shows that the courts will carefully examine a purported secondary effects rationale to see if it disguises content-based regulation of speech, governments continue to argue that content-based sign regulations should be upheld under the secondary effects doctrine.

When does a regulation impose a “prior restraint” on speech? “Prior restraint” is the legal term for any attempt to condition the right to freedom of expression upon receiving the prior approval of a governmental official. In the context of land-use regulation, a prior restraint may take the form of requiring an applicant to obtain a permit, license, or conditional use approval as a condition to displaying or conveying a message. Such attempts are seen as posing a particularly serious threat to the values embodied by the First Amendment and will receive the strictest judicial scrutiny. As with other forms of strict scrutiny, when a court finds a prior restraint, it will reverse the traditional presumption of validity



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Because local governments have fairly broad discretion in regulating sexually oriented businesses under the “secondary effects” doctrine, courts have generally upheld greater than normal restrictions on signs identifying adult businesses.

afforded to the actions of government and presume that the prior restraint is unconstitutional.

In order to overcome the presumption that a prior restraint is unconstitutional, government must show that the licensing or permitting scheme:

- (1) is subject to clearly defined standards that strictly limit the discretion of the official(s) administering the scheme, and
- (2) meets stringent procedural safeguards to guarantee that a decision to grant or deny the license is rendered within a determined and short period of time, with provision for an automatic and swift judicial review of any denial.

In the context of sign regulation, it would seem logical that requiring any type of permit, license, or conditional use approval as a prerequisite to engaging in activity protected by the First Amendment would be a prior restraint, but, until 1990, the Supreme Court limited the prior restraint concept to permit or license schemes that constitute a “content-based” regulation of expression. That year, in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), a case involving a sexually oriented business licensing ordinance, the Court extended a somewhat lessened form of prior restraint protection to speech that was viewed as content-neutral because of the application of the secondary effects doctrine. The Court has, however, not yet applied the prior restraint doctrine to commercial speech.

Is the regulation “void for vagueness” or “overbroad”? Even where a government regulation of speech is otherwise valid, it may be struck down if a court finds the language so vague that it is unclear what type of expression is actually regulated, or it is so broadly worded that it has the effect of restricting speech to an extent that is greater than required to achieve the goals of the regulation. These two principles—termed “void for vagueness” and “overbreadth”—seek to ensure that government regulation of expression is sufficiently precise so that individuals will know exactly what forms of expression are restricted, and that laws which legitimately regulate certain forms of expression do not also include within their scope other types of expression that may not be permissibly regulated. These two principles are quite closely related, and courts often find that an ordinance violates both; however, the Supreme Court has not, to date, ruled that overbreadth is applicable to commercial speech.

The Changing First Amendment Status of Commercial Speech

Historically, local regulation of commercial on-premise signs has rarely raised significant First Amendment issues. In recent years, however, the Supreme Court has dramatically increased the degree of First Amendment protection afforded to commercial expression, and this change is beginning to influence the way that lower federal and state courts view the treatment of commercial on-premise signs in local ordinances.

Although the Court has been expanding the constitutional protection given to most forms of expression for the past 80 years, its broadened protection of free speech rights has only recently been extended to “commercial speech,” such as advertising and signs. Prior to 1975, the Court had maintained the position, first announced in *Valentine v. Christensen*, 316 U.S. 52 (1942), that commercial speech is not fully protected by the First Amendment. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), however, the Court seriously questioned its decision in *Valentine*, and, one term later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), it finally acknowledged that even if speech did “no more

than propose a commercial transaction,” it was still entitled to some degree of protection under the First Amendment.

In the last few years, the Court has increased the degree of protection afforded commercial speech to the point where many scholars and jurists now argue that truthful commercial speech should receive the same degree of First Amendment protection as speech. Although *Bigelow* and *Virginia State Board* did not deal directly with regulation of on-premise commercial signs, they appear to affect the way that state courts and the lower federal courts view such regulations. By reducing the distinctions between commercial speech and noncommercial speech, these decisions can encourage courts, under appropriate circumstances, to apply the legal doctrines developed in cases involving noncommercial speech to regulation of commercial speech.

The Central Hudson “intermediate scrutiny” test for commercial speech. In *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S.557 (1980), the Court announced a four-part test to determine when government regulation of commercial speech was valid. First, a court must ask whether the commercial speech at issue concerned “lawful activity” and was not “misleading.” If so, it was protected by the First Amendment. Second, the court must ask if the government interest served by the regulation was substantial, because free speech should not be limited for insubstantial reasons. If the answer to both of the first two questions was positive, the court “must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest” (447 U.S. at 566).

Although the language of the *Central Hudson* test differs somewhat from the intermediate scrutiny test used for time, place, or manner regulation, or the *O’Brien* test for regulations that incidentally regulate speech, it is clearly similar to both. All three impose a lesser standard than the strict scrutiny tests for content-based regulations or restrictions on speech that amounted to a prior restraint, but they are also far more stringent than the deferential standards—“reasonableness” or “rationality” or “not arbitrary and capricious”—normally applied to test the validity of governmental regulations of purely economic interests.

The Metromedia decision and the on-premise/off-premise distinction. The Supreme Court had its first opportunity to apply the *Central Hudson* analysis to the regulation of commercial signs in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). Here the Court considered the constitutionality of a San Diego sign ordinance that regulated on-premise signs while banning off-premise billboards. San Diego’s effort to treat on-premise signs more leniently than off-premise billboards is not unusual. Because of the practical and commercial necessity of allowing signs identifying the location of a business, on-premise signs are often regulated but never completely banned. By contrast, off-premise signs are frequently deemed to be merely another mode of advertising and, particularly in the case of large outdoor billboards, are often criticized as significantly degrading the attractiveness of communities. Thus, communities often seek to ban off-premise signs. On-premise signs, on the other hand, are an accessory use.

The Court struggled in *Metromedia* to agree on a workable accommodation between First Amendment guarantees, now extended to commercial speech, and the deference normally granted to a municipality’s exercise of the police power, producing five separate opinions. There were some issues, however, where the justices could agree. First, the Court was unanimous in finding that a community could permit on-premise com-



Katherine Hawk

The Metromedia court was unanimous in finding that a community could permit on-premise commercial signs while prohibiting off-premise commercial billboards as a basic part of local efforts to reduce sign clutter and promote traffic safety. Shown here: On-premise commercial signs in the LaJolla district of San Diego.

mercial signs but prohibit off-premise commercial billboards as a basic part of local efforts to reduce sign clutter and promote traffic safety. Next, seven justices agreed that, based on the *Central Hudson* four-part test, San Diego's interest in promoting traffic safety and avoiding visual clutter was substantial enough to justify a complete prohibition of off-premise commercial billboards. Finally, although the Court ruled 6-3 that the San Diego sign ordinance was unconstitutional, the six justices disagreed on the reason why the ordinance was flawed.

Two justices simply found that the San Diego ordinance failed the *Central Hudson* test because the city had not conclusively shown that off-premise commercial signs actually impair traffic safety or that the city's interest in aesthetics was substantial enough to justify a prohibition on signs in commercial and industrial areas. The other four justices joined in a plurality opinion that found two flaws in the San Diego ordinance. First, the ordinance favored commercial over noncommercial speech because commercial speech could be displayed on on-premise signs while noncommercial speech could not. Second, San Diego's treatment of off-premise signs was invalid because the ordinance chose among various noncommercial messages by creating exceptions for some, but not all, noncommercial messages on off-premise signs.

The three dissenting justices in *Metromedia*, while writing separate opinions, agreed that the city could ban all off-premise billboards based on its interests in traffic safety and aesthetics. Since the plurality also approved of some content-based regulation of commercial speech—"the city may distinguish between the relative value of different categories of commercial speech . . ." (453 U.S. at 514-15)—seven members of the *Metromedia* Court had signaled their willingness to allow municipalities some degree of freedom in applying content-based regulations to commercial speech, so long as these were not also viewpoint-based. Thus, for example, while the Court could uphold a ban on all off-premise commercial signs, it would not allow an exception to that ban for commercial billboards that advertised "products made in America" because this would be seen as viewpoint-based.

The "reasonable fit" requirement for regulation of commercial speech. The Court subsequently provided further guidance concerning the application of the *Central Hudson* test in two cases that address government regulation of commercial speech in contexts other than sign regulation. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), and *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), both discuss the burden placed on government to establish a "reasonable fit" between the government's ends and the means chosen to achieve those ends.

The *Fox* case involved the legality of a state university's ban on commercial solicitation, in this case a Tupperware party, in school dormitories. The Supreme Court used this case to specify more precisely the standard required by the third part of the *Central Hudson* test: regulation of commercial speech must be "no more extensive than necessary to achieve the substantial governmental interest." The Court reiterated that regulation of commercial speech did not have to meet the least restrictive means test required by strict scrutiny, but that something more than mere reasonableness was required: "a 'fit' between the legislature's ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective" (492 U.S. at 480).

In *Discovery Network*, the Supreme Court rejected a claim that Cincinnati's legitimate interests in the safety and attractive appearance of its streets and sidewalks justified the city's ban on commercial newsracks. The Court, noting that the ban would remove only 62 commercial newsracks while leaving 1,500-2,000 newsracks in place, agreed with the lower courts' findings that the benefits to be derived from the ban were "minute" and "paltry," given the city's primary concern of achieving a reduction in the total number of newsracks.

In reaching this conclusion, the Court rejected the city's contention that the "low value" of commercial speech justified the city's selective ban on commercial newsracks and held that Cincinnati had failed to establish the necessary "fit" between its goals and the means chosen to achieve those goals:

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 a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills" (507 U.S. 410, at 428).

The Court also discussed the reasonable fit test to be applied to regulation of commercial speech in more general terms, noting that:

[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 (507 U.S. at 418 n.13).

The Court also found that the Cincinnati ban could not be considered a valid content-neutral regulation of the time, place, and manner of speech because the very basis for the regulation was the difference in content between commercial and noncommercial newsracks.

The Court elevates the status of commercial speech in 44 Liquormart. The decision of the Supreme Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), is the most significant pronouncement on the status of commercial speech since *Bigelow v. Virginia* established that commercial speech was protected by the First Amendment. In this case, the Court struck down a state law that prohibited the advertising of retail liquor prices except at the place of sale. Although the justices found it difficult to agree on the reasoning to support their decision, the various opinions, taken together, are evidence of a profound change in how the Court views the status of commercial speech. In brief, a majority of the Court expressed a willingness either to apply a more stringent test than *Central Hudson* or to apply *Central Hudson* with "special care" to judge the constitutionality of regulations that impose a ban on the dissemination of truthful information about lawful products.

44 Liquormart thus announced the Court's intent to apply a standard reasonably close to strict scrutiny in judging the validity of content-based bans on commercial speech. This would nearly equate the First Amendment status of commercial speech with that of noncommercial speech in cases involving a regulation that seeks to impose a content-based prohibition on communication. Further, in the Court's most recent commercial speech decision, *Lorillard Tobacco Co., et. al. v. Reilly*, 121 S.Ct. 2404 (2001), Justices Thomas, Kennedy, and Scalia expressed their continuing concern that the *Central Hudson* test gives insufficient protection to commercial speech.



Michael Davidson

In City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993), the court found that there was not a reasonable fit between the city's desire to improve community appearance and safety and its ban on commercial newsracks. The ban would have removed just 62 newsracks while leaving 1,500 to 2,000 in place.

RECURRING PROBLEMS IN LOCAL GOVERNMENT REGULATION OF SIGNS

Although this chapter focuses on the regulatory treatment of commercial on-premises signs, below we briefly discuss some of the general problem areas that many communities encounter in their sign regulations.

Regulating “Too Much” vs. Regulating “Too Little”

As stated previously, regulations that distinguish signs by their subject matter or ideas raise First Amendment concerns because people fear that government will use its regulatory powers to restrict, censor, or distort speech. For this reason, a regulation that differentiates among signs on the basis of the ideas or viewpoints communicated is subject to strict scrutiny, as are regulations that differentiate by content (i.e., subject matter) rather than viewpoint. Thus, for example, regulations that restrict election signs to endorsements of major party candidates (viewpoint-based) and regulations that ban all election signs (content-based) are both highly suspect. In order to sustain such content-based regulations, government is required to show that the regulation is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that interest.

Communities argue, however, that, since they can't prohibit and don't want to allow all signs, a sign ordinance needs to make distinctions among various categories of signs to achieve aesthetics, traffic safety, or other goals. The crux of the sign regulation problem is the courts' seeming inability to articulate a rule or standard that provides an adequate degree of predictability in judging the validity of ordinances that characterize signs by their content or ideas in order to differentiate their regulatory treatment.

The latest Supreme Court guidance on this dilemma comes from *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), where a unanimous Supreme Court ruled that a ban on all residential signs, except for those falling within 10 exempted categories, violated the First Amendment rights of homeowners, because it totally foreclosed their opportunity to display political, religious, or personal messages on their own property. Despite the numerous exceptions in the ordinance, the Court, for the sake of argument, accepted the city's contention that the ordinance was a content-neutral time, place, or manner regulation, but still struck down the ordinance because the city had foreclosed an important and distinct medium of expression—lawn signs—to political, personal, or religious messages and had failed to provide adequate substitutes for such an important medium.

Justice Stevens' opinion in *Ladue* began by reviewing the Supreme Court's three previous sign cases—*Metromedia*, *Vincent*, and *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977)—and then noted “[t]hese decisions identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs” (512 U.S. at 50). Such a measure may be challenged either because it “in effect regulates *too little* speech because its exemptions discriminate on the basis of the signs’ messages,” or “[a]lternatively, such provisions are subject to attack on the ground that they simply prohibit *too much* protected speech” (512 U.S. at 50-51, emphasis added).

Thus, Justice Stevens clearly recognized the bind that communities are in when regulating signs: an overly restrictive ordinance risks prohibiting too much speech, but any effort to avoid that result, by creating exemptions from the general ban, may result in restricting too little speech (i.e., the exemptions suggest that government is impermissibly favoring certain messages over others). Conversely, any attempt to cure the defect of regulating too little speech by simply repealing all the exemptions raises anew the likelihood that the ordinance prohibits too much speech. This choice, between all or nothing, when it comes to sign regulations had also been recognized 10 years earlier in Justice Burger's dissent in *Metromedia*.

Although *Ladue* had argued that its sign ordinance implicated neither of these concerns because it was directed only at the signs' secondary effects, Justice Stevens expressed skepticism about the city's secondary effects rationale for its particular exemptions, and noted that exemptions may be generally suspect for a reason other than the concerns over viewpoint and content discrimination: “they may diminish the credibility of the government's rationale for restricting speech in the first place,” citing *Cincinnati v. Discovery Network, Inc.* Unfortunately, for our purposes, after making this point, Justice Stevens turned away from any further analysis of either the too little vs. too much dilemma or the secondary effects question, and focused the remainder of his opinion on the issue that most concerned the plaintiff: Did she have a constitutional right to display an antiwar sign at her own home?

Not surprisingly, to pose the question in this way is to answer it. The fact that the ordinance struck at the very core of the First Amendment no doubt explains why Stevens at this point chose to treat the *Ladue* ordinance, despite its various exemptions, as being free of any impermissible content or viewpoint discrimination. By treating the ordinance as content-neutral, Stevens could easily show that a prohibition on noncommercial speech at one's own home could not be sustained under even a minimal level of scrutiny.

Stevens claimed, however, that invalidating *Ladue's* ban on almost all residential signs did not leave the city “powerless to address the ills that may be associated with residential signs,” expressing confidence that the city could find “more temperate measures” to satisfy its regulatory goals. But the opinion provided scant guidance as to what such measures might entail, noting only that “[d]ifferent considerations might apply” if residents attempted to display commercial billboards or other types of signs in return for a fee and mentioning that “individual residents themselves have strong incentives to keep their own property values up and to prevent ‘visual clutter’ in their own yards and neighborhoods—incentives markedly different from those of persons who erect signs on others’ land, in others’ neighborhoods, or on public property” (512 U.S. at 50).

When the Supreme Court agreed to decide *Ladue*, expectations were raised that the Court would issue its first major pronouncement on local sign regulations in a decade. The Eighth Circuit Court of Appeals had found that the ordinance was a content-based regulation of speech



In Ladue v. Gilleo, the court made it clear that attempts to prohibit noncommercial residential signs are unlikely to survive even minimal scrutiny. Shown here: A traffic safety sign for family pets in Provincetown, Massachusetts.

because the city favored commercial speech over noncommercial speech and favored some kinds of noncommercial speech over others. Observers hoped that the Court might clarify whether cities had any latitude in crafting exceptions to their sign regulations.

There was good reason to expect much from *Ladue*. In the decade since *Vincent*, the Court had addressed several First Amendment issues with implications for sign regulations. *Ladue* presented the court with an opportunity to clarify one or more of the following issues:

1. The secondary effects doctrine, first fully articulated in *Renton* and then clarified in *Boos v. Barry*
2. The reasonable fit requirement between legislative means and ends, stated first in *Fox* and reiterated in *Discovery Network*, both dealing with regulation of commercial speech
3. The standards for judging time, place, or manner restrictions elaborated in *Ward*
4. The possibility, suggested in the *Discovery Network* case, that the Court was prepared to reconsider the lesser standard of review it applied to commercial, as compared to noncommercial, speech

Expectations were also raised in *Ladue* because there seemed so little at stake were the Court to rule only on the narrow issue raised by the prohibition of Margaret Gilleo's signs. While it is pointless to speculate why the Court declined the opportunity to make *Ladue* its instrument for a definitive statement on sign regulation, we can productively discuss what implications the Court's decision does have for sign regulation.

Ladue certainly makes clear that attempts to prohibit noncommercial residential signs are unlikely to survive even minimal scrutiny. The decision also shows that a community cannot successfully assert the secondary effects doctrine to justify sign prohibitions unless the secondary effects of the prohibited signs differ significantly from those of permitted signs in ways that are substantially related to the goals to be achieved by the prohibition. In other words, local government must be able to demonstrate that the secondary effects of the signs it seeks to regulate contribute far more significantly to the problem(s) it seeks to remedy than the secondary effects of the signs it is willing to permit. Finally, nothing in *Ladue* disturbs the rule, derived from the plurality opinion in *Metromedia*, that communities may prohibit off-premise commercial billboards but permit on-premise signs so long as on-premise signs are not restricted only to commercial messages. But, short of the invalidity of a ban on noncommercial residential signs, there is little in Justice Stevens' opinion to guide local officials attempting to maneuver between the Scylla of too much and the Charybdis of too little sign regulation.

Regulation of Political Signs

A sign ordinance, prohibiting political or election signs, is clearly unconstitutional and courts have struck down prohibitions on political signs that applied in both residential and other districts. For examples, see *Runyon v. Fasi*, 762 F.Supp. 280 (D. Hawaii 1991) and *Fisher v. City of Charleston*, 425 S.E.2d 194 (W.Va. 1992). Courts have also struck down sign ordinances that discriminated among different political messages. For example, in *City of Lakewood v. Colfax Unlimited Ass'n*, 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 at an upcoming

election. The court construed the ordinance as prohibiting all ideological signs other than those concerning election matters, thus violating the principle that “[g]overnment may not set the agenda for public debate” (643 P.2d at 62).

Ordinances that place unreasonable limits on the number of political signs that may be displayed or that impose restrictive time limits only on political signs have also been struck down. For example, in *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993), the federal Fourth Circuit Court of Appeals invalidated a sign ordinance that imposed a two-sign limit on political signs. There are numerous other decisions invalidating time limits for political signs.¹ Some of the cases have suggested, however, that time limits on political signs might be permissible if they are part of a “comprehensive” program to address aesthetic issues. Thus, in *Collier v. City of Tacoma*, 854 P.2d 1046 (Wash. 1993), the Washington Supreme Court invalidated an ordinance that restricted the display of political signs in residential areas to the 60 days before and 7 days after an election but imposed no time restrictions on other temporary signs. This was done on the grounds that the city could not impose time restrictions on political speech to advance aesthetic interests until it could show that it was seriously and comprehensively addressing aesthetic concerns. Similarly, in *Tauber v. Town of Longmeadow*, 695 F.Supp. 1358 (D. Mass. 1988), a federal district court suggested that time limits may be valid if supported by a demonstration that the enacting government is seriously and comprehensively addressing aesthetic concerns in the community. Note, however, that these cases provided little guidance on how comprehensive the government program must be to justify the restrictions on political signs.

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. The court, applying the *Ward* tests for time, place, or manner restrictions found that the 90-day limitation was constitutional.

Finally, while the Supreme Court, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), approved a government’s prohibition of the posting of all signs, including political signs, on public property, an ordinance prohibiting the posting of any sign on public property without the written consent of the town board was struck down as an unconstitutional prior restraint on speech by a federal trial court in *Abel v. Town of Orangetown*, 759 F.Supp. 161 (S.D.N.Y. 1991), because the prohibition could be selectively applied to ban only those signs carrying messages disfavored by the board.

Distinguishing Between On-Premise and Off-Premise Signs

Local sign regulations often distinguish between on-premise and off-premise signs in an effort to restrict the location and number of commercial off-premise signs (i.e., billboards); however, such efforts often lead to serious legal problems because the regulations have the unintended and unconstitutional effect of placing greater restrictions on noncommercial signs than on commercial signs. Such regulations are discussed here because it is their effect on noncommercial signs that is the critical issue.

On-premise signs advertise goods or services offered on the site where the sign is located, while off-premise signs advertise products or services not offered on the same premises as the sign. Although this distinction is con-



Courts will support reasonable time limits on temporary political signs in residential areas, but such signs can not be subject to any greater restrictions than other temporary commercial or noncommercial signs in those areas.

tent-based, courts, including the Supreme Court in its *Metromedia* decision, accept it as being rationally related to valid police power objectives. 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.

For example, in *National Advertising Co. v. Village of Downers Grove*, 561 N.E.2d 1300 (Ill. App. 2d Dist. 1990), *appeal denied*, 567 N.E.2d 333 (Ill. 1991), *cert. denied*, 501 U.S. 1261 (1991), the plaintiff challenged the validity of an ordinance permitting on-premise advertising but not allowing advertisement of off-premise businesses. It argued that “since the content of the sign determines whether it is permissible, i.e., a sign in an on-premise district must advertise the business on the premises or a non-commercial message, the ordinance is not a neutral time, place and manner restriction.” The court disagreed: “The distinction between on-site and off-site advertising is not aimed toward the suppression of an idea or viewpoint.” The court sustained the ordinance, concluding that it “furthers a substantial governmental interest, no greater than necessary, and is unrelated to the suppression of speech.”

Banning or Restricting “Off-Premise” Signs

There is little question that local government may lawfully enact a ban limited to off-premise commercial signs. *National Advertising Co. v. City of Denver*, 912 F.2d 405 (10th Cir. 1990), a decision of the federal Tenth Circuit Court of Appeals, is one of the many cases upholding such an ordinance. Regulations have also been upheld that limit the height, size, and/or number of off-premise signs or that restrict their location, whether limited to commercial signs or including both commercial and noncommercial signs.

In *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), for example, the federal Fourth Circuit Court of Appeals argued that, even if a municipal ordinance’s size restrictions on outdoor off-premises advertising effectively prohibited all such advertising, it did not warrant a finding that the ordinance was overly broad or was not a substantial promotion of legitimate state interests if it was enacted to promote aesthetic and safety concerns—a legitimate state objective. Other cases have upheld various time, place, or manner regulations on off-premise signs.²

Off-premise sign regulations have been struck down, however, for a number of reasons. The plurality in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), found San Diego’s ban on off-premise signs to be invalid because exceptions to the ban were made for some, but not all noncommercial messages. Exempt signs included:

- government signs;
- signs located at public bus stops;
- signs manufactured, transported, or stored within the city, if not used for advertising purposes;
- commemorative historical plaques;
- religious symbols;
- signs within shopping malls;
- For Sale and For Lease signs;
- signs on public and commercial vehicles;
- signs depicting time, temperature, and news;
- approved temporary, off-premises subdivision directional signs; and
- temporary political campaign signs.

Thus, under the San Diego ordinance, an off-premise sign relating to a political campaign would be allowed, but one expressing a general political belief that did not pertain to a campaign would not be. The *Metromedia* plurality said, “With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: ‘To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth’” (453 U.S. at 515).

Courts have followed *Metromedia* by striking down both off-premise sign regulations that make distinctions among forms of noncommercial speech and those that allow exceptions for certain commercial messages but not a general exception for noncommercial messages.³ In contrast, regulations that exempt all noncommercial speech from a general ban on off-premise signs, have been upheld (see, e.g., *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986)) as have those where the definition of off-premise signs has been found not to include noncommercial messages (e.g., *City of Cottage Grove v. Ott*, 395 N.W.2d 111 (Minn. Ct. App. 1986)).

Off-premise sign regulations have been found invalid where the local government failed to show the interests it is seeking to promote through the regulations. While most courts merely require that the interests be mentioned in the ordinance, and then defer to the governing body’s determination that the regulations substantially promote those interests (e.g., *National Advertising Co. v. Town of Babylon*, 703 F.Supp. 228 (E.D.N.Y. 1989), *aff’d in part and rev’d in part*, 900 F.2d 551 (2d Cir. 1990)), other courts have required a higher level of substantiation of the interests involved and the regulations’ relationship to them. For example, in *Bell v. Stafford Township*, 541 A.2d 692 (N.J. 1988), the New Jersey Supreme Court struck down a prohibition on off-premise signs because the city failed to provide “adequate evidence that demonstrates its ordinance furthers a particular, substantial government interest, and that its ordinance is sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression” (541 A.2d at 699-700).

Restricting the Content of Signs to “On-Premise” Commercial Messages

As discussed, the *Metromedia* plurality found fault with San Diego’s allowing on-premise signs to contain commercial but not noncommercial messages. Since *Metromedia*, lower courts have routinely struck down local ordinances that do not allow on-premise signs to display noncommercial messages, while upholding ordinances that allow on-premise signs to display both commercial and noncommercial messages.⁴ In some cases, courts have accepted the inclusion of the following or similar language as solving this problem: “Any sign authorized in this chapter is allowed to contain noncommercial copy in lieu of any other copy.”⁵

Regulating Portable Signs

Local governments often enact special restrictions and prohibitions on portable signs based on the argument that the haphazard use of these signs is detrimental to several legitimate governmental interests, including aesthetics, traffic safety, electrical hazards, and hazards to persons and property during high winds because of insecure placement. Several courts have upheld stringent regulation of portable signs because they found that the restrictions were a reasonable approach to dealing with these risks.⁶

Regulations on portable signs have been struck down, however, when a court found they were irrational or overly stringent. In *Dills v. City of*

Marietta, 674 F.2d 1377 (11th Cir. 1982), for example, the federal Eleventh Circuit Court of Appeals affirmed an injunction against enforcement of an ordinance that placed time restrictions on the use of portable signs. The court found that the time restrictions would not further the city's claimed interest in traffic safety since the effect of the ordinance would be to exacerbate the distracting quality of portable signs: motorists would tend not to ignore portable signs when they appeared because they would learn that such signs were displayed for only a brief period, so they were used only to advertise something special.⁷

Despite these cases striking down regulation of portable signs, the trend of decisions has moved towards acceptance of such restrictions, if reasonable, on the ground that local government does not have to undertake a comprehensive approach to achieve aesthetic objectives but has the flexibility to regulate selectively (e.g., by restricting portable signs) in order to partially achieve the objective. For example, in *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), the federal Fifth Circuit Court of Appeals stated that cities can pursue the "elimination of visual clutter in a piecemeal fashion."

Regulating Real Estate Signs

In *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the United States 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. While courts have upheld the imposition of reasonable restrictions on the size, number, and location of real estate signs in furtherance of legitimate interests (e.g., aesthetics), such restrictions, because they are content-based, are suspect and have been invalidated where the government has failed to convince the court that its regulations were necessary to achieve a legitimate governmental interest or were not aimed at curtailing information.

In *South-Suburban Housing Center v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991), *cert. den. sub nom. Greater South Suburban Board of Realtors v. City of Blue Island*, 502 U.S. 1074 (1992), for example, the federal Seventh Circuit Court of Appeals upheld restrictions on the size, placement, and number of realty signs to protect the aesthetic interests of a wooded semi-rural village. By contrast, in *Citizens United for Free Speech v. Long Beach Twp. Bd. of Comm'rs*, 802 F.Supp. 1223 (D.N.J. 1992), a federal trial court invalidated an ordinance in this resort community that permitted For Sale signs, but prohibited For Rent signs, during certain periods, on the grounds that the community presented no evidence to justify that the ordinance would achieve its claimed interest in aesthetics.

In a federal Sixth Circuit Court of Appeals case involving this issue, *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382 (6th Cir. 1996), an organization of real estate brokers challenged a city ordinance permitting real estate signs only in windows as opposed to the more normal placement of the front yard. The Sixth Circuit viewed the ordinance as a content-neutral regulation but still struck it down based on the finding that the ordinance was neither narrowly tailored to achieve its claimed interest in aesthetics nor did it provide an adequate alternative channel of communication.⁸

While local government may not prohibit temporary real estate signs on private property, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Supreme Court held that government may totally prohibit the posting of signs on public property. Thus, local government may prohibit the posting of real estate Open House directional signs in the



Bob Brown

Several courts have upheld stringent regulations—including outright bans—on portable signs, finding such regulations a reasonable approach to dealing with the negative impacts of such signs on community appearance and safety.

public right-of-way or attached to public property, such as street and traffic lights, as part of a total prohibition on posting signs in these public locations. A prohibition that applied only to the posting of real estate signs in the public right-of-way would, however, be viewed as a content-based restriction and be subject to strict scrutiny, with government facing the difficult task of justifying such a partial ban. Finally, local government may totally prohibit posting real estate Open House directional signs on private property since such signs are merely another form of commercial off-premise sign.

Where ordinances *allow* temporary real estate signs in residential areas, while *prohibiting* political and other noncommercial temporary signs, courts will declare the ordinance invalid, both because they restrict the free speech rights of property owners without providing an alternative channel of communication and grant more favorable treatment to commercial than noncommercial messages.⁹

The upshot of these rulings is that temporary signs containing both noncommercial and commercial on-premise messages must be allowed in residential areas. The reasoning of these rulings would apply as well to nonresidential areas. For example, in *Gonzales v. Superior Court*, 226 Cal. Rptr. 164 (Cal.App. 1986), a state appellate court invalidated an ordinance prohibiting the placement of temporary noncommercial signs on vehicles while permitting vehicles to display temporary commercial signs.

THE TAKINGS ISSUE: REQUIRING THE REMOVAL OR AMORTIZATION OF ON-PREMISE COMMERCIAL SIGNS

The Fifth Amendment to the U.S. Constitution 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”—safeguards citizens from government action that arbitrarily deprives them of fundamental rights and may be applied both to the substance and procedures of governmental actions. The takings clause—“nor shall private property be taken for public use, without just compensation”—was “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁰ In this century, the U.S. Supreme Court has interpreted the due process clause of the Fourteenth Amendment as making these two provisions of the Fifth Amendment, along with certain other constitutional guarantees, applicable to the actions of state and local government and has developed a variety of takings tests to judge the constitutionality of government regulations that affect property interests.¹¹

Takings claims may arise in the context of regulation of on-premise signs whenever government requires the removal of a sign. Government may lawfully require the removal of illegal or unsafe signs without raising significant takings issues because in such cases the sign’s owner either never acquired a property right in the first place (illegal signs) or has a property right that may be terminated because it constitutes a nuisance (unsafe signs). However, requiring the removal of a lawfully erected and well-maintained sign that has simply become nonconforming as a result of regulation enacted after the sign was erected can give rise to a takings challenge because the sign owner’s property rights are being infringed upon to some degree. Amortization, permitting a nonconforming sign to remain in use for a period long enough to allow the owner to fully depreciate his investment, is a technique often used by government to defeat such takings claims.



Maryna Morris

Local governments have alternately given real estate signs preferential treatment by allowing them to be posted indefinitely while imposing strict time limits on noncommercial signs, such as campaign signs. Other local governments have tried to ban real estate signs entirely. Courts have invalidated total prohibitions on real estate signs and directed local governments to permit small temporary signs of any type on private property in residential areas.

Removal of Unsafe and Illegal Signs

Local government may require the immediate removal of any sign that poses a hazard to the safety of the public because no one has a right to maintain a dangerous condition on their property. Similarly, since no one has a right to maintain an illegal use on their property, cities may also require the immediate removal of signs that are illegal, rather than merely nonconforming.¹²

Removal of Nonconforming Signs

Although some state zoning enabling laws prohibit the forced termination of a lawful nonconforming use (e.g., Ohio and New Hampshire), a local government may, as a general matter, require timely compliance with all land development regulations, so long as this does not so diminish the value of the property as to constitute a taking. Thus, sign ordinances often contain provisions requiring the removal of nonconforming signs. In practice, this usually means that a sign that is smaller in area and/or lower in height than the existing sign will replace the nonconforming sign. Cities that have adopted such provisions argue that nonconforming signs, because they are larger or taller, have greater negative aesthetic and traffic safety impacts. Cities also argue that, because nonconforming signs are usually larger, a business with a smaller conforming sign may be put at a competitive disadvantage compared to a business with a larger nonconforming sign that has been “grandfathered.”

Must a city compensate the sign owner for lawfully requiring the removal of a nonconforming sign? The answer depends on whether there is a state statutory requirement mandating compensation, or, in the absence of such a requirement, whether the removal constitutes a compensated taking under the federal or state constitutions. Thus, for example, several cases have held that a local government may require the removal of a nonconforming sign that has been poorly maintained since it has little monetary value.¹³ As a general matter, it has proved quite difficult for the owner of a nonconforming on-premise commercial sign to prove that requiring removal of the sign constitutes a taking, particularly where the ordinance provides for an amortization period. (See the section on amortization of nonconforming signs below.)

Requiring Compliance With Current Zoning Standards

Courts have also generally agreed that local governments may require owners of nonconforming structures and uses to bring them into compliance upon the happening of prescribed events. For example, conformity with the sign ordinance may be required as a precondition to expanding the nonconforming sign, as a precondition to reconstruction of the sign after its substantial destruction, before taking action that would extend the life of the nonconforming sign, or after the sign has been abandoned.¹⁴

This is an area, however, where the Supreme Court’s expanded protection of commercial speech may be changing the way lower federal and state courts view certain attempts to require conformance. For example, in *Kevin Gray-East Coast Auto Body v. Village of Nyack*, 566 N.Y.S.2d 795 (N.Y. App. Div. 1991), a local business changed hands and the new owner wanted to reflect this with a new name for the business. A village ordinance allowed nonconforming commercial signs to remain in place so long as the copy on the signs was not changed. The court held that the ordinance failed First Amendment scrutiny by prohibiting the owner from changing the copy on the sign. “Generally, absent a showing that the predominant purpose of an ordinance is not to control the content of the message . . ., such truthful commercial

speech may not be prohibited on the basis of its content alone.” Thus, the sign could remain in place after the new owner changed the copy to reflect the change in ownership. This case casts doubt on any regulation that prohibits changing the copy of a nonconforming sign.¹⁵

Amortization of Nonconforming Signs

Amortization is another widely used technique to effect the removal of nonconforming signs. Amortization provisions permit a nonconforming sign to remain in place for a period that a local or state government has judged to be sufficient to allow the owner to recoup the cost of the sign before requiring its removal. In the absence of an express statutory requirement that “just compensation” be paid, the majority of courts that have considered such amortization provisions (in most cases as applied to off-premise signs) have found them to be a constitutionally acceptable method for achieving the removal of nonconforming signs.

Where amortization has been allowed, the general rule is that the amortization period must allow the owner of the sign a reasonable amount of time to recoup his investment. The courts have looked to several factors to determine reasonableness, including the:

1. amount of initial capital investment;
2. amount of investment realized at the effective date of the ordinance;
3. life expectancy of the investment;
4. existence of lease obligations, as well as any contingency clauses permitting termination of such leases;
5. salvage value of the sign, if any; and
6. extent of depreciation of the asset for tax and accounting purposes.

In most cases, courts have not required governments to produce an economic analysis to prove that the owner’s investment has been fully recouped over the amortization period. This position is based on a leading case from the New York Court of Appeals, *Modjeska v. Berle*, 373 N.E.2d 255 (N.Y. 1977), which held that complete recovery of the amount invested is not necessary and comports with the principle that some uncompensated economic loss is constitutionally allowable as a consequence of beneficial police power regulation. There are, however, a growing number of cases in which courts have required that local governments present evidence addressing the economic value of off-premise billboards in order to determine whether an amortization period provides reasonable compensation by allowing the owner to recoup his investment. At issue is the life of a billboard and whether allowing a billboard to stand for a certain number of years provides reasonable compensation relative to the value of the billboard at the end of its life.

In *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), for example, the federal district court undertook a detailed factual inquiry of the city’s virtually complete ban on commercial billboards before finding that the five-and-one-half-year amortization period did not deny Naegele the economically viable use of its property. The federal Fourth Circuit Court of Appeals then affirmed this finding on appeal.

Listed in the sidebar on page 140 are state and federal court decisions from jurisdictions that have upheld statutes or ordinances with amortization periods ranging from 10 months to 10 years. Unless otherwise



Marya Morris

Many large and tall signs become nonconforming when a sign ordinance is revised. Some states require local governments to pay sign owners cash compensation for the removal of nonconforming signs, particularly for off-premise billboards. However, a majority of courts that have considered amortization provisions—through which a sign owner is required to remove noncompliant signs that have depreciated in value after a prescribed number of years—have found they are a constitutionally acceptable method for compensating owners for the removal of nonconforming signs.

indicated, the amortization provision upheld in these decisions was applied to off-premise signs. It is important to note, however, that none of these decisions should be interpreted as affording local governments in any of these jurisdictions unquestioned authority to enact an amortization provision, even one equal in duration to the one approved in the cited case. The reasonableness of an amortization provision is decided on a case-by-case basis. The fact that a particular amortization provision was found to be justified based on the evidence presented in a given case does not mean that a similar provision could be found to be reasonable under different circumstances.

The decision in *Northern Ohio Sign Contractors v. City of Lakewood*, 513 N.E.2d 324 (Ohio 1987), is a good example of this need for caution. Because the Ohio statutes ban amortization of nonconforming uses, courts in that state require that a nonconforming sign be a nuisance or a safety hazard before local government may force its removal. In *Northern Ohio Sign Contractors*, although the Ohio Supreme Court ruled that “sign blight . . . is the functional equivalent of a public nuisance” and allowed nonconforming signs to be amortized, the ruling was a 4-3 decision, with the dissenters arguing strenuously against the majority position on the ground that the facts presented simply did not support the ruling. In light of this dissent and the unique facts in the case (there was a heavy concentration of signs in an urban area that the federal Department of Housing & Urban Development had declared “blighted”), a local government in a more suburban setting could find that a court would reject *Northern Ohio Sign Contractors* as authority for an amortization provision targeting a few widely scattered freestanding on-premise signs.

Also listed in the sidebar are decisions from jurisdictions that have prohibited the amortization of signs based either on state statutory or constitutional limitations. These decisions are the “mirror image” of those from the pro-amortization jurisdictions listed above them in that they should not be interpreted as absolutely prohibiting any local government in that jurisdiction from enacting an amortization provision. For example, in several of the cases involving state laws, the statutory prohibition on amortization is limited to signs located within a specified distance from a federal highway.

PROVISIONS FOR ENFORCEMENT

Relationship to Code Enforcement

A requirement that no sign may lawfully be displayed without first obtaining a permit can greatly assist local governments in achieving the goals stated in their sign ordinances. The permitting system can prevent the erection of illegal signs and also create an inventory of lawfully erected signs, which assists government in identifying any signs that are being displayed illegally. A further requirement—that the permit must be renewed at specified intervals—can serve to identify and require the repair, replacement, or removal of signs that have become either unsafe or unsightly due to inadequate maintenance and repair. Enforcement of such a permit system is greatly enhanced by a requirement that each sign carry on its face a “stamp” or other mark indicating that the sign is currently in compliance with the permit requirement.

Permit Fees

Local government may lawfully charge a sign permit fee so long as the amount of the fee is reasonably related to the costs actually incurred in the administration and enforcement of the permit system. In other words, it

SIGN INDUSTRY PERSPECTIVE ON AMORTIZATION

Amortization is a method used by some local governments to eliminate nonconforming signs within a proscribed period of time, typically following the enactment of a new sign ordinance. The rationale for affecting such a taking of private property without paying cash compensation is that signs are typically depreciated over five years for tax purposes and financed by banks for comparable periods. The table on page 140 indicates which state courts have supported the use of amortization and which have rejected it. The sign industry feels strongly that amortization should be avoided and has worked actively to dissuade local governments from using it for several reasons. First, in many instances, a survey of existing signs prior to a sign ordinance revision can reveal that the “problem” signs (in other words, those that have prompted the city to revise the ordinance) may have been installed illegally in the first place and could be removed using standard enforcement measures. Second, the sign industry believes that amortization provisions in a sign ordinance simply send the wrong message to businesses; that is, if the prospect exists that a business may be forced to remove its signage, it will have little incentive to install signs that are well crafted and aesthetically pleasing. Local governments considering amortization should be aware of the sign industry’s objections to the technique and should work collaboratively with local sign makers and businesses toward a resolution of how best to deal with illegal and nonconforming signs.

CASES ACCEPTING AMORTIZATION OF SIGNS

- Federal: *Naegele Outdoor Advertising, Inc. v. City of Durham*, 19 F.3d 11 (4th Cir. 1994), *affirming* 803 F.Supp. 1068 (M.D.N.C. 1992)(8 years); *Art Neon Co. v. City & County of Denver*, 488 F.2d 118 (10th Cir.1973), *cert. denied*, 417 U.S. 932 (1974)(5 years); *E.B. Elliot Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970)(5 years); *Brewster v. City of Dallas*, 703 F. Supp. 1260 (N.D. Tex. 1988)(10 years for on-premise signs)
- Arkansas: *Donrey Communications v. City of Fayetteville*, 660 S.W.2d 900 (Ark. 1983)(4 years); *Hatfield v. City of Fayetteville*, 647 S.W.2d 450 (Ark. 1983)(7 years for on-premise auto dealership sign)
- Connecticut: *Murphy v. BZA of Town of Wilton*, 161 A.2d 185 (Conn. 1960)(2 years)
- Delaware: *Mayor & Council of New Castle v. Rollins Outdoor Advertising*, 475 A.2d 355 (Del. Super. Ct. 1984)(3 years)
- Florida: *Lamar Advertising v. City of Daytona Beach*, 450 So. 2d 1145 (Fla. 5th DCA 1984)(10 years); *Webster Outdoor Advertising v. City of Miami*, 256 So.2d 556 (Fla. 3d DCA 1972)(5 years)
- Georgia: *City of Doraville v. Turner Communications Corp.*, 223 S.E.2d 798 (Ga. 1976)(2 years)
- Illinois: *Village of Skokie v. Walton on Dempster, Inc.*, 456 N.E.2d 293 (Ill. App. 1983)(7 years for on-premise auto dealership sign)
- Maine: *Inhabitants of Boothbay v. National Advertising Co.*, 347 A.2d 419 (Me. 1975)(10 months)
- Maryland: *Donnelly Advertising Corp. of Md., v. City of Baltimore*, 370 A.2d 1127 (Md. 1977)(5 years)
- Michigan: *Adams Outdoor Advertising v. East Lansing*, 483 N.W.2d 38 (Mich. 1992)(8 years, but subsequently extended to 12 years)
- New York: *Syracuse Savings Bank v. Town of DeWitt*, 436 N.E.2d 1315 (N.Y.1982)(4 years and 9 months); *Suffolk Outdoor Advertising v. Hulse*, 373 N.E.2d 263 (N.Y. 1977)(3 years with opportunity for extension); *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255 (NY 1977)(6 years)
- North Carolina: *R.O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 388 (N.C. Ct. App. 1982)(6 years); *County of Cumberland v. Eastern Fed. Corp.*, 269 S.E.2d 672 (N.C.App. 1980)(3 years)
- North Dakota: *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D. 1978)(5 years)
- Ohio: *Northern Ohio Sign Contractors v. City of Lakewood*, 513 N.E.2d 324 (Ohio 1987)(5 1/2 years applied to on-premise signs)
- Texas: *City of Houston v. Harris County Outdoor Advertising*, 732 S.W.2d 42 (Tex.App. 1987)(6 years); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (Tex.App. 1978)(6 1/2 years)
- Vermont: *State v. Sanguinetti*, 449 A.2d 922 (Vt. 1982)(5 years)

CASES REJECTING AMORTIZATION OF SIGNS

- California: *Patrick Media Group v. California Coastal Commission*, 6 Cal.Rptr.2d 651 (App. 1992)(state law)
- Colorado: *City of Fort Collins v. Root Outdoor Advertising*, 788 P.2d 149 (Colo. 1990)(state law)
- Georgia: *Lamar Advertising v. City of Albany*, 389 S.E.2d 216 (Ga. 1990) (unconstitutional taking)
- Maryland: *Chesapeake Outdoor Enterprises v. City of Baltimore*, 597 A.2d 503 (Md.App. 1991)(state law)
- New Hampshire: *Dugas v. Town of Conway*, 480 A.2d 71 (N.H. 1984)(unconstitutional taking)
- New Mexico: *Battaglini v. Town of Red River*, 669 P.2d 1082 (N.M. 1983)(state law)
- Tennessee: *Creative Displays v. City of Pigeon Forge*, 576 S.W.2d 356 (Tenn.App. 1978)(state law)

is legal to require sign owners to pay all reasonable costs incurred by a local government associated with the operation of a sign permitting requirement. For example, this includes the administrative costs for processing and reviewing applications and renewals, and the cost of inspections, such as the salaries of inspectors. Note, however, that if a sign permit fee is challenged, local government will bear the burden of proving that the fee charged bears a reasonable relationship to the actual costs of administering the permit system. If the fee has been calculated properly, this is not a problem, but courts will invalidate sign permit fees if a local government fails to show that the fee was reasonably related to the costs of enforcement.¹⁶

Prior Restraint Issues

As previously discussed, any regulation that makes the right to communicate subject to the prior approval of a government official is presumed to be a prior restraint on freedom of expression. In the context of sign regulations, any type of permit, license, or conditional use approval that is a content-based regulation of expression (e.g., requiring permits only for political signs) is clearly a prior restraint. Such a regulation would not be permissible unless government could show that the licensing or permitting scheme:

- (1) is subject to clearly defined standards that strictly limit the discretion of the official(s) administering the scheme; and
- (2) meets stringent procedural safeguards to guarantee that a decision to grant or deny the license is rendered within a determined, short period of time with provision for an automatic and swift judicial review of any denial.

The U.S. Supreme Court has, however, not yet applied the prior restraint doctrine to content-neutral time, place, or manner regulations outside the context of zoning restrictions on adult entertainment businesses. Even so, it is doubtful that any court would uphold a time, place, or manner permit or licensing system that placed unfettered discretion in the hands of a government official to deny a sign permit. Thus, a court would strike down a permit system in which the only standard for approving the location of a sign was “The Building Inspector finds the location acceptable.” For example, in *Desert Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), cert. den. sub. nom. *City of Moreno Valley v. Desert Advertising, Inc.* 522 U.S. 912 (1997), the federal Ninth Circuit Court of Appeals struck down an ordinance where 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.” Similarly, in *North Olmsted Chamber of Commerce v. City of North Olmsted*, 86 F.Supp.2d 755 (N.D. Ohio 2000), a federal district court struck down the city’s sign code in part because of the broad discretion it granted the code administrator to grant or deny a permit.¹⁷

Conditional Uses

The critical legal issue raised when signs are treated as conditional uses (also known as special uses or special exceptions) is the prior restraint question discussed above in relation to permits and licensing schemes. Since courts make no fundamental distinction whether a sign permit or a conditional use requirement imposes the prior restraint, the legal analysis above may be applied equally to conditional uses.

PROVISIONS FOR FLEXIBILITY

The most common approach to sign regulation is the specification of standards that determine the number, size, height, and location of various types of signs in business and other districts. In such a “standards” ordinance, flexibility may be achieved through variance provisions, creating either special districts or overlay districts, or by building flexibility into the standards themselves.

Variances

Variances are constitutionally mandated flexibility devices included in zoning ordinances to ensure that an ordinance, as applied to a particular use or property, is not arbitrary or unreasonable or does not effect a taking of private property. There are two types of variances:

- 1) a use variance, which, if granted, allows a property owner to maintain a use that is not allowed in the zoning district in which the property is located; and
- 2) an area variance, which, if granted, accords a property owner relief from the application of some dimensional restriction, such as minimum lot or building size, height limits, or setback requirements.

While use variances were a much-needed device three or more decades ago, as zoning ordinances were first being introduced into many communities, they have, more recently, become strongly out of favor in most jurisdictions as communities have enacted more sophisticated flexibility devices, such as conditional uses and overlay zones. The legal standard for granting a use variance, generally termed “unnecessary hardship,” is extremely stringent and intended only for situations where the failure to provide relief from the terms of the zoning ordinance would leave no viable economic use for the property. Area variances, in contrast, remain a much-needed element of even the most skillfully drawn zoning ordinance since no generally applicable standards can accommodate a property with unique dimensional and/or topographic peculiarities. The legal standard for granting an area variance, generally termed “practical difficulties,” is less demanding than that for a use variance.

The application of sign regulations to specific properties will often give rise to requests for an area variance due to the peculiarities of the property involved. A common situation is when adherence to the sign code would seriously compromise the visibility of a sign and thus potentially harm the economic viability of the business. This situation can occur, for example, where a significant grade difference exists between the property and an adjacent or nearby street or highway from which the business is expected to draw significant vehicular traffic and with a business sign limited to the height, type, or location, permitted by the ordinance that would not be visible from that street or highway. In such cases, there is little reason why a variance should not be granted.

In California, the problem posed to businesses by the situation described above was recognized by the state legislature in enacting California Business and Professions Code Section 5499, which states:

Regardless of any other provision of this chapter or other law, no city or county shall require the removal of any on-premises advertising display on the basis of its height or size by requiring conformance with any ordinance or regulation introduced or adopted on or after March 12, 1983, if special topographic circumstances would result in a material impairment of visibility of the display or the

owner's or user's ability to adequately and effectively continue to communicate with the public through the use of the display. Under these circumstances, the owner or user may maintain the advertising display at the business premises and at a location necessary for continued public visibility at the height or size at which the display was previously erected and, in doing so, the owner or user is in conformance.

A recent appellate decision, *Denny's Inc. v. City of Agoura Hills*, 66 Cal.Rptr.2d 382 (Cal.App. 1997), illustrates how this provision operates. Several businesses that drew a significant amount of their business from the nearby Ventura Freeway were faced with the obligatory removal of their freestanding signs after the city enacted an ordinance that made all freestanding and pole signs nonconforming, and mandated their removal at the expiration of an amortization period. The affected businesses requested variances from the ordinance. Their requests were denied by the zoning board and again on appeal to the city council. The businesses then sued the city under the California statute.

At trial, the court found that each individual business met the statutory test—that “special topographic circumstances would result in a material impairment of visibility of the display or the owner's or user's ability to adequately and effectively continue to communicate with the public through the use of the display”—because a sign in conformance with the ordinance would either not be visible at all from the freeway or not be visible in time for drivers to exit safely at the off-ramp. As a result, there would be “a material impairment in the commercial effectiveness of a conforming sign” because each of the businesses relied on its existing sign to attract a substantial proportion of its customers from the highway. The appellate court affirmed these findings, and the businesses were permitted to retain their signs as conforming uses.

Common examples of when a variance is likely to be appropriate include allowing larger signs on buildings that are so far from the street that a conforming sign cannot be read from the street, and allowing an additional sign on corner buildings that front on two main streets when the code limits signs to the building façade fronting on a single street.

Special Districts and Overlay Districts

The unique signage needs of particular areas can be accommodated by drafting district-specific standards that take into account the area's regulatory and economic development goals. Such differences in regulatory treatment may be justified based on a clearly articulated plan for a special district that is designated on the zoning map (e.g., a historic district, a downtown business district, or an entertainment district). Another approach to accommodating specific signage needs is the creation of an overlay district that can be applied on an as-needed basis depending on the planning and economic development goals of the community. (See Chapter 3 for additional information on overlay districts and flexible standards.)

“Flexible” Standards

It is also feasible to build significant flexibility into the standards themselves. This can be accomplished, for example, by stating certain location choices, constraints, and the maximum square footage for signs, but allowing the size, number, and precise location of the signs to be determined by the property owner or tenant. Another way to add flex-

ibility to standards is to allow planning department staff to grant “administrative variances” from the sign ordinance within a specified range of discretion.

Design Review

In a design review sign ordinance, the appearance and location of signs in some or all districts is subject to aesthetics-based review by a special board or commission or by an existing body, such as a planning commission. Design expertise may be provided by the members of the board/commission, or by a design professional hired as staff to the board/commission. A complete discussion of the issues raised by the use of design review to achieve a community’s aesthetic goals as they relate to signs may be found in Chapter 3.

COMMERCIAL ON-PREMISE SIGNS AND THE FIRST AMENDMENT

Local regulation of commercial on-premise signs primarily takes the form of content-neutral, time, place, or manner controls that apply to signs classified by structure or location, such as freestanding, wall, or roof signs. It is not unusual, however, to find that a local government has also imposed prohibitions on certain types of signs (e.g., pole or freestanding signs, neon signs). Most courts that have considered First Amendment challenges to such regulations have applied the *Central Hudson* analysis or some other form of intermediate scrutiny to test their validity. Further, the majority of courts have applied intermediate, rather than strict, scrutiny even where regulations categorize commercial signs for differing regulatory treatment based on their content or appear to impose a prior restraint in the form of licensing or permitting requirements. As noted previously, this is because the Supreme Court has to date not applied the prior restraint doctrine to time, place, or manner regulations and signaled that it would permit some limited types of content-based regulation of commercial signs.

On the other hand, when local governments actually attempt to censor the content of the messages displayed on commercial signs (e.g., by prohibiting the display of gasoline prices at service stations), courts have applied strict scrutiny and struck down the regulations. Further, in the past few years, several courts have struck down local regulation of commercial on-premise signs as in violation of the First Amendment because they viewed certain provisions, which fell short of actual censorship, as still imposing unlawful content restrictions. Because many of these cases involved regulations that “prohibited,” rather than regulated, certain categories of signs, their application may be limited to situations involving “content-based prohibitions” of certain categories of commercial signs.

Other cases, however, do involve regulations that government contended were content-neutral time, place, or manner restrictions but which courts struck down as invalid content-based restrictions. It is not yet clear if these decisions signal the beginning of a movement towards closer judicial scrutiny of commercial sign regulations. A note of caution must also be sounded in regards to the decisions that come from state trial or intermediate appellate courts, since many of these opinions exhibit confusion in addressing complex and rapidly evolving First Amendment doctrines.

TIME, PLACE, OR MANNER REGULATION OF ON-PREMISE COMMERCIAL SIGNS **The Reasonableness Standard**

Historically, courts have been very deferential to local government when they reviewed time, place, or manner restrictions on commercial signs, and only strike down limits on the number, size, height, and location of signs if they

find them to be arbitrary or irrational. For example, in *Rhodes v. Gwinnett County*, 557 F.Supp. 30 (N.D. Ga. 1982), a federal trial court invalidated a county regulation that allowed only one sign per premises but placed no controls on the size of that sign on the grounds that this regulation neither promoted traffic safety nor improved the appearance of the community because “any imaginable aggregation of signs, no matter how offensive or distracting, would likewise be permitted . . . so long as each of the component signs were pieced together to form a single whole” (557 F.Supp. at 33).

On occasion, a court applying this reasonableness standard would also note the First Amendment implications that resulted from arbitrary regulations. For example, in *State v. Miller*, 416 A.2d 821 (N.J. 1980), a case involving a noncommercial sign, the New Jersey Supreme Court, after announcing a general rule that size limits would be considered arbitrary if they did not “permit viewing from the road, both by persons in vehicles and on foot,” also noted that “Inadequate sign dimensions may strongly impair the free flow of protected speech . . .” (416 A.2d at 828).

Approval of Legitimate Time, Place, or Manner Regulations

When local governments enact sign regulations that are entirely content-neutral, regulating only the size, location, type, and number of signs, courts have little difficulty in upholding the ordinance. For example, in *Bender v. City of St. Ann*, 816 F.Supp. 1372 (E.D. Mo. 1993), *aff'd* 36 F.3d 57 (8th Cir. 1994), federal trial and appellate courts rejected due process, equal protection, and First Amendment challenges to an ordinance regulating the size, type, and number of wall signs. On the First Amendment claim, the court held that the ordinance, which did not distinguish between commercial and noncommercial signs, satisfied *Central Hudson*. It allowed a variety of sign options and directly advanced the city’s substantial interests in eliminating visual clutter and distractions to traffic.

Wilson v. City of Louisville, 957 F.Supp. 948 (W.D. Ky 1997), provides another example of how the courts treat a legitimate time, place, or manner regulation. There, a federal trial court had little trouble upholding an ordinance that reduced the maximum allowable size of both commercial and noncommercial “small freestanding signs.” Applying the *O’Brien* standard, the court found that the city had a substantial interest in safety and protecting the community from visual nuisances. It also agreed that the ordinance directly advanced those interests and was no broader than necessary. There was no evidence that users of larger portable signs could not adequately convey their messages on smaller portable signs or by other means. A similar ruling was made by a state appellate court in *Atlantic Refining & Marketing Corp. v. Board of Commissioners*, 608 A.2d 592 (Pa. Commw. Ct. 1992), where the court had no trouble rejecting a First Amendment challenge to an ordinance that merely restricted the height of commercial signs.

Restrictions on Sign Illumination

Although decisions are split in their treatment of regulatory prohibitions for particular types of illumination for signs, courts have been consistent in requiring that local government demonstrate that the prohibited type of illumination has a direct, specific, negative impact upon the aesthetic goals of the ordinance. For example, in *Asselin v. Town of Conway*, 628 A.2d 247 (N.H. 1993), the New Hampshire Supreme Court upheld an ordinance that prohibited new internally lit signs but allowed the “grandfathering” of existing internally illuminated signs when there was expert testimony stating that internally illuminated signs appear as disconnected squares

Local governments that prohibit certain types of sign illumination, such as neon, to achieve aesthetic or safety goals, should be prepared to prove why such lighting has a greater negative impact than other forms of sign lighting.



of light, which, in the aggregate, create a visual barrier to the natural environment. The court stated:

The evidence supports a finding that the restriction on internally lighted signs is rationally related to the town's legitimate, aesthetic goals of preserving vistas, discouraging development that competes with the natural environment, and promoting the character of a country community (628 A.2d at 250-51).¹⁸

In one recent case, *State v. Calabria, Gillette Liquors*, 693 A.2d 949 (N.J. Super. L.D. 1997), a state appellate court struck down a prohibition of neon signs. Although the court mislabeled the standard it applied (the court stated it was analyzing the prohibition on neon as a total ban, but its approach appears to be that used to analyze the reasonable fit question for commercial speech), both its application of the standard and the outcome of the decision are correct. In this case, a local government prohibited the use of neon in signs as one aspect of its regulating the size, placement, lighting source, and degree of illumination of commercial signs to prevent the look of "highway commercial signage." The court found, however, that the local officials could not demonstrate how the ban advanced the community's interest in aesthetics:

The record is devoid of evidence, facts or analysis why the mere existence of neon is offensive to that goal. There is no evidence that there are unusual problems in the use of neon that cannot otherwise be regulated as other

forms of lighting, specifically, as to degree of illumination; amount of light used within a given space or size of structure; direction of the light; times when the light may be used; or number of lights used on the interior of the store. It is apparent that the appearance of the commercial district may be enhanced by limiting forms of lighting, but it is not apparent as a matter of experience—or of fact—that a complete elimination of one form of lighting has any impact on the undesirable “highway” look of the town. There is no evidence that neon is, in and of itself, inconsistent with careful design or tasteful presentation of advertisements, the general goal of aesthetic restrictions. In fact, [the town’s expert] acknowledged that electronically lit gasoline station signs “very well may” give an appearance of highway commercial signage; that “brightly lighted signs” or signs “thirty to forty feet high” or “massive signs in terms of area” may give that appearance. Indeed, even the illuminated signs allowable under the ordinance could constitute the look of a highway commercial zone. “It all depends,” [the expert] states. If it all depends, then it can otherwise be regulated, rather than banned (693 A.2d at 954-55).

WHEN IS A SIGN REGULATION CONTENT-BASED?

In *North Olmsted Chamber of Commerce v. City of North Olmsted*, 86 F.Supp.2d 755, (N.D. Ohio 2000), a federal trial court ruled that a sign ordinance that not only classified signs by their structure (wall, pole, etc.)—which is clearly not a content-based classification—but also by their use (“identification sign,” “information sign,” etc.) was content-based because “the classifications by use section categorizes, defines, and/or limits signs by their content. The content of a sign determines whether it is allowed to be erected in a business district” (86 F.Supp.2d at 770). The decision provided several examples about the way the use classifications categorize, define, and/or limit signs by their content. One example noted that a “directional sign” in front of a business could contain words such as “Enter Here” or “Entrance,” but could not display the McDonald’s “golden arches” logo or the words “Honda Service.” A second described how an “identification sign” could include only the “principal types of goods sold or services rendered” but “the listing of numerous goods and services, prices, sale items, and telephone numbers” was prohibited; thus, a Dodge dealership’s sign could display its name—Great Northern Dodge—but was prohibited from displaying the “Five Star Dealer” designation it had been awarded by the Daimler-Chrysler Corporation.

The court ruled that such content-based regulations of commercial speech should receive “intermediate scrutiny with *bite* under the four-part *Central Hudson* test . . .” (at 769, emphasis added). Applying this test, the court found that the city was unable to provide “any evidence to show why their content-based restrictions directly and materially contribute to their goal of safety and aesthetics. In fact, many of the City’s content-based restrictions fail to contribute to safety and aesthetics and seem to be unrelated to these goals” (at 773). The court concluded that the sign ordinance, as a whole, lacked rationality and was unconstitutional.

In another case, *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F.Supp. 1223 (D.N.J. 1992), a federal trial court applied strict scrutiny in striking down a township ordinance that placed restrictions on real estate signs, including a ban on certain types of For Rent signs. The ban prohibited in-ground For Rent signs, although allowing window signs, from June 1st to October 1st because the mayor and council thought the abundance of For Rent

signs during the summer vacation season made this resort town undesirable. A federal trial court held that the ordinance constituted content-based regulation of commercial speech, triggering strict scrutiny, and then found the township could not demonstrate that the ordinance served a compelling governmental interest.

The court's ruling on this point is instructive. Although the township's lawyers claimed that the ordinance had been enacted to serve its interests in aesthetics, traffic safety, and maintaining property values, the court found that the township could only produce evidence supporting the interest in aesthetics and, further, that the township's evidence concerning aesthetics lacked any specificity. Moreover, the township could not show how the seasonal ban on For Rent signs, while permitting For Sale signs, would achieve the desired aesthetic goals. The court found these evidentiary failings to be critical in light of the Supreme Court's admonition in *Metromedia* that "aesthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose" (453 U.S. 490, 510).

Significantly, as a result of the township's failure to establish either the precise nature of the aesthetic interest to be served or how it would be served by the seasonal ban on For Rent signs, the court also noted that this regulation would not have survived the less-demanding *Central Hudson* test for a content-neutral regulation of commercial speech. Because the city's asserted interests in aesthetics was not a "substantial" interest under part two of that test and there was no evidence to suggest the ordinance would advance this interest or that it was not more extensive than necessary, the ordinance could not even pass intermediate scrutiny.

In another case, *Village of Schaumburg v. Jeep-Eagle Sales Corp*, 676 N.E.2d 200 (Ill.App. 1996), a state appellate court considered a sign regulation that limited commercial uses and auto dealerships to the display of no more than three "corporate or official flags" and prohibited all other flags or banners. While the city attempted to justify the sign ordinance as a content-neutral "effort to control visual clutter, preserve aesthetics and prevent traffic problems," the court found this to be an impermissible content-based restriction on expression because it discriminated between official and corporate flags and all others flags and banners. In the court's opinion: "Because the permissibility of a flag is dependent upon the nature of the message conveyed, the sign ordinance must be deemed content-based" (676 N.E.2d at 204).

A similar result was reached in *Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993), where the ordinance regulated the display of signs, flags, and other forms of graphic communication but exempted government flags (i.e., state or federal flags). In this case, the federal Eleventh Circuit Court of Appeals ruled that the "meager evidence" that the restriction on graphic expression advanced the city's interests in aesthetics and traffic safety was insufficient to justify exempting only government flags from the permit requirement.

These decisions show that courts are likely to be very critical of any provision in a sign ordinance that uses content as the basis for prohibiting certain types of commercial signs. A community that seeks to impose a content-based prohibition on commercial signs must be prepared to defend the prohibition by providing competent and specific evidence to the court that, at minimum, can meet a stricter form of *Central Hudson* intermediate scrutiny. Further, it is increasingly likely that any content-based prohibition will be subjected to strict scrutiny. As the cases in the three following sections show, courts will be extremely critical when government goes beyond content-based prohibitions on types of signs and attempts to prohibit the display of truthful information on commercial signs.



Marya Morris

Regulations that make content-based distinctions regarding flags (e.g., permitting government flags but prohibiting commercial flags) will be subject to strict scrutiny by courts. Size limits on flags are constitutional.

Prohibitions on Posting Price Information

Several examples of unlawful content-based ordinances involve regulations that ban the display of gasoline prices on signs at service stations. The leading case is *People v. Mobil Oil Corp.*, 397 N.E.2d 724 (NY 1979), where New York's Court of Appeals, the state's highest court, held that a county law banning all signs on or near service stations that referred directly or indirectly to the price of gasoline, other than certain required uniform price signs on gasoline pumps, was an unconstitutional content-based regulation of commercial speech. Interestingly, aesthetics was not one of the governmental interests supporting the ordinance in this case. The county argued that the regulations served to focus consumers' attention on the actual price posted at the pump rather than other, potentially misleading signs, such as Mobil's "Check Our Low Low Low Prices" sign. The court noted, however, that aesthetics could not support a law "that prohibits only gasoline price signs and none other, no matter how blatant or bizarre."

In another New York case, *Zoepy Marie, Inc. v. Town of Greenburgh*, 477 N.Y.S.2d 411 (App. Div. 1984), a state appellate court had no trouble finding that a sign restriction that banned advertisement of gasoline prices but not other commercial signs was an impermissible content-based restriction on the dissemination of truthful commercial speech. And, in *H&H Operations v. City of Peachtree City*, 283 S.E.2d 867 (Ga. 1981), *cert. den.* 456 U.S. 961 (1982), the Georgia Supreme Court ruled that an ordinance permitting signs that stated the name of the business and category of products available but prohibiting the posting of the prices of such products was an invalid restriction on a gas station operator's right to engage in commercial speech. In this case, the city had cited aesthetics as the substantial governmental interest served by the ordinance, but the court ruled that numbers were not aesthetically inferior to the letters forming words, and thus the ordinance did not serve to achieve that interest.

Prohibition on Changing Sign Copy

In *Kevin Gray-East Coast Auto Body v. Village of Nyack*, 171 A.D.2d 924, 566 N.Y.S.2d 795 (N.Y. App. Div. 1991), a local ordinance provided for variances allowing nonconforming commercial signs to remain in place but prohibited the owner from changing the copy on the sign. A state appellate court held that this provision was an unlawful content-based regulation, noting that "truthful commercial speech may not be prohibited on the basis of its content alone."²⁰

Regulations Prescribing the Content of Signs

In an unusual case, *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989), a federal trial court struck down an ordinance that required all commercial or manufacturing establishments with on-premise signs containing advertising copy in foreign languages to devote at least half of the sign area to advertising copy in English. The court found that the speech restricted was an expression of national origin, culture, and ethnicity, and that the ordinance therefore impermissibly imposed content-based restriction's on noncommercial speech. The court also found that the ordinance was not narrowly tailored to accomplish any compelling governmental interest. Importantly, the court also found that, even if the restricted speech was considered to be commercial speech, the ordinance would still fail because it was more restrictive than necessary to serve the government's stated purpose of ready identification of commercial structures for reporting emergencies.



Marilyn Morris

Restrictions or prohibitions on the display of prices are regarded by courts as content based, and therefore subject to scrutiny. The leading cases in this area involve gasoline price signs.

A federal trial court in California struck down an ordinance that required all commercial or manufacturing establishments with signs containing foreign language advertising copy to devote at least half of the sign area to advertising copy in English.



Michael Davidson

Regulation of Cigarette Advertising

Beginning in the mid-1990s, a number of local and state governments sought to regulate signs advertising cigarettes or other tobacco products based on public health concerns, particularly as related to the role of such advertising in inducing children to begin smoking. These efforts quickly led to court challenges by various tobacco companies which argued that such regulations were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA)²¹ and also violated their First Amendment rights. By 2000, these challenges had been decided by five different federal Circuit Courts of Appeals, all but one of which upheld the tobacco advertising regulations against both the preemption and First Amendment challenges.²² In early 2001, however, the U.S. Supreme Court indicated that it would examine this issue when it agreed to review a decision from the First Circuit Court of Appeals that upheld a Massachusetts regulation barring the display of tobacco advertising on billboards, on-premise signs, and in-store signs visible from the street, located within 1,000 feet of any elementary or secondary school or public playground.

In *Lorillard Tobacco Co., et. al. v. Reilly*, 121 S.Ct. 2404 (2001), the Court struck down the Massachusetts law, ruling that the 1,000-foot ban, as applied to cigarette advertising, was barred by the explicit preemption provision in the FCLAA and that the application of that same ban to other forms of tobacco violated the First Amendment. Applying the *Central Hudson* test for regulation of commercial speech, the Court acknowledged that Massachusetts had a “substantial, and even compelling” interest in preventing underage tobacco use, but 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.”²³

Sign Regulation and the Federal Lanham Act

Several recent federal court decisions have considered whether the federal legislation protecting trademarks, the Lanham Act, prohibits the enforcement of local sign regulations that would require the “alteration” of a federally registered trademark. All of these cases turn on the interpretation of 15 U.S.C. Section 1121(b), which provides in pertinent part that “[n]o state . . . or any political subdivision or agency thereof

may require alteration of a registered mark. . . .”

In the first cases addressing this issue, two decisions from the Western District of New York relied extensively on legislative history in concluding that the Congress never intended that 1121(b) would interfere with uniform aesthetic zoning requirements; rather, the provision was aimed solely at prohibiting state and local government from requiring actual alteration of the trademark for all purposes within the jurisdiction.²⁴

Subsequently, in *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2d Cir. 1999), the Second Circuit affirmed one of the earlier trial court rulings from the Western District of New York, arguing that “local uniform aesthetic and historic regulations simply limit color typefaces and decorative elements to certain prescribed styles [and thus] [t]hese regulations have no effect on businesses’ trademark. They limit only the choice of 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” (at 15).

But, in *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295 (9th Cir. 1998), a split panel of the Ninth Circuit held that application of a municipal zoning ordinance to require changes in the coloring of a registered trademark on a sign in a shopping center constituted an alteration of the mark in violation of 1121(b).²⁵ The majority opined, however, that its ruling would not bar a local government from “prohibiting” the display of the mark entirely but failed to discuss whether such a prohibition could withstand scrutiny as a content-based prohibition on lawful commercial speech, and a discussion of this issue was also absent from the Second Circuit’s opinion.



Maya Morris

Court decisions are mixed as to whether local governments can require a business to alter its federally registered trademark (as displayed on on-premise signs) to conform to the sign ordinance. In Blockbuster Videos, Inc. v. City of Tempe, a split panel of the Ninth Circuit held that the application of a zoning ordinance to require changes in coloring of a sign for a Blockbuster video store constituted an alteration of the trademark in violation of the Federal Lanham Act. But a case in the Second Circuit involving a Party City store in New York ruled that Congress never intended for the Lanham Act to interfere with municipal aesthetic regulations. Stay tuned.



Maya Morris

Regulations That Impose a Total Ban

Regulations that impose a complete ban on a type of commercial sign, based on the sign's content, will be struck down. For example, in *Outdoor Systems, Inc. v. City of Atlanta*, 885 F.Supp. 1572 (N.D.Ga. 1995), a federal trial court invalidated Atlanta's 1994 "Olympic Sign Ordinance," which created a five-member committee to recommend Concentrated Sign Districts within the city where only those signs that promote an Olympic or Olympic-related event of some kind would be permitted. Applying the *Central Hudson* test, the court found that, while the ordinance directly served a substantial governmental interest in promoting Atlanta's hosting of the 1996 Olympic Games, it was more extensive than necessary to serve that interest because it imposed a "blatant content-based restriction" prohibiting all forms of commercial speech other than those advertising the Olympics. In another case, *Pica v. Sarno*, 907 F.Supp. 795 (D.N.J. 1995), a federal trial court struck down a municipal ban on "temporary signs, or lettered announcements used or intended to advertise or promote the interests of any person," as a content regulation banning "an entire category of speech, inconsistent with *Ladue*."

A total ban of a different sort, that is prohibition on certain commercial signs in residential districts, has been upheld. For example, in *City of Rochester Hills v. Schultz*, 592 N.W.2d 69 (1999), *rev'ing*, 568 N.W.2d 832 (Mich.App.1997), the Michigan Supreme Court reversed a state appellate court ruling which found that an ordinance imposing a total ban on home occupation signs displayed in single-family residential districts was an unconstitutional content-based restriction of protected commercial speech.

The Prior Restraint Question

In *Purnell v. State*, 921 S.W.2d 432 (Tex. App. 1996), a state appellate court upheld an ordinance that prohibited the use of a sign without a prior permit against a challenge brought by a local business. The court held that the permit requirement did not constitute an unlawful prior restraint because "the Constitution accords lesser protection to commercial speech," citing *Central Hudson*. The decision stressed that the city "does not have unlimited discretion to grant or deny permits," but was limited to such content-neutral matters as design, construction, and size. The court also found that the government interest in safety and the "beauty of public thoroughfares" to be substantial and the ordinance to be narrowly drawn and a "permissible regulation of commercial speech."

In *North Olmsted Chamber of Commerce v. City of North Olmsted*, 86 F.Supp.2d 755 (N.D. Ohio 2000), a federal district court took a differing view of the prior restraint issue, however. In this case, the court argued that because the sign ordinance requires the permitting official to consider a number of content-based factors, including the design and color of a sign, and was granted broad discretion to grant or deny a permit, the sign code constituted an impermissible prior restraint on expression.²⁶

The "Reasonable Fit" Issue

In *Flying J Travel Plaza v. Commonwealth*, 928 S.W.2d 344 (Ky. 1996), the Kentucky Supreme Court reversed a lower court decision that had upheld a state statute prohibiting signs near highways "containing or including flashing, moving, or intermittent lights except those displaying time, date, temperature or weather. . . ." The sign in question contained an electronic message board that was intended to attract the attention of drivers on I-75 by displaying such information as welcome

messages, time, date, temperature, weather, and information regarding various local activities and events in addition to the prices of products sold on the premises.

The business owner argued that the statute was not a “reasonable fit” under *Central Hudson* because commercial speech was prohibited while several noncommercial categories were not, even though the effects of the messages on aesthetics and traffic safety were identical. While acknowledging that “the sign may be an irritation and an annoyance,” the court held that the state could not demonstrate a reasonable connection between the statute and the ends of highway safety and aesthetics. The court stated: “the most telling factor in this case, which is fatal to the [government’s] position,” was its failure to demonstrate that the restrictions “advance a legitimate governmental interest.” There simply was no “offer of any proof in the trial court, either by expert testimony or otherwise,” that the content restrictions on the electronic billboard display “have anything to do with highway safety or aesthetics.” In contrast, the court noted that “regulations regarding time limits and the number of electronic cycles displayed, as distinguished from content, could have some bearing on highway safety.” The court also held that the restrictions were an impermissible content-based limitation on noncommercial speech, placing “greater value on information relating to time, date, temperature, and weather than is placed on other non-commercial forms of speech.”

Another decision striking down an ordinance for failure to achieve a reasonable fit between regulatory ends and means is *In re Gerald B. Deyo*, 670 A.2d 793 (Vt. 1995). There, the Vermont Supreme Court struck down an ordinance that banned on-premise real estate signs based on a finding that, by permitting other types of signs that are distracting to motorists, the traffic safety benefits of the ordinance were undermined. The court also concluded that a more finely tuned ordinance would serve the government’s interest in preventing the proliferation of signs while allowing limited forms of real estate advertising. After weighing the cost of the sign ban to owners of real estate in the town against the traffic safety and aesthetic benefits derived from the sign ban, the court concluded that the appellant had failed to affirmatively establish the reasonable fit required by the *Central Hudson* test.

RECOMMENDATIONS AND GUIDELINES

In the past few years, courts have become increasingly critical of local government sign regulations that distinguish among various categories of commercial on-premise signs based on the content of the messages displayed on such signs. While such criticisms are common when content is the basis for “prohibiting” certain messages or categories of signs, they have also appeared when content-based distinctions are used merely to apply differing time, place, or manner restrictions to different types of signs. When such distinctions are used, courts are now more likely to demand that government justify the “reasonable fit” between these regulatory distinctions and the government’s claimed interests in aesthetics and/or traffic safety.

As a result, a local government should avoid enacting or retaining sign regulations that go beyond time, place, or manner restrictions on the height, area, number, and location of commercial signs unless it is able to answer, with specificity, the following questions: What substantial government interest would be served by the regulation? and Is there a “reasonable fit” between the regulation and the interest to be served by the regulation?

Local governments also need to be aware that they face significant potential liabilities if they are unable to justify their sign regulations. Plaintiffs who challenge sign regulations on constitutional grounds normally bring their claims under a federal civil rights statute, 42 U.S.C., Section 1983, which allows a plaintiff to sue local government for any actual money damages and, more importantly, makes local government liable for a successful plaintiff's attorneys' fees under a companion statute, 42 U.S.C. Section 1988. Such fees can be substantial: plaintiffs' attorneys received fee awards of more than \$300,000 in the *City of Euclid* case and more than \$200,000 in the *North Olmsted* case.

Below, are several guidelines for local government sign regulations based on decisions of the U.S. Supreme Court and lower state and federal courts:

1. Commercial signs are a form of constitutionally protected speech, the regulation of which will trigger heightened scrutiny by courts.
2. Commercial signs should never be treated more favorably than non-commercial signs.
3. Government may ban commercial off-premises signs, while allowing noncommercial off-premise signs and both commercial and noncommercial on-premise signs.
4. Government must normally maintain content-neutrality in regulating noncommercial signs, with any exemptions or exceptions subject to strict scrutiny by the courts.
5. Government should normally maintain content-neutrality in regulating commercial signs, with any exemptions or exceptions subject to intermediate scrutiny "with bite" by the courts.
6. Government may not ban residential signs that carry political, religious, and personal messages.
7. Government may not prohibit real estate signs.
8. Government may prohibit the posting of all signs on public property but will be subject to heightened scrutiny for any exceptions or exemptions.
9. Government may not impose time limits solely on political signs.

NOTES

1. See, for example: *City of Painesville v. Dworkin & Bernstein*, 89 Ohio St.3d 564, 733 N.E.2d 1152 (2000), invalidating an ordinance limiting the display of political signs to 30 days before and 7 days after an election; *Whitton v. City of Gladstone*, 54 F.3d 1400 (8th Cir. 1995), affirming 832 F.Supp. 1329 (W.D. Mo. 1993), which invalidated an ordinance limiting the display of political signs to 30 days before and 7 days after an election; *McCormack v. Township of Clinton*, 872 F.Supp. 1320 (D.N.J. 1994), enjoining an ordinance stating that "no political sign shall be displayed more than ten (10) days prior to any event or later than three (3) days after the event;" *Collier v. City of Tacoma*, 854 P.2d 1046 (Wash. 1993), invalidating an ordinance limiting the display of political signs to 60 days before and 7 days after an election; *City of Antioch v. Candidates Outdoor Graphic Service*, 557 F.Supp. 52 (N.D. Cal. 1982), invalidating an ordinance that banned political signs except for a period beginning 60 days before an election, but placed no time restrictions on other types of noncommercial signs, such as those advertising upcoming charitable or civic events; and *Orazio v. Town of North Hempstead*, 426 F.Supp. 1144 (E.D.N.Y. 1977), invalidating an ordinance that limited the posting of "political wall signs" to the six weeks prior to an election.

2. For example, see: *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 district; and *Rzadkowski v. Village of Lake Orion*, 845 F.2d 653 (6th Cir. 1988), upholding the restriction of off-premise signs to industrial zones.
3. For example, *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990), struck down an ordinance that impermissibly discriminated against noncommercial speech, and the court in *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988) struck down an ordinance as applied to noncommercial messages, but left the ban on off-premise commercial signs in place.
4. For example, in *Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 467 S.E.2d 875 (Ga. 1996), the Georgia Supreme Court struck down an ordinance limiting on-premise signs to “messages advertising a product, person, service, place, activity, event or idea” directly connected with the property as “effectively ban[ning] signs bearing noncommercial messages in zoning districts where a sign . . . may display commercial advertisements.” Similar decisions were handed down by federal courts in *National Advertising Co. v. Town of Niagara*, 942 F.2d 145 (2d Cir. 1991) and *Revere National Corp., Inc. v. Prince George’s County*, 819 F.Supp. 1336 (D. Md. 1993).
5. For examples, see: *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986) and *City of Salinas v. Ryan Outdoor Advertising, Inc.*, 234 Cal. Rptr. 619 (Cal. Ct. App. 1987).
6. For examples, see: *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992); *Don’s Porta Signs v. City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987); *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987); *Harnish v. Manatee County*, 783 F.2d 1535 (11th Cir. 1986); *Falls v. Town of Dyer*, 756 F.Supp. 384 (N.D. Ind. 1990); *Mobile Sign v. Town of Brookhaven*, 670 F.Supp. 68 (E.D.N.Y. 1987); *City of Hot Springs v. Carter*, 836 S.W.2d 863 (Ark. 1992); and *Barber v. Municipality of Anchorage*, 776 P.2d 1035 (Alaska 1989).
7. See also *All American Sign Rentals, Inc. v. City of Orlando*, 592 F.Supp. 85 (M.D. Fla. 1983); *Signs, Inc. v. Orange County*, 592 F. Supp. 693 (M.D. Fla. 1983); *Rhodes v. Gwinnett County*, 557 F. Supp. 30 (N.D. Ga. 1982); and *Risner v. City of Wyoming*, 383 N.W.2d 276 (Mich. Ct. App. 1985).
8. The *Cleveland Board of Realtors* 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, as was the case in *South-Suburban*, but rather was principally intended to curtail the negative messages that are often associated with the proliferation of real estate signs in neighborhoods. See also *Sandhills Assoc. of Realtors, Inc. v. Village of Pinehurst*, 1999 WL 1129624 (MDNC 1999).
9. For example, see, *National Advertising Co. v. Town of Babylon*, 703 F.Supp. 228 (E.D.N.Y. 1989), *aff’d in part and rev’d in part*, 900 F.2d 551 (2d Cir. 1990).
10. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
11. The Court’s taking tests range from per se categorical rules: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), holding that any physical occupation and/or invasion by or on behalf of government is always a taking and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), holding that regulation that eliminates all economic value is a taking unless the same result could have been reached under the common law of nuisance or some other common law property rule); to “nexus” tests *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), holding that government must demonstrate that there is an “essential nexus” between a regulation and its goal (i.e., a regulation that does not substantially advance a legitimate state interest is a taking), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), holding that government must meet a “roughly proportional” standard for the “nexus” (i.e., connection) between a regulation and the state interest it seeks to substantially advance; to ad-hoc multifactor balancing with a focus on diminution of value:

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), holding that court must look at a number of factors including “character of the governmental action” and the economic impact of the regulation, with particular concern for whether the regulation interferes with “distinct investment backed expectations”); to a “two-factor” test: *Agins v. City of Tiburon*, 447 U.S. 255 (1980), a regulation is a taking if it does not substantially advance a legitimate state interest or denies all economically viable use of property. Needless to say, such a disparate variety of tests has not made for doctrinal clarity. [Editor’s note: In May 2002, the U.S. Supreme Court ruled in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764 (2002), that local government use of moratoria, in this case as part of the planning process, does not constitute taking of property requiring compensation to the landowner.]

12. For examples, see *Burns v. Barrett*, 561 A.2d 1378 (Conn. 1989) and *Carroll Sign Co. v. Adams County Zoning Hearing Bd.*, 606 A.2d 1250 (Pa.Cmwlth.1992).

13. For examples, see: *Goodman Toyota v. City of Raleigh*, 306 S.E.2d 192 (N.C. App. 1983) and *Hilton v. City of Toledo*, 405 N.E.2d 1047 (Ohio 1980).

14. For examples, see: *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (1993); *National Advertising Company, Inc. v. Mount Pleasant Bd. of Adjustment*, 440 S.E.2d 875 (S.C. 1994); *Miller’s Smorgasbord v. Dept. of Transportation*, 590 A.2d 854 (Pa.Cmwlth. 1991); and *Camara v. Bd. of Adjustment of Twp. of Belleville*, 570 A.2d 1012 (N.J. Super. App. Div. 1990).

15. See also *Budget Inn of Daphne, Inc. v. City of Daphne*, 2000 WL 1842425 (Ala.), striking down a similar provision as unconstitutional based on a substantive due process analysis; *Motel 6 Operating Ltd. Partnership v. City of Flagstaff*, 195 Ariz. 569, 991 P.2d 272 (1999), ruling owners’ proposed sign face changes were reasonable alterations to their legal, non-conforming signs; *Rogers v. Zoning Bd. of Adjustment of the Village of Ridgewood*, 309 N.J. Super. 630, 707 A.2d 1090 (App.Div.1998), *aff’d*, 158 N.J. 11, 726 A.2d 258 (N.J.1999), holding that change of sign to indicate new owner of nonconforming building does not cause the sign to lose its protected status; *Ray’s Stateline Market, Inc. v. Town of Pelham*, 140 N.H. 139, 665 A.2d 1068 (1995), replacing plastic face panels of two signs in store’s exterior with face panels advertising doughnut franchise would not result in impermissible change or extension of store’s legal nonconforming use, as lettering changes to existing signs would not affect signs’ dimensions.

16. For examples, see *South Suburban Housing Center v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991) and *City of Dellwood v. Lattimore*, 857 S.W.2d 513 (Mo. App. 1993)

17. The code permitted the administrator to “consider” any “facts and circumstances related to” the city’s standards, criteria, purpose, and intent of the sign code, and a sign could be prohibited based upon its “visual impact and influence” (86 F.Supp.2d at 776, referencing Magistrate’s Report & Recommendation at 17-21). See also *North Olmsted Chamber of Commerce v. City of North Olmsted*, 108 F.Supp.2d 792 (N.D. Ohio 2000), denying plaintiff’s motion for clarification of the court’s decision on the prior restraint issue and holding that the city’s permit scheme was an unconstitutional prior restraint.

18. For similar rulings, see *Central Advertising Co. v. Ann Arbor*, 218 N.W.2d 27 (Mich. 1974); *Schaffer v. Omaha*, 248 N.W.2d 764 (Neb. 1977); and *Hilton Head Island v. Fine Liquors, Ltd.*, 397 S.E.2d 662 (S.C. 1990).

19. The opinion noted that “the Supreme Court’s recent cases have given extra bite to the intermediate scrutiny review of *Central Hudson*.”

20. See note 15. See also *Budget Inn of Daphne, Inc. v. City of Daphne*, 2000 WL 184245 (Ala.), striking down a similar provision as unconstitutional based on a substantive due process analysis.

21. 15 U.S.C. § 1331 *et seq.*

22. The First, Second, Fourth and Seventh Circuits upheld such regulations, while the Ninth Circuit struck them down on preemption grounds. *Penn Advertising v. Mayor and City Council of Baltimore*, 101 F.3d 332 (4th Cir. 1996), *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir.1999), *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2^d Cir.1999); *Lindsey v. Tacoma-*

Pierce County Health Dept., 195 F.3d 1065 (9th Cir. 1999), and *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000). See also *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore*, 101 F.3d 325 (4th Cir. 1996), *cert. den.* 520 U.S. 1204 (1997), upholding an ordinance banning billboard advertising of alcoholic beverages.

23. 121 S.Ct. at 2427. The Court noted that “In 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” (at 2425).

24. *Lisa’s Party City, Inc. v. Town of Henrietta*, 2 F.Supp.2d 378 (W.D.N.Y. 1998) and *Payless Shoesource, Inc. v. Town of Penfield*, 934 F.Supp. 540 (W.D.N.Y. 1996).

25. The opinion of the dissenting Circuit Court Judge was in line with that of the Second Circuit in *Lisa’s Party City, Inc.*

26. See also *North Olmsted Chamber of Commerce v. City of North Olmsted*, 108 F.Supp.2d 792 (N.D. Ohio 2000), denying plaintiff’s motion for clarification of the court’s decision on the prior restraint issue and holding that the city’s permit scheme was an unconstitutional prior restraint.

The Regulation of Signage: Guidelines for Local Regulation of Digital On-Premise Signs

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Introduction

Advancements in technology and their application to signage have been a constant in the evolution of signs, their design, and their role in defining physical places. Parallel to this, with each successive application of new technology to new signs – internal/external lighting, backlit awnings, and currently digital sign technology or electronic message centers -- local governments have found themselves unable to understand the new sign technology or the specifics of how to regulate the new types of signs it allowed. Eventually, during the first phase of the use of new technologies, sign regulations are amended to impose various restrictions on the new type of signs. During subsequent phases, a more balanced picture emerges because more knowledge about the new technology becomes available, the sign industry provides more options and technical specifications to address community concerns and meet statutory standards, and local governments gain experience with regulating these new signs.

Perhaps there are no better places that illustrate the evolution in sign design, specifically lighting and graphics, and the integration of new sign technology in a concentrated district than Times Square in New York City and “The Strip” in Las Vegas. Even though these districts do not resemble the typical American commercial strip, their current visual character is the result of the evolution of new technology in the design of signage and its use in a very defined space.

In the 1890’s, the introduction of incandescent light bulbs made the electrification of Broadway possible and began to give a new aesthetic to New York’s theater district and Times Square. The first electrically-illuminated sign appeared in Times Square 1892 and was an advertisement for a Coney Island resort. Signs illuminated with light bulbs replaced the previous hand painted wooden billboards that were primarily textual in nature, similar to signs that are the average preference for Main Street-type historic places. Times Square became known as “The Great White Way” due to its saturation of electric billboards and signs in theater marquees, restaurants, and shops. There were many negative reactions to the use of this new technology that added colorful lighting displays to the content of building signs and billboards. The concentration of specific land uses, the theaters, and the location of the square were driving the continuous need for exciting signs. New advances in technology fed the need for inventing new creative graphics. Gradually, the current character of Times Square emerged, but each time technology made it possible to invent a new sign, opposition by New Yorkers resulted in regulatory responses. Finally, in 1987, a comprehensive signage ordinance was enacted to regulate billboards on buildings.

Today, Times Square and the Las Vegas “Strip” contain some of the world’s largest signs and the new technology of Electronic Message Centers is defining a new era of exciting graphics, messaging, and place definition making these two districts unlike any other place in the world. With the collaboration of the sign industry, the businesses, the regulators and the elected officials, both Times Square and “The Strip” have evolved into unique districts with a distinctive character.

But how much of this new sign technology can – or should be – adapted to the rest of the country -- to “Mainstreet USA”? And, what are the appropriate regulatory options for local governments to consider when businesses and sign companies seek to introduce this technology in their communities? These questions are the focus of this session.

New Technology

Currently, the concern with the applications and regulation of on-premise digital sign technology is in its initial phase, marked by confusion among the planning and zoning community both as to how these signs work and how they can and should be regulated. Further adding to the confusion is the fact that the technology is evolving rapidly, offering exciting possibilities for new types of sign displays in exterior and interior environments. For example, during the opening ceremonies of the 2008 Beijing Olympics, the floor of the stadium was equipped with a 3000 sq m video digital screen that used very similar type LED technology.

Technically, digital signs are a more complex and graphically versatile technology than what planners are used to: internally or externally illuminated signs that present a fixed message. Rather than using incandescent lamps or fluorescent tubes as a light source, digital signs use light-emitting diodes (LEDs), a semiconductor-based light source. LEDs transmit across the visible, ultraviolet and infrared wavelengths, and can generate very bright colors. According to Wikipedia, when a light-emitting diode is forward biased (switched on), electrons are able to recombine with holes within the device, releasing energy in the form of photons. This effect is called electroluminescence and the color of the light (corresponding to the energy of the photon) is determined by the energy gap of the semiconductor. An LED is usually small in area (less than 1 mm²), and integrated optical components are used to shape its radiation pattern and assist in reflection.

Key Issues with LED Signage

Digital sign manufacturers operate at the national level and that makes it difficult for local planners to have direct access to the technology before an application for a sign permit is made through a local sign company. In addition, there are no national standards for the production of digital signs; however, the sign industry, through the International Sign Association, is working with various states to develop such standards. In short, digital signs present planners with the question of how to regulate a type of sign that uses a new technology and is dynamic, rather than the static signs to which they are accustomed ... and there is little guidance to answer that question. Thus, local government is asked to issue a permit for something it does not understand.

Assuming the local government does not have any regulations that are specific for digital sign technology, what does it do? Usually it will copy another community's requirements. But how were those regulations developed? Most local governments have limited experience with LED signs, mainly from electronic billboards on highways, a small number of electronic message centers signs in commercial areas, and signs embedded in the monument signs of houses of worship and administration buildings. In fact, most of the reaction to digital signs from APA and other groups is focused on the off-premise digital billboards with many studies looking at the issue of driver's safety when reading the bright and changeable billboard messages. Research by the Federal Highway Administration and the Transportation Research Board has been examining digital signs along highways. In addition, APA has reviewed a few communities that have enacted amendments to their sign codes to address digital signs, mainly focusing on digital billboards. These studies do not directly help the local planner and zoning regulator with the enactment of local regulations to manage on-premise LED-based signs. Specific knowledge from research of commercial environments at the local level where digital signs will need to be incorporated into the existing signs and visual character is not yet available. That said, the International Sign Association has been funding research to address key aspects of digital signs and is working with the States to develop standards.

Electronic Message Center Sign Luminance

An important question is: What level of digital sign brightness is acceptable at night? Many local sign ordinances include standards and guidelines for commercial signs that employ a variety of light source types (fluorescent, neon, incandescent and high intensity discharge such as mercury, metal halide or high pressure sodium). These signs have a fixed message. The lamps inside the sign illuminate letters or symbols that do not have the ability to change what is displayed on the sign: a graphic that was approved by the building/zoning department. In these signs, the only change possible is through switching on or off or dimming certain parts of the sign.

Digital signs, on the other hand, use LEDs and the sign face consists of a multitude of closely spaced dots of pixels or light elements similar to a television screen. These signs are controlled by a computer and their message can change and be displayed as a colored image on the sign's face. As a result, the brightness of the displayed image changes according to the program that drives it and the sign can produce varying levels of luminance. Consequently, the regulation of lighting limits will depend on the signage graphic display program, its location within an environmental zone (*i.e.* dense urban areas where there is much electric light as opposed to 'darker' suburban and exurban areas), the size of the sign, and the distance from which it is seen.

At present, most communities that regulate the luminance of on-premise digital signs have merely copied the standards that have been previously applied to digital billboards. Typically, these currently call for a maximum luminance of **5000 nits during daylight hours and 500 nits at night**; however, the daylight luminance will likely be increasing to 7,500 nits based on discussions between the off-premise industry and the federal government.

Methodologies are being developed that will allow to compute new maximum levels of luminance depending on the factors explained, and their placement and proximity to residential areas.

Changing Display Message and/or Image

The programmable change of messages and/or images in a combination with vivid colors and graphics makes digital signs unique. Digital signs have the ability to accommodate any changing display pattern through the computer program that drives them and turn on and off color and brightness to compose new images. Static signs do not change their message and/or image. Most sign ordinances do not permit flashing signs or 'light movement' on the sign. A key question with digital signs is: Should the number of changes in the display be regulated? If yes, how do we establish a practical and defensible number? What should the time interval (in seconds) be between each successive display frame? Currently, there are no unified standards among the local sign ordinances that have been amended to accommodate digital signs. Of the ordinances sampled/referenced, most have considered the research done for billboards and have focused on driver distraction from changing messages. Approaches range from a complete ban on digitally changing graphics to the use of arbitrary guidelines and standards. Currently, many communities have adopted an **8 second static image** requirement derived from an interim guidance recommendation issued by the federal government that governs off premise advertising signs/billboards.

However, as was pointed out, local commercial areas where on-premise signs are installed and are regulated are different than highways where off-premise billboards are located.

Digital Display Sign Size, Height, and Placement

Sign size and height have been key considerations of sign regulations. Almost all existing sign regulations have provisions for sign size that arbitrarily set total sign area without considering driving speeds, the driver's cone of vision, the sight distance needed to read a sign, or reaction time after the sign is read to make a decision to turn. The United States Sign Council has conducted considerable research on these issues and has developed standards and guidelines to address them effectively. In addition the Council has developed guidelines to be used to determine size of lettering so that it can be detected by the driver. On-premise digital signs need to be regulated on the basis of the standards and guidelines developed by the United States Sign Council and we will provide recommendations on how to address these and other issues with regard to the regulation of on-premise digital signs discussed during this session.

Current Practice

Based on a recent survey of numerous jurisdictions by one of the authors, the most common regulatory provisions applicable to digital on-premise signs appear below:

- Require that the sign display remain static for a minimum of 5- 8 seconds and require “instantaneous” change of the display; *i.e.*, no “fading” in/out of the message.
- Prohibit scrolling and animation outside of unique – and mostly pedestrian-oriented – locations.
- Limit brightness to 5,000 nits during daylight and 500 nits at night.
- Require automatic brightness control keyed to ambient light levels.
- Require display to go dark if there is a malfunction.
- Specify distancing requirements from areas zoned for residential use and/or prohibit orientation of sign face towards an area zoned for residential use.

Opportunities for the Use of LED On-Premise Signage in the Local Commercial District

At the local commercial district or arterial strip the character of the environment and the driving speed are different than the highway where billboards are mostly located. The regulation of billboards at the local commercial districts varies from State to State and it is not really relevant to the regulation of on-premise signs. A typical commercial area already has many signs dispersed throughout a very loose mix of mostly freestanding buildings, parking lots, and utility poles and wires. Its character, including signage, evolved over a long period of time. The focus on the new technology and signs cannot ignore the existing spatial arrangements and the relationship with existing signs. Regulations will need to be applied in concert with the total environment, not by isolating these new signs. If planners were to apply a comprehensive approach to the management of signage, regulations for on-premise digital signs will be more effective and can also provide a way to ‘visually decongest’ existing strip commercial areas from ill-placed and ineffective signs.

Planners also need to consider differing approaches to digital signs for different types of zoning districts. What may be appropriate in a regional commercial district may well be “too little” signage for a downtown entertainment or sports arena district and “too much” for a neighborhood commercial district.

City of Cottonwood, Arizona City Council Agenda Communication



 Print

Meeting Date:	March 13, 2012
Subject:	Bicycle Plan Implementation Progress
Department:	Development Services
From:	Nichole Arbeiter, Planner

REQUESTED ACTION

Receive update on Bicycle Plan

SUGGESTED MOTION

N/A

BACKGROUND

In responding to the City Council's 2011 Strategic Initiatives, City Staff has been taking steps to implement the 2009 Bicycle Plan. The following progress has been made this fiscal year:

- The Bicycle Advisory Committee started meeting monthly in October. The committee is comprised of 12 members including staff from four (4) City departments, as well as community members representing local businesses, schools, Yavapai County, and the Verde Valley Cyclists Coalition.
- The City of Cottonwood's first ever "Sharrows" were painted along South 12th Street to help encourage motorists to share the road with bicyclists. More sharrow symbols will be installed in the near future.
- The application for "Bicycle Friendly Community" designation was re-submitted in February and the results will be released in May. If an award is granted, the City will be presented with a "Bicycle Friendly Community" sign by the American League of Cyclists.
- Two off-road "connector" paths were approved by the City Council in January. Construction of the paths will occur on February 25th and March 4th by local volunteers, a Yavapai County probation crew, and a joint training venture with Verde Valley Fire, City of Cottonwood Fire, and Yavapai College.
- The Bicycle Advisory Committee has developed strategic ideas to help further implement the Bicycle Plan and is in the process of organizing and prioritizing project concepts. Receiving funding through the City's 2012/2013 Budget cycle will be a fundamental piece to help continue the implementation of the Bicycle Plan.

JUSTIFICATION/BENEFITS/ISSUES

COST/FUNDING SOURCE

Potential FY 13 budget appropriation

ATTACHMENTS:

Name:

Description:

Type:

No Attachments Available
