

PLANNING & ZONING COMMISSION

PLANO MUNICIPAL CENTER

1520 K AVENUE

February 2, 2009

ITEM NO.	EXPLANATION	ACTION TAKEN
	<p>6:30 p.m. - Dinner - Planning Conference Room 2E</p> <p>7:00 p.m. - Regular Meeting - Council Chambers</p> <p>The Planning & Zoning Commission may convene into Executive Session pursuant to Section 551.071 of the Texas Government Code to Consult with its attorney regarding posted items in the regular meeting.</p> <p>1 Call to Order/Pledge of Allegiance</p> <p>2 Approval of Agenda as Presented</p> <p>3 Approval of Minutes for the January 20, 2009, Planning & Zoning Commission meeting.</p> <p>4 General Discussion: The Planning & Zoning Commission will hear comments of public interest. Time restraints may be directed by the Chair of the Planning & Zoning Commission. Specific factual information, explanation of current policy, or clarification of Planning & Zoning Commission authority may be made in response to an inquiry. Any other discussion or decision must be limited to a proposal to place the item on a future agenda.</p> <p><u>CONSENT AGENDA</u></p> <p>5a BM Preliminary Plat: Custer-Ridgeview Addition, Block 1, Lot 5 - Retail on one lot on 1.5± acres located at the northwest corner of Ridgeview Drive and Custer Road. Zoned Retail. Neighborhood #3. Applicant: Custer Ridgeview, L.P.</p> <p>5b EH Revised Site Plan: Hope Center Addition, Block A, Lot 2 - General office building on one lot on 8.9± acres located at the northeast corner of Plano Parkway and Custer Road. Zoned Planned Development-377-Retail/General Office. Neighborhood #66. Applicant: The Hope Center Foundation</p>	

<p>5c TF</p>	<p>Revised Preliminary Site Plan: The Shops at Legacy Town Center (North), Phase II, Block C, Lot 6 - Hotel on one lot on 2.8± acres located at the northwest corner of Bishop Road and Legacy Circle. Zoned Planned Development-65-Central Business-1. Neighborhood #8. Applicant: Jackson Shaw/Legacy Hotel, L.P.</p>	
<p>5d TF</p>	<p>Final Plat: Capital One Addition, Block 1, Lot 3 - General office building on one lot on 24.8± acres located on the west side of Preston Road, 1,036± feet north of Hedgcoxe Road. Zoned Commercial Employment. Neighborhood #8. Applicant: Capital One National Association</p>	
<p>5e TF</p>	<p>Preliminary Plat: Sante Chary Addition, Block A, Lot 1 - One Single-Family Residence-20 lot on 4.6± acres located on the east side of Pecan Lane, 810± feet north of Crabapple Drive. Zoned Planned Development-95-Single-Family Residence-20. Neighborhood #22. Applicant: Sante Santhanam Chary</p>	
<p><u>END OF CONSENT AGENDA</u></p>		
<p><u>PUBLIC HEARINGS</u></p>		
<p>6 EH</p>	<p>Public Hearing - Preliminary Replat & Revised Site Plan: Messiah Lutheran Church Addition, Block A, Lot 1R - Religious facility on one lot on 13.8± acres located on the north side of Plano Parkway, 680± feet east of Custer Road. Neighborhood #66. Applicant: Messiah Lutheran Church</p>	
<p><u>END OF PUBLIC HEARINGS</u></p>		
<p>7 SM</p>	<p>Discussion and Direction: Sign Ordinance Review - Discussion and direction to identify potential amendments to sign regulations.</p>	
<p>8</p>	<p>Items for Future Discussion - The Planning & Zoning Commission may identify issues or topics that they wish to schedule for discussion at a future meeting.</p>	

ACCESSIBILITY STATEMENT

Plano Municipal Center is wheelchair accessible. A sloped curb entry is available at the main entrance facing Municipal Avenue, with specially marked parking spaces nearby. Access and special parking are also available on the north side of the building. Requests for sign interpreters or special services must be received forty-eight (48) hours prior to the meeting time by calling the Planning Department at (972) 941-7151.

**CITY OF PLANO
PLANNING & ZONING COMMISSION
PUBLIC HEARING PROCEDURES**

The Planning & Zoning Commission welcomes your thoughts and comments on these agenda items. The commission does ask, however, that if you wish to speak on an item you:

1. **Fill out a speaker card.** This helps the commission know how many people wish to speak for or against an item, and helps in recording the minutes of the meeting. **However, even if you do not fill out a card, you may still speak.** Please give the card to the secretary at the right-hand side of the podium before the meeting begins.
2. **Limit your comments to new issues dealing directly with the case or item.** Please try not to repeat the comments of other speakers.
3. **Limit your speaking time so that others may also have a turn.** If you are part of a group or homeowners association, it is best to choose one representative to present the views of your group. The commission's adopted rules on speaker times are as follows:
 - 15 minutes for the applicant - After the public hearing is opened, the Chair of the Planning & Zoning Commission will ask the applicant to speak first.
 - 3 minutes each for all other speakers, up to a maximum of 30 minutes. Individual speakers may yield their time to a homeowner association or other group representative, up to a maximum of 15 minutes of speaking time.

If you are a group representative and other speakers have yielded their 3 minutes to you, please present their speaker cards along with yours to the secretary.

- 5 minutes for applicant rebuttal.
- Other time limits may be set by the Chairman.

The commission values your testimony and appreciates your compliance with these guidelines.

For more information on the items on this agenda, or any other planning, zoning, or transportation issue, please contact the Planning Department at (972) 941-7151.

CITY OF PLANO
PLANNING & ZONING COMMISSION
CONSENT AGENDA ITEM

February 2, 2009

Agenda Item No. 5a

Preliminary Plat: Custer-Ridgeview Addition, Block 1, Lot 5

Applicant: Custer Ridgeview, L.P.

Retail on one lot on 1.5± acres located at the northwest corner of Ridgeview Drive and Custer Road. Zoned Retail. Neighborhood #3.

The applicant is proposing to develop a pharmaceutical store. The preliminary plat shows easements necessary for the development.

Recommended for approval subject to additions and/or alterations to the engineering plans as required by the Engineering Department.

Agenda Item No. 5b

Revised Site Plan: Hope Center Addition, Block A, Lot 2

Applicant: The Hope Center Foundation

General office building on one lot on 8.9± acres located at the northeast corner of Plano Parkway and Custer Road. Zoned Planned Development-377-Retail/General Office. Neighborhood #66.

The applicant is proposing to reduce the number of parking spaces provided onsite in the parking garage and meet their required parking through an offsite parking easement. The purpose of this revised site plan is to show the proposed changes in the parking garage and site parking data.

Recommended for approval as submitted.

Agenda Item No. 5c

Revised Preliminary Site Plan: The Shops at Legacy Town Center (North), Phase II, Block C, Lot 6

Applicant: Jackson Shaw/Legacy Hotel, L.P.

Hotel on one lot on 2.8± acres located at the northwest corner of Bishop Road and Legacy Circle. Zoned Planned Development-65-Central Business-1. Neighborhood #8.

The reason for the revised preliminary site plan is due to the reduction of the proposed hotel building size, the modified building footprint, and deletion of the retail uses component.

Recommended for approval as submitted.

Agenda Item No. 5d

Final Plat: Capital One Addition, Block 1, Lot 3

Applicant: Capital One National Association

General office building on one lot on 24.8± acres located on the west side of Preston Road, 1,036± feet north of Hedgcoxe Road. Zoned Commercial Employment. Neighborhood #8.

The site is currently being developed as a general office building with structured parking. The purpose of the final plat is to dedicate easements necessary for completing the development.

Recommended for approval as submitted.

Agenda Item No. 5e

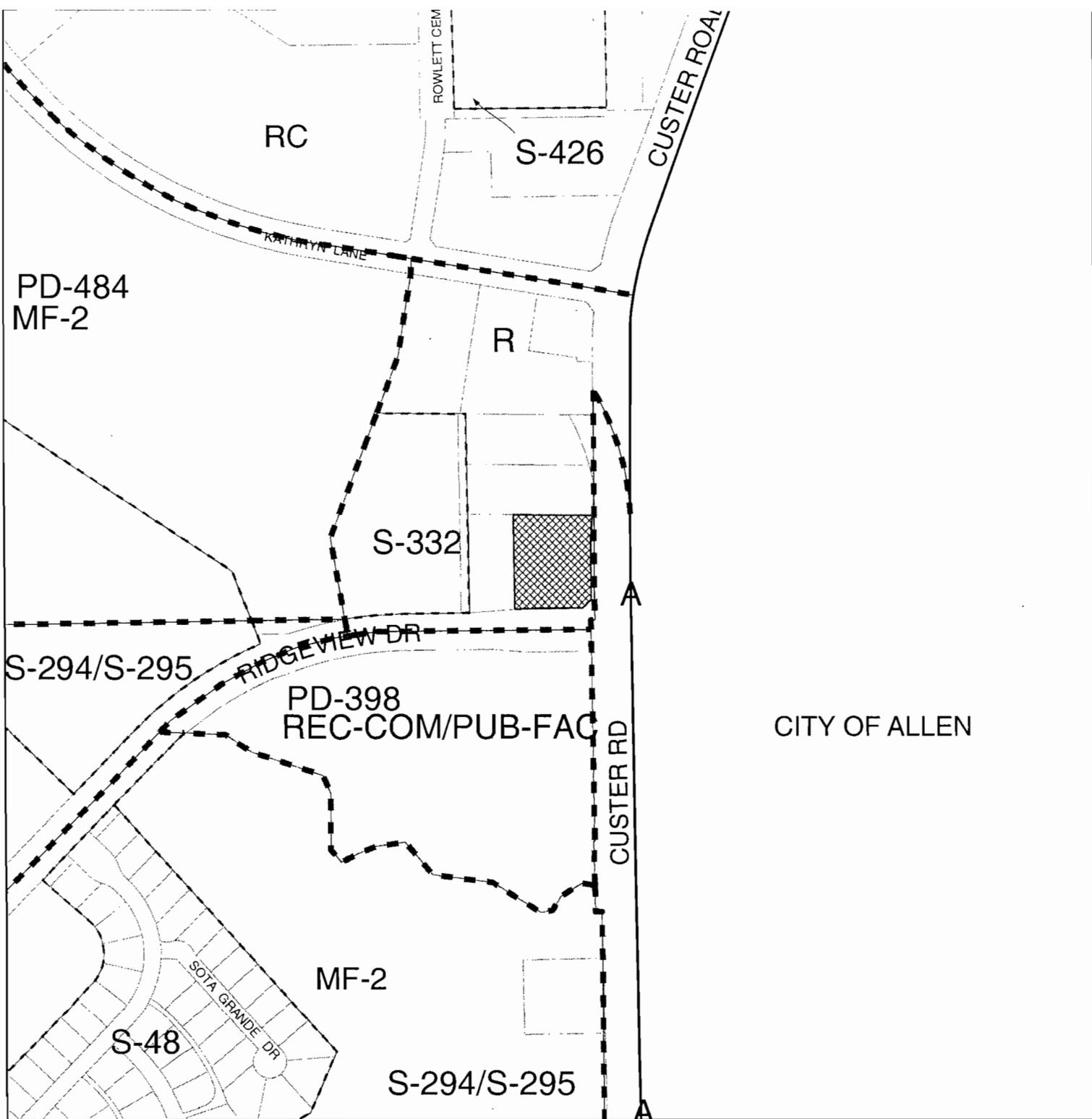
Preliminary Plat: Sante Chary Addition, Block A, Lot 1

Applicant: Sante Santhanam Chary

One Single-Family Residence-20 lot on 4.6± acres located on the east side of Pecan Lane, 810± feet north of Crabapple Drive. Zoned Planned Development-95-Single-Family Residence-20. Neighborhood #22.

The applicant is proposing to plat the property and dedicate easements in order to build a single-family residence.

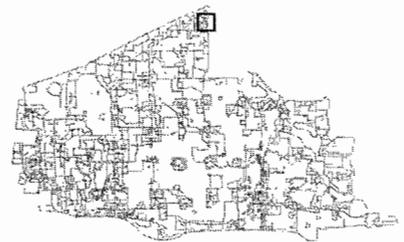
Recommended for approval as submitted.



Item Submitted: PRELIMINARY PLAT

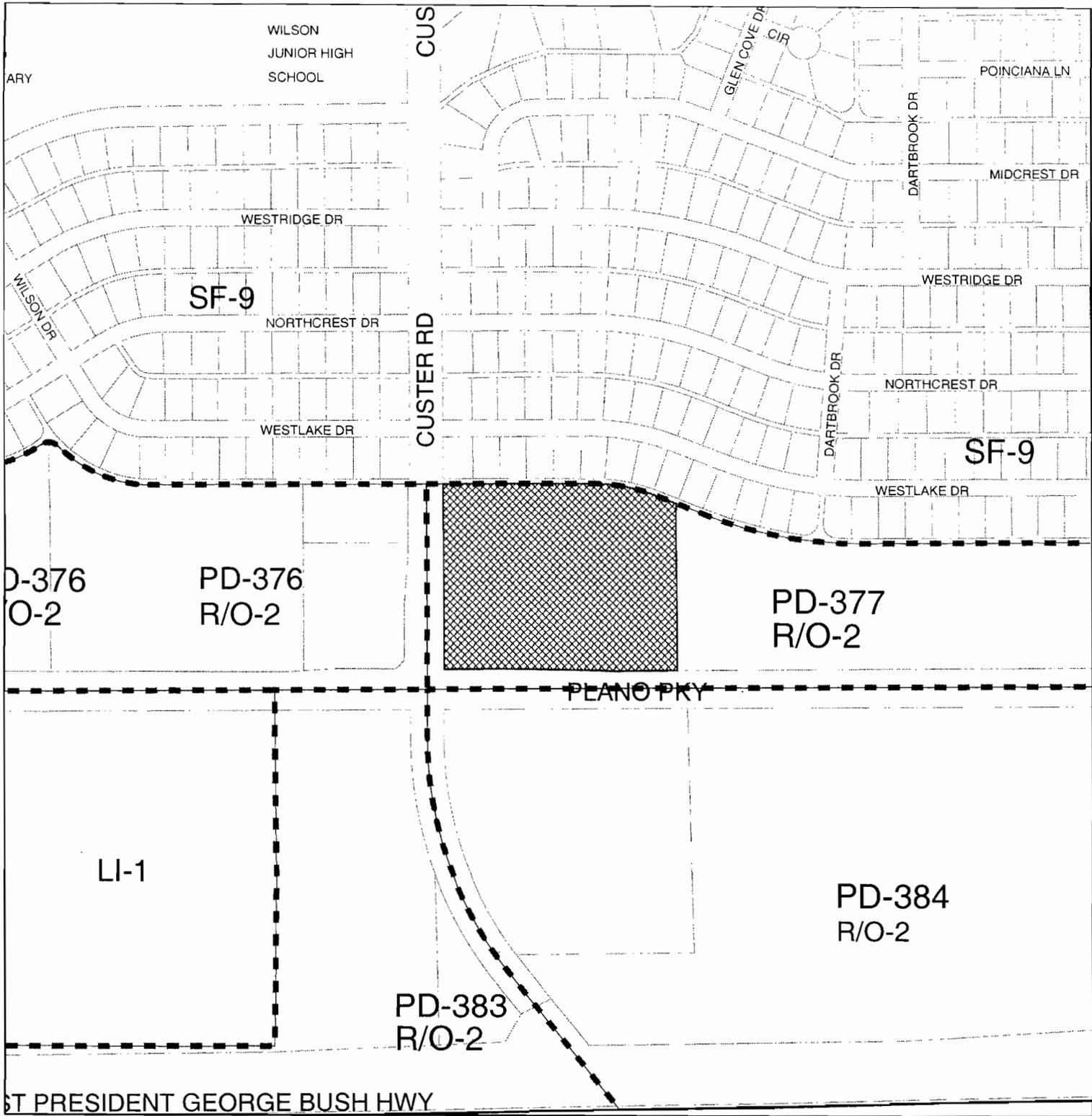
Title: CUSTER-RIDGEVIEW ADDITION
BLOCK 1, LOT 5

Zoning: RETAIL



○ 200' Notification Buffer



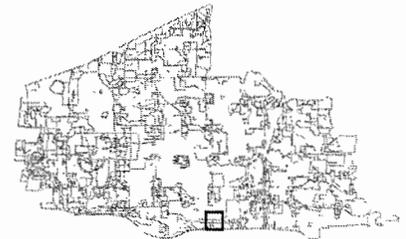


Item Submitted: REVISED SITE PLAN

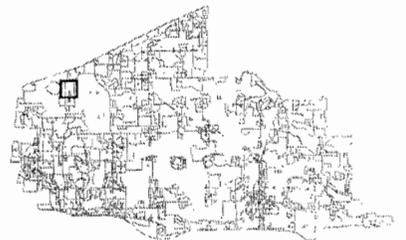
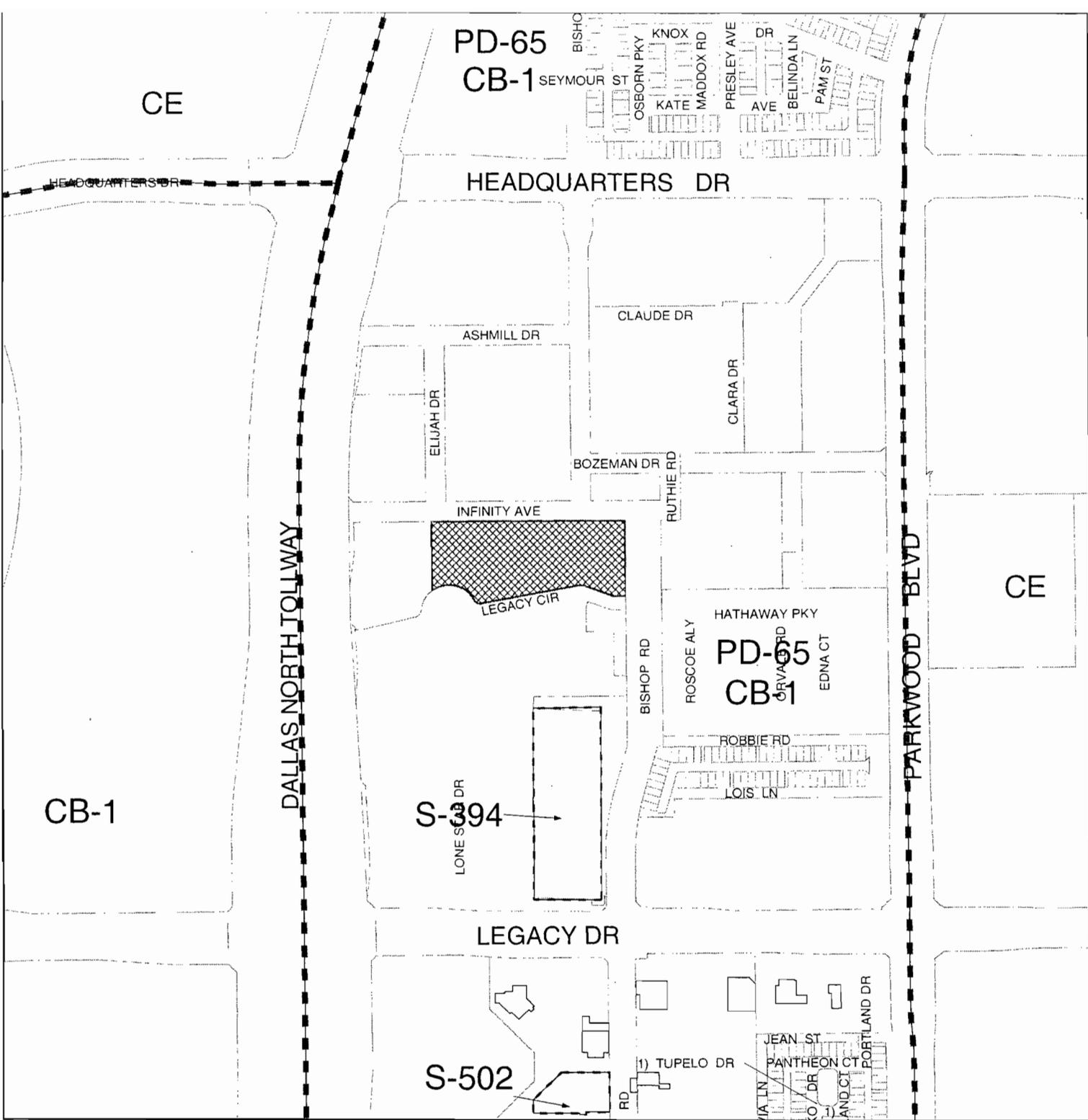
Title: HOPE CENTER ADDITION
BLOCK A, LOT 2



Zoning: PLANNED DEVELOPMENT-377-RETAIL/GENERAL OFFICE/
190 TOLLWAY/PLANO PARKWAY OVERLAY DISTRICT



○ 200' Notification Buffer



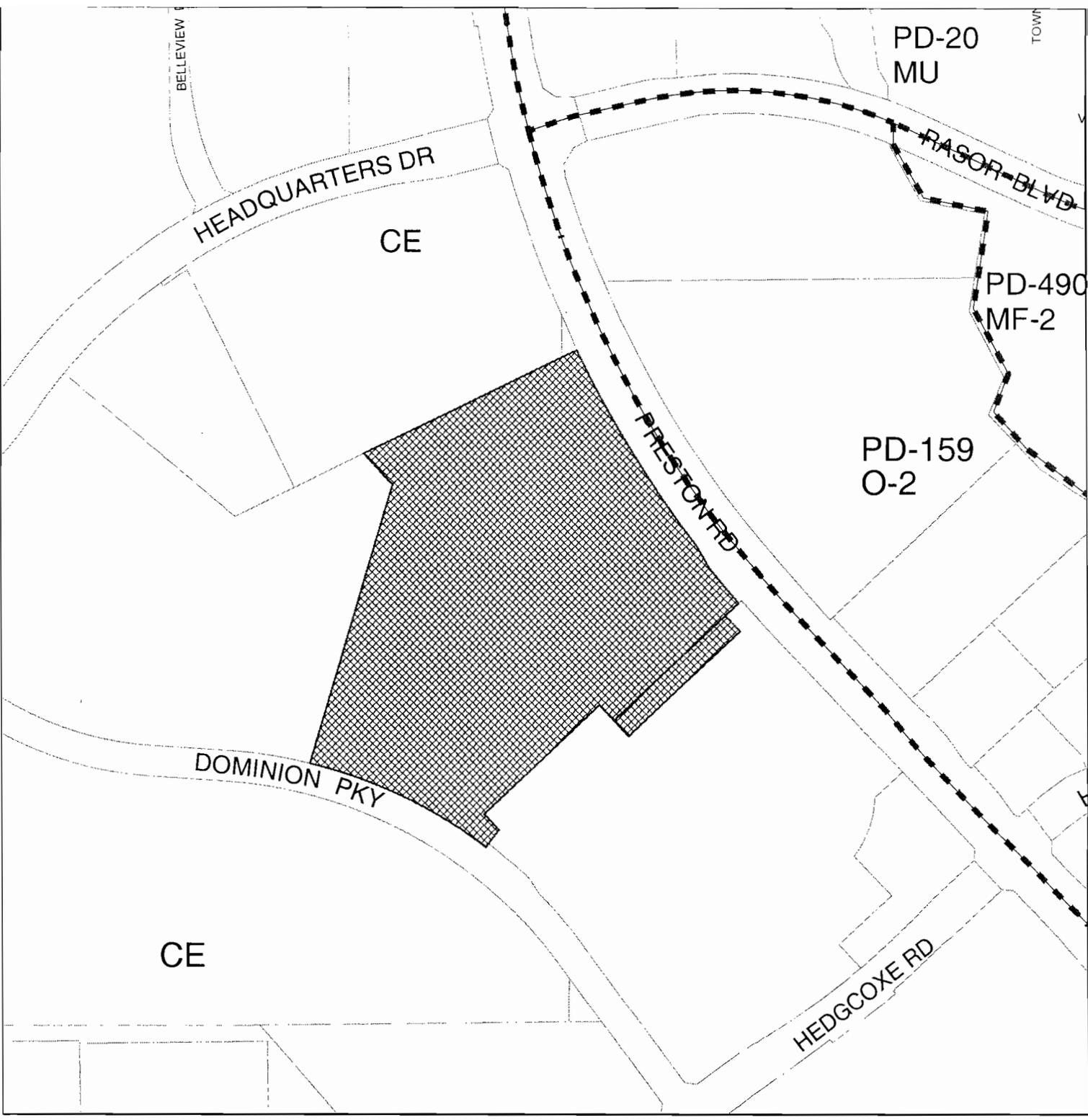
Item Submitted: REVISED PRELIMINARY SITE PLAN

Title: THE SHOPS AT LEGACY TOWN CENTER (NORTH), PHASE II
BLOCK C, LOT 6

○ 200' Notification Buffer



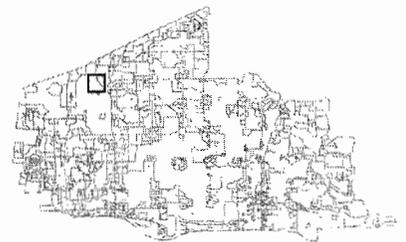
Zoning: PLANNED DEVELOPMENT-65-CENTRAL BUSINESS-1/
DALLAS NORTH TOLLWAY OVERLAY DISTRICT



Item Submitted: FINAL PLAT

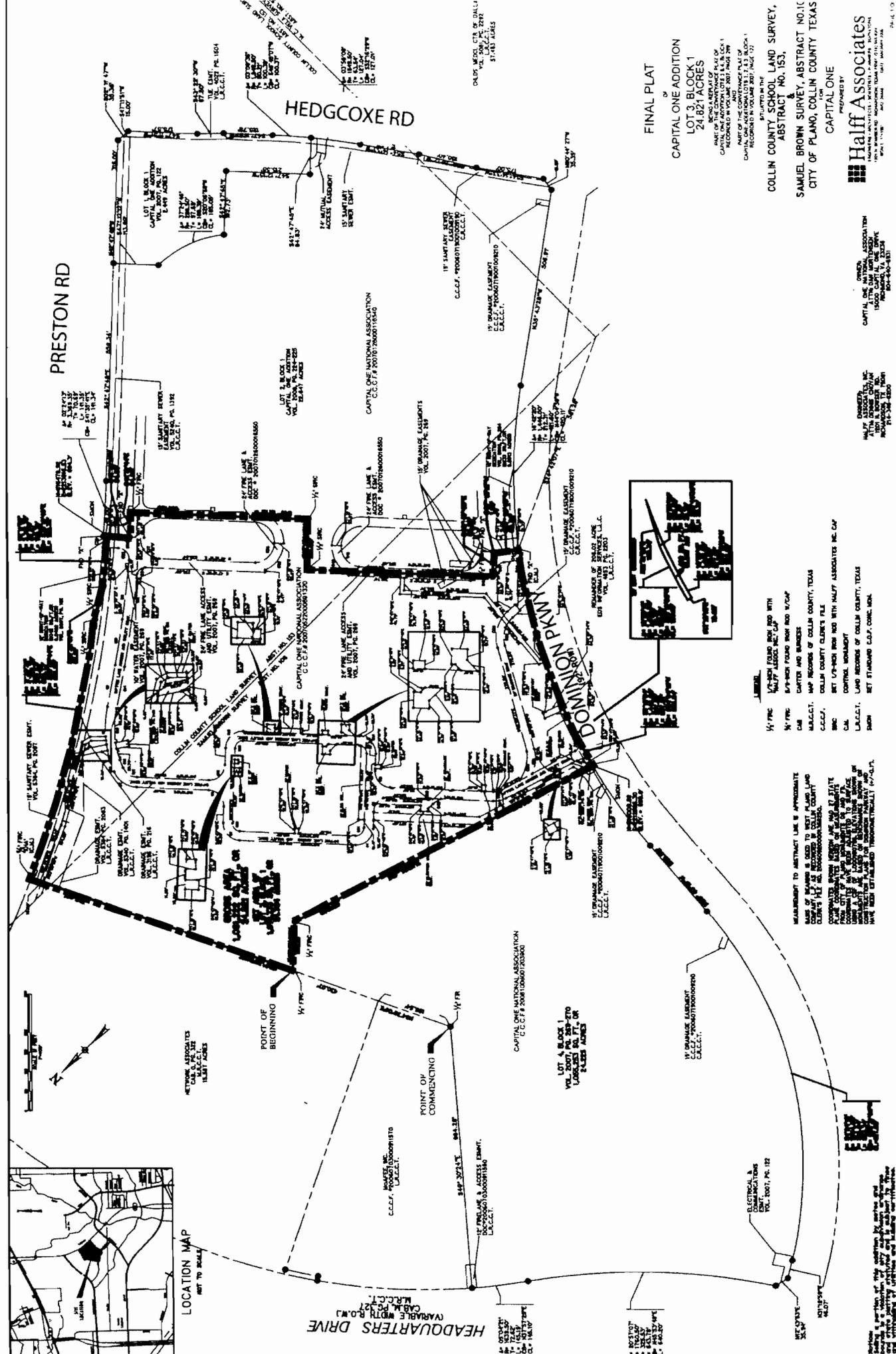
Title: CAPITAL ONE ADDITION
BLOCK 1, LOT 3

Zoning: COMMERCIAL EMPLOYMENT/
PRESTON ROAD OVERLAY DISTRICT



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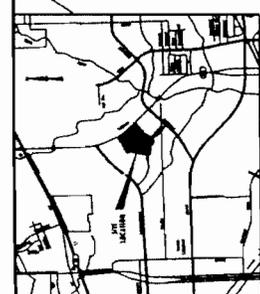
FINAL PLAT
 OF
CAPITAL ONE ADDITION
LOT 3, BLOCK 1
24.821 ACRES

BEING A PART OF THE
 CAPITAL ONE ADDITION LOT 1 & 2, BLOCK 1
 RECORDED IN VOLUME 207, PAGE 132
 CAPITAL ONE ADDITION LOT 1 & 2, BLOCK 1
 RECORDED IN VOLUME 207, PAGE 132

PREPARED BY
Half Associates
 COLLIN COUNTY SCHOOL LAND SURVEY,
 ABSTRACT NO. 153,
 SAMUEL BROWN SURVEY, ABSTRACT NO. 110
 CITY OF PLANO, COLLIN COUNTY TEXAS

PREPARED BY
Half Associates
 COLLIN COUNTY SCHOOL LAND SURVEY,
 ABSTRACT NO. 153,
 SAMUEL BROWN SURVEY, ABSTRACT NO. 110
 CITY OF PLANO, COLLIN COUNTY TEXAS

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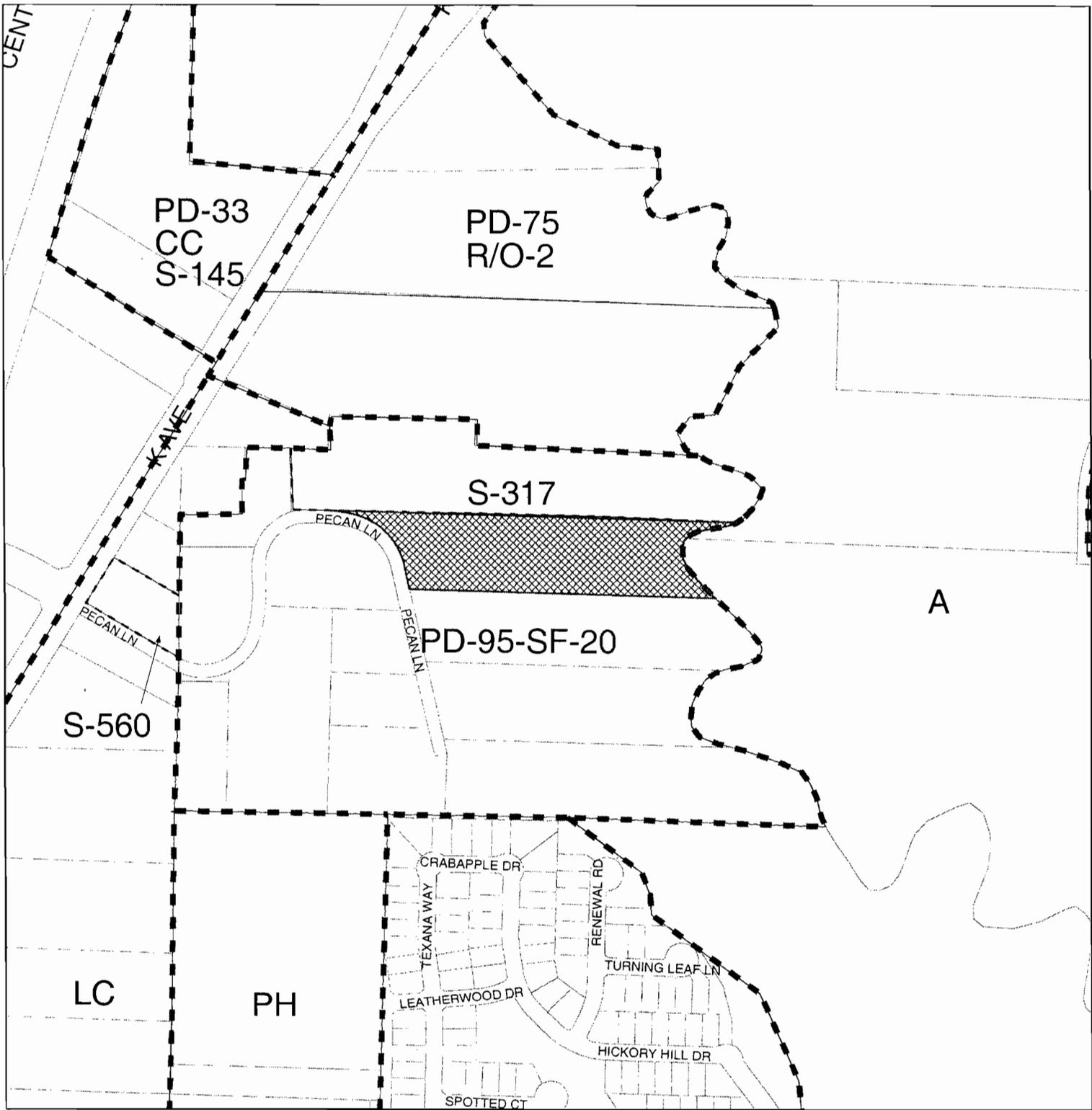
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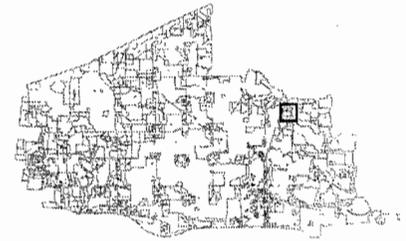
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Item Submitted: PRELIMINARY PLAT

Title: SANTE CHARY ADDITION
BLOCK A, LOT 1

Zoning: PLANNED DEVELOPMENT-95-
SINGLE-FAMILY RESIDENCE-20



○ 200' Notification Buffer



CITY OF PLANO

PLANNING & ZONING COMMISSION

February 2, 2009

Agenda Item No. 6

Public Hearing - Preliminary Replat & Revised Site Plan: Messiah Lutheran Church
Addition, Block A, Lot 1R

Applicant: Messiah Lutheran Church

DESCRIPTION:

Religious facility on one lot on 13.8± acres located on the north side of Plano Parkway, 680± feet east of Custer Road. Neighborhood #66.

REMARKS:

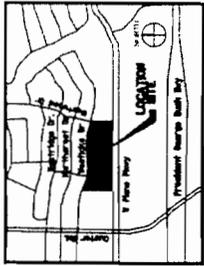
The purpose of the preliminary replat is to propose access and parking easements.

This applicant proposes a parking lot addition to the existing religious facility. The parking lot will be shared with the adjacent Hope Center development. The purpose of the revised site plan is to show the new easements and parking lot addition.

RECOMMENDATION:

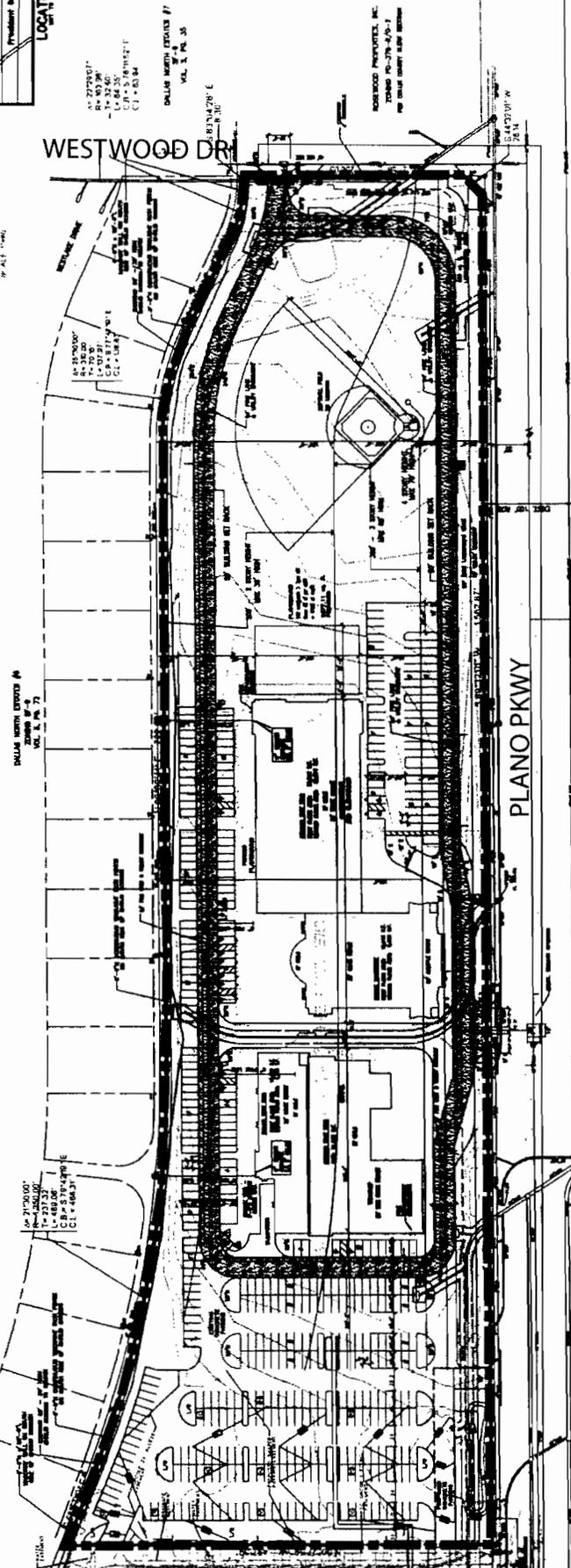
Preliminary Replat: Recommended for approval subject to additions and/or alterations to the engineering plans as required by the Engineering Department.

Revised Site Plan: Recommended for approval as submitted.



WESTWOOD DR

PLANO PKWY



DALLAS NORTH DIVISION #4
ZONING PD-30-A(7)-1
REV. 5, 14, 15

DALLAS NORTH DIVISION #7
ZONING PD-30-A(7)-1
REV. 5, 14, 15

ROCKWOOD PROPERTIES, INC.
ZONING PD-30-A(7)-1
REV. 5, 14, 15

ROCKWOOD PROPERTIES, INC.
ZONING PD-30-A(7)-1
REV. 5, 14, 15

PURPOSE STATEMENT:
THE PURPOSE OF THIS REVISED SITE PLAN IS TO RELOCATE THE EXISTING CHURCH AND ACCESS EASIMENT

- GENERAL NOTES:**
1. ALL LANDS UNDER REGISTRY FEES OR UNITS SHALL BE 100% TREE RETENTION
 2. TREE LAMP SHALL BE ORANGE AND CONTROLLED BY CITY STANDARDS
 3. UNDEVELOPED IMPROVING AREAS SHALL BE DEMOLISHED AND PROVIDED TO CITY STANDARDS AND SHALL COMPLY WITH REQUIREMENTS OF THE CURRENT ACCEPTED LAND USE ZONING CODE
 4. THE SITE PLAN SHALL BE SUBMITTED TO THE CITY ENGINEER FOR REVIEW AND APPROVAL. THE CITY ENGINEER SHALL BE PROVIDED WITH ALL NECESSARY INFORMATION TO REVIEW THE SITE PLAN. THE CITY ENGINEER SHALL BE PROVIDED WITH ALL NECESSARY INFORMATION TO REVIEW THE SITE PLAN.
 5. MECHANICAL, UTILITY, EXISTING AND TRAIL CONNECTIONS SHALL BE SUBMITTED IN ACCORDANCE WITH THE ZONING ORDINANCE
 6. ALL IRONWORK CONTINGENT UPON APPROVAL BY BUILDING DEPARTMENT DEPT
 7. APPROVAL OF THE SITE PLAN IN PART FINAL, ALL ENGINEERING PLANS AND APPROVED
 8. CONSTRUCTION SHALL BE COMPLETED, SHALL BE COMPLETED IN ACCORDANCE WITH ZONING ORDINANCE
 9. ALL OTHER FEATURES WITHIN THE DEVELOPMENT SHALL BE COMPLETED, AS PROVIDED IN THE ZONING ORDINANCE
 10. ALL OTHER FEATURES WITHIN THE DEVELOPMENT SHALL BE COMPLETED, AS PROVIDED IN THE ZONING ORDINANCE
 11. ALL ELECTRICAL TRANSMISSION, DISTRIBUTION AND SERVICE LINES MUST BE UNDERGROUND
 12. ALL ELECTRICAL TRANSMISSION, DISTRIBUTION AND SERVICE LINES MUST BE UNDERGROUND
 13. ALL ELECTRICAL TRANSMISSION, DISTRIBUTION AND SERVICE LINES MUST BE UNDERGROUND
 14. ALL ELECTRICAL TRANSMISSION, DISTRIBUTION AND SERVICE LINES MUST BE UNDERGROUND
 15. ALL ELECTRICAL TRANSMISSION, DISTRIBUTION AND SERVICE LINES MUST BE UNDERGROUND

WATER TABLE SCHEDULE

C	TYPE	DEPTH	NO.	DATE	DEPTH	REMARKS
1	CON	1.10'	1	1	1	EXISTING
2	CON	1.10'	1	1	1	EXISTING
3	CON	1.10'	1	1	1	EXISTING

ITEM NO.	DESCRIPTION	QUANTITY	UNIT	PRICE	TOTAL
1	CONCRETE	100	YD	100.00	100.00
2	STEEL	50	TON	50.00	50.00
3	PAINT	100	GA	100.00	100.00
4	LABOR	1000	HOUR	1000.00	1000.00
5	EQUIPMENT	100	HOUR	100.00	100.00
6	PERMITS	1	SET	100.00	100.00
7	INSURANCE	1	YEAR	100.00	100.00
8	UTILITIES	100	YD	100.00	100.00
9	LANDSCAPING	100	YD	100.00	100.00
10	TOTAL				2000.00

MESSIAH LUTHERAN CHURCH
REVISED SITE PLAN
LOT R1, BLOCK A
PLANO, COLLIN COUNTY, TEXAS
WILLIAM BEVERLY SURVEY, ABSTRACT NO. 75
FOR RECORD: JANUARY 26, 2009

LOTT & COMPANY
REGISTERED PROFESSIONAL ENGINEERS
11111 TEXAS HIGHWAY 175, SUITE 1000
DALLAS, TEXAS 75244-8977

HALFF
REGISTERED PROFESSIONAL ENGINEERS
11111 TEXAS HIGHWAY 175, SUITE 1000
DALLAS, TEXAS 75244-8977

NOV 2014 SCALE 1" = 80'
SHEET C0.01

CITY OF PLANO

PLANNING AND ZONING COMMISSION

February 2, 2009

Agenda Item No. 7

Discussion and Direction: Sign Ordinance Review

DESCRIPTION:

Discussion and direction to identify potential amendments to sign regulations.

REMARKS:

The variety of sign styles, types, and purposes change over time as do the types of development in a community. Periodic review of the sign ordinance can help ensure that it remains current and does not inadvertently restrict desirable signage. This review was requested by City Council to identify any regulations that may unreasonably limit contemporary and innovative advertising and marketing practices.

Plano's sign regulations are within the City's Zoning Ordinance and Code of Ordinances. They are intended to provide for:

- **Public Safety** - Reduce sign or advertising distractions and obstructions that may contribute to traffic accidents, reduce hazards that may be caused by signs.
- **Protection of Property Value** - Stabilize and reinforce property values to protect private and public investment; preserve and reinforce the natural, historic, and architectural qualities of neighborhoods; and establish and enhance aesthetic and architectural compatibility within neighborhoods and commercial areas.
- **Clear and Consistent Standards** - Create a regular and impartial process for businesses and/or persons seeking to erect signs.
- **Balanced Interests of Stakeholders** - Balance the needs and interests of local businesses, sign manufacturers, local residents, and elected officials.

In today's economic climate, many cities are exploring loosening restrictions on signage as a means of supporting businesses and protecting the tax base. (Please see attached USA Today article). "The economic well-being and fiscal health of a community depend to a significant degree on the success of its commercial districts.

Retail and service businesses provide jobs and income for residents. They also contribute to the property and sales tax base, which, according to common wisdom, translates to revenues for the local government from a source other than residential property taxes, thereby helping to reduce or stabilize property tax bills of homeowners and businesses.”¹

As with any land use decision, short term interests must be balanced with long term goals. Decisions must be carefully weighed, and at a minimum should consider²:

1. The needs of a business to identify itself and attract customers.
2. The needs of a citizen to be able to locate a business and find a desired product.
3. The needs of a community to create or preserve a visual environment that is in keeping with the professed preferences of its citizens and business community.

Further, community interests for desirable signage must be in harmony with the legal constraints of sign regulation. A discussion of these legal issues is provided in the attached document “Legal Issues in the Regulation of On-Premise Signs” by Alan Weinstein.

This is a cursory look at these issues intended to provide a brief introduction and overview. Cases can be complicated and nuanced beyond what can be reasonably covered here. Please find additional supporting materials attached on these and other areas of sign regulation.

At the Monday, February 2, 2009 Planning & Zoning Commission meeting, Building Inspections staff will provide additional background information on signs and the sign ordinance. On Tuesday, February 3, 2009, a work session will be dedicated to receiving comments from the community on this topic.

¹ *Context-Sensitive Signage Design - Marya Morris, Mark L. Hinshaw, Douglas Mace, Alan Weinstein*

² *Context-Sensitive Signage Design - Marya Morris, Mark L. Hinshaw, Douglas Mace, Alan Weinstein*

Cities ease signage rules to boost business

By Charisse Jones, USA TODAY

When David Gwathmey and his wife opened their coffee and wine bar in Alexandria, Va.'s "Old Town" section, he defied a ban on sidewalk signs to try to steer customers their way. Now that the city has eased its restriction, what Gwathmey did surreptitiously, he can do in the daylight. Already, he has seen the difference.

"It definitely drives foot traffic," says Gwathmey, 38, noting that the sign may have boosted the number of weekend visitors to his shop, Grape + Bean, by 20%. "This is a very strong statement and action that supports (the city's) claim to want to support small businesses."

Alexandria is one of several communities that have lifted or are considering loosening restrictions on sidewalk signs and banners to help shore up businesses struggling to survive a recession that has slowed consumer spending and depleted municipal tax revenue.

"We have definitely been touting the advantage of signs for businesses during this downturn in the economy," says David Hickey, director of government relations for the International Sign Association, adding that several communities have become more lenient. "This is a tool that advertisers can use 24 hours a day, seven days a week, and it's often the more cost-effective way to bring in new customers."

Cities that are making or considering changes to sign rules include:

- Agoura Hills, Calif. The City Council decided in October to waive the fee and expedite permitting for businesses wanting to hang temporary banners advertising sales or special events. Businesses can take advantage of the changes until Jan. 22, says Nathan Hamburger, assistant city manager.

- Boynton Beach, Fla. The City Commission is likely by early February to give businesses more time to display a banner, extending the period from 14 to 90 days a year. "We're expediting it for the benefit of local business stability," says Michael Rumpf, city planning and zoning director.

- Victorville, Calif. The City Council in June allowed a large commercial center to increase the size of a sign advertising its various businesses by as much as 25%. The council may allow other business strips to do the same by spring, city spokeswoman Yvonne Hester says. "It's helpful for motorists being able to locate things," she says, "and of course it also helps individual businesses during a tough economic time."

Local governments traditionally regulate the size, number and types of business signs in their communities, aiming to preserve aesthetics and minimizing distractions to motorists. Some planning experts say that relaxing restrictions could be detrimental.

"I don't think compromising your standards on aesthetics ... is necessary to address economic hard times," says Lora Lucero, staff attorney at the American Planning Association. "I hope they're cautious ... because once you've made a change like that, it's very hard to roll back in the future."

Last month in San Angelo, Texas, efforts by planning officials to get the City Council to restrict banners and electronic signs were rejected or questioned, a stance planners say was likely influenced by the economic crisis.

"If the city staff's recommendations to tighten the regulations would've been brought to the City Council three years ago, we would have had a much different outcome," says Shawn Lewis, director of the city's planning and development services.

In Alexandria, the charm of the historic district known as Old Town is key to its bustling tourism industry. There is no neon, and signs are regulated by an architectural review board. That's why the ordinance, passed Nov. 25 by the City Council to allow businesses in the district to place signs along the main thoroughfare of King Street, is significant.

"Times have changed," says Mayor William Euille, adding that the provision, which expires March 15, helps businesses on side streets and those on the upper floors of King Street buildings get noticed by potential patrons. "Because the economy is in a downturn and businesses are experiencing a lower sales volume, the City Council felt that we needed to do something immediately to help these small businesses and retailers."

Alexandria officials are projecting a \$10.5 million revenue shortfall for this fiscal year, which ends in June, and sales tax funds are down 3%. The ordinance is part of a larger campaign encouraging locals to patronize businesses in the city where they live or work and may lead to a more permanent change, such as allowing signs on poles.

"I would say it probably is more urgent than ever," Tara Zimnick-Calico, president of the Old Town Business and Professionals Association, says of the ordinance.

Find this article at:

http://www.usatoday.com/news/nation/2009-01-05-signs_N.htm

ZONING PRACTICE

April 2008

AMERICAN PLANNING ASSOCIATION



➔ ISSUE NUMBER FOUR

PRACTICE SMART SIGN CODES



**Digital
Signs:
Context Matters**

Looking Ahead: Regulating Digital Signs and Billboards

By Marya Morris, AICP

Cities and counties have always been challenged to keep their sign ordinances updated to address the latest in sign types and technologies.

Each new sign type that has come into use—for example, backlit awnings and electronic message centers—has prompted cities to amend their regulations in response to or in anticipation of an application to install such a sign.

The advent in the last several years of signs using digital video displays represents the latest, and perhaps the most compelling, challenge to cities trying to keep pace with signage technology. More so than any other type of sign technology that has come into use in the last 40 to 50 years, digital video displays on both off-premise (i.e., billboards) and on-premise signs raise very significant traffic safety considerations.

This issue of *Zoning Practice* covers current trends in the use of digital technology on off-premise billboards and on-premise signs. It recaps the latest research on the effects of

this type of changeable signage on traffic safety. It also discusses the use of digital video sign technology as a component of on-premise signs, including a list of ordinance provisions that municipalities should consider if they are going to permit this type of sign to be used. I use the phrase digital display or video display, but these devices are also referred to as LEDs or, collectively, as “dynamic signs.”

BRIGHT BILLBOARDS

While digital technology is growing in use for on-premise signs, it is the proliferation of digital billboards that has triggered cities and counties to revise their sign ordinances to address this new type of display. Of the approximately half-million billboards currently lining U.S. roadways, only about 500 of them are digital. However, the industry's trade

group, the Outdoor Advertising Association of America, expects that number to grow by several hundred each year in the coming years. In 2008, digital billboards represent for the sign industry what the Comstock Lode must have represented for silver miners in 1858—seemingly limitless riches. The technology allows companies to rent a single billboard—or pole—to multiple advertisers. A billboard company in San Antonio, for example, estimated that annual revenue from one billboard that had been converted from a static image to a changeable digital image would increase tenfold, from \$300,000 to \$3 million just one year after it went digital.

It is very difficult for cities and counties to get billboards removed once they are in place. Billboard companies have made a concerted effort to get state legislation passed that limits or precludes the ability of local

⊕ A typology of moving-image signs. The variable message sign at the right uses a motor to switch among three different static images. Next, the electronic messageboard at Wrigley Field in Chicago displays scrolling text and simple images. The on-premise digital sign, pictured third from left, looks like a giant television screen, displaying a steady stream of video images. On the far right, this digital billboard cycles through a number of static video images at regularly timed intervals.



ASK THE AUTHOR JOIN US ONLINE!

Go online from May 12 to 23 to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. Marya Morris, AICP, will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and Zoning Practice will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice web pages.

About the Author

Marya Morris is a senior associate at Duncan Associates, a planning consulting firm specializing in land development regulations and infrastructure finance. www.duncanassociates.com

governments to require removal of existing billboards through amortization. The only option left is paying cash compensation. The federal Highway Beautification Act, which was modified many years ago under industry pressure, also prohibits amortization and requires cash compensation for billboard removal.

With the amortization option unavailable, some cities and counties have struck deals with billboard companies requiring them to remove two boards for every new one they install. Other jurisdictions have established simple no-net-increase policies. Although many communities have had success with these approaches, in the

last few years the industry has devised a litigious tactic to secure new billboard permits. Billboard companies challenge the constitutionality of a sign provision, and when the ordinance is in legal limbo, they rush in to secure billboard permits.

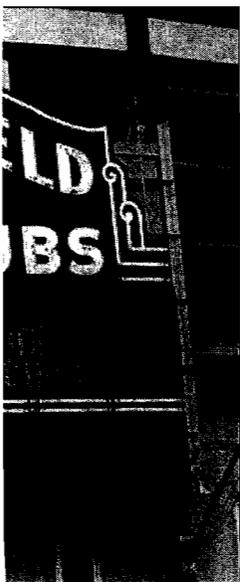
The American Planning Association has joined Scenic America, the International Municipal Lawyers Association, and others in filing amicus curiae briefs in many of these cases to show the courts the industry's pattern of conduct and deliberate strategy to circumvent local sign codes. A review in January 2006 found 113 such "shakedown" sign cases filed in the federal

courts since 1997, and eight filed in state courts in the same time period. For more information visit the APA Amicus Curiae webpage at www.planning.org/amicusbriefs.

The emergence of the highly lucrative digital billboards has also, however, given local governments some leverage to at least reduce the total number of billboards. Many of the applications cities are seeing for the video billboards are requests by companies to replace the static type with the new video displays in key locations. The added revenue potential from a digital format has proved to be enough of an incentive to get companies to agree to remove multiple static billboards in exchange for permits to install video display in certain locations.

In June 2007, Minnetonka, Minnesota, in the Twin Cities area, reached a settlement with Clear Channel in which the company agreed to

The emergence of the highly lucrative digital billboards has given local governments some leverage to at least reduce the total number of billboards.



Photos by David Morley

remove 15 of the 30 conventional static image billboards in the city in exchange for permission to install its digital billboards. The city will permit the company to install no more than eight dynamic signs at four to six locations.

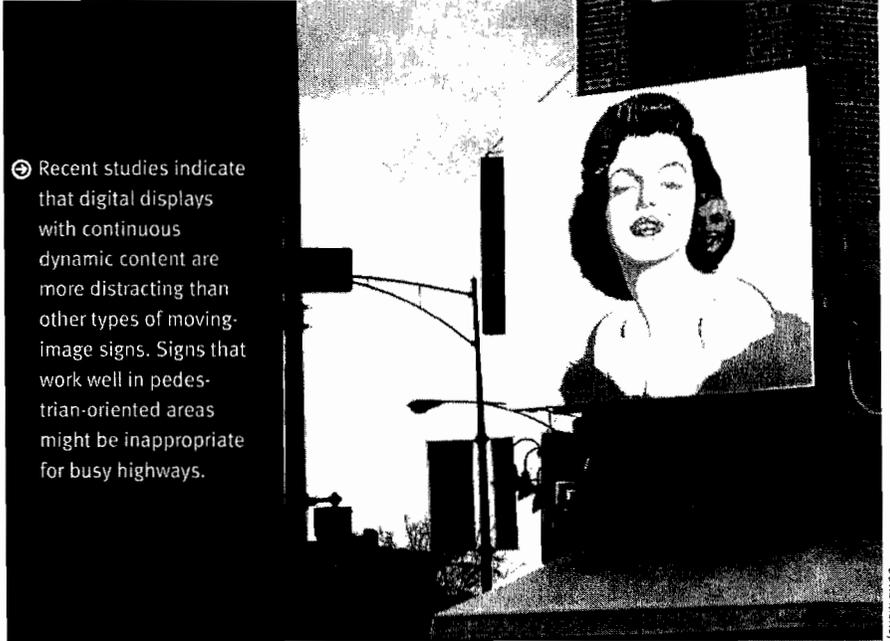
The City of San Antonio amended its sign and billboard ordinance in December 2007 to require the removal of up to four static billboards in exchange for permission to install one digital display billboard in their place. Prior to that amendment the city had no provisions for digital sign technology, but it did already have a two-for-one replacement requirement. The city has a developed a sliding scale that determines the number of billboards required to be removed in exchange for a single digital billboard. According to the scale, the number of digital signs permitted is determined by the total square footage of static billboard faces removed. Therefore, a billboard company will be required to demolish as few as three and as many as 19 billboards to get one new digital billboard structure placed or an existing static billboard face replaced.

IT DEPENDS ON YOUR DEFINITION OF 'DISTRACTING'

Digital signs are brighter and more distracting than any other type of sign. Other attention-grabbers, like strobe lights, mirrors, searchlights, and signs with moving parts, are typically prohibited (or allowed under very narrow circumstances) by even the most hands-off jurisdictions. The high visual impact of digital signs has prompted highway and traffic safety experts to try to quantify how drivers respond to such distractions. This research, which is summarized below, has been instrumental in helping cities craft new sign ordinances that address the specific characteristics of such signs, including how often the messages or images change, the degree of brightness, and their placement relative to residential areas.

The Federal Highway Administration is currently conducting a study on driver distraction and the safety or impact of new sign technologies on driver attention. The initial phase, which is slated to be completed by June 2008, will identify and evaluate the most significant issues and develop research methods needed to secure definitive results. The FHWA anticipates the second phase of the research study and final report will be completed in the latter part of calendar year 2009. Also, the Transportation Research Board (a branch of the National Science Foundation) has formed a subcommittee to examine research needs on electronic signs.

Recent studies indicate that digital displays with continuous dynamic content are more distracting than other types of moving-image signs. Signs that work well in pedestrian-oriented areas might be inappropriate for busy highways.



Until a couple of years ago, one of the only studies on the effects of billboards and traffic safety was a 1980 survey of existing research on the subject prepared for the Federal Highway Administration (Wachtel and Netherton 1980). It did not, however, provide any concrete answers. The study noted "attempts to quantify the impact of roadside advertising on traffic safety

have not yielded conclusive results." The authors found that courts typically rule on the side of disallowing billboards because of the "readily understood logic that a driver cannot be expected to give full attention to his driving tasks when he is reading a billboard."

A 2006 study by the National Highway Traffic Safety Administration that focused primarily on driver distractions inside the car (i.e., phone use, eating, and changing the radio station) concluded that any distraction of more than two seconds is a potential cause of crashes and near crashes.

A 2004 study at the University of Toronto found that drivers make twice as many glances at active (i.e., video signs) than they do at passive (i.e., static) signs. All three of the moving sign types that were studied (video, scrolling text, and trivision) attracted more than twice as many glances as static signs. They also found that the drivers' glances at the active signs were longer in duration; 88 percent of glances were at least 0.75 seconds long. A duration of 0.75 seconds or longer is important because that is the amount of time required for a driver to react to a vehicle that is slowing down ahead. Video and scrolling text signs received the longest average maximum glance duration.

An earlier study also at the University of Toronto that was designed to determine whether video billboards distract drivers' attention from traffic signals found that drivers made roughly the same number of glances at traffic signals and street signs with and without full-motion video

ORDINANCES AND ZONING REPORTS

- ◆ City of Minnetonka, Minnesota. 2007. Staff report to city council recommending adoption of an ordinance regulating digital signs. June 25. Available at www.eminnetonka.com/community_development/planning/show_project.cfm?link_id=Dynamic_Signs_Ordinance&cat_link_id=Planning.
- ◆ City of San Antonio City Code, Chapter 28. Amendment Adding Provisions for Digital Signs. Last revised December 2, 2007. Available at <http://epay.sanantonio.gov/dsddocumentcentral/upload/SIGNsecDRAFT.pdf>.
- ◆ City of Seattle, Land Use Code, Section 23.55.005 Signs, Video Display Methods. Last revised 2004. <http://clerk.ci.seattle.wa.us/~public/clrkhome.htm>.

billboards present. This may be interpreted to mean that while electronic billboards may be distracting, they do not appear to distract drivers from noticing traffic signs. This study also found that video signs entering the driver's line of sight directly in front of the vehicle (e.g., when the sign is situated at a curve) are very distracting.

A 2005 study by the Texas Transportation Institute of driver comprehension of sign messages that flash or change concluded that such signs are more distracting, less comprehensible, and require more reading time than do static images. While this research did not evaluate advertising-related signs, it does demonstrate that flashing signs require more of the driver's time and attention to comprehend the message. In the case of electronic billboards, this suggests that billboards that flash may require more time and attention to read than static ones.

The City of Seattle commissioned a report in 2001 to examine the relationship between

Sign messages that flash or change are more distracting, less comprehensible, and require more reading time than do static images.

The Seattle study also found that drivers expend about 80 percent of their attention on driving-related tasks, leaving 20 percent of their attention for nonessential tasks, including reading signs. The report recommended the city use a "10-second rule" as the maximum display time for a video message.

APPROACHES TO REGULATING DIGITAL DISPLAY SIGNS

Most cities and counties that have amended their sign ordinances to address the use of digital display on on-premise signs and billboards have done so in response to an application by a sign owner to install a new sign that uses the

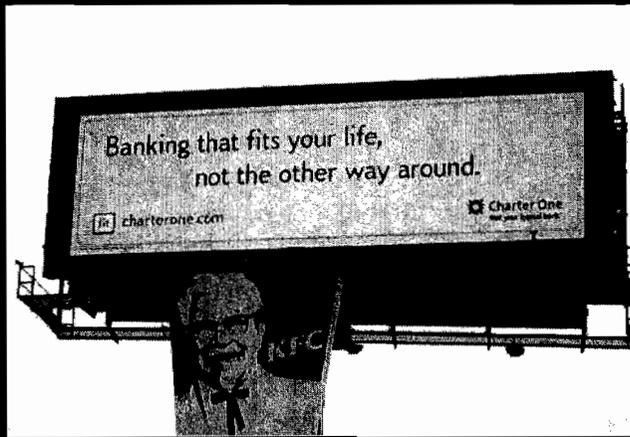
ital video display signs while still permitting electronic message centers.

3) A relatively small number of sign ordinances have been amended to allow video display signs under narrowly prescribed circumstances and with numerous conditions.

For jurisdictions that want or need to allow them, the following section explains additional considerations that should be added to a sign ordinance to effectively regulate digital display signs.

Sign type. The ordinance must indicate whether the digital display can be used on off-premise billboards only, on on-premise signs only, or on both sign types.

Billboards with changeable digital images allow billboard companies to dramatically increase their revenue by renting the same sign face to multiple advertisers.



electronic signs with moving/flashing images and driver distraction. The study was conducted by Jerry Wachtel, who in 1980 had conducted the first-ever study on signs and traffic safety for the Federal Highway Administration.

The Seattle report concluded that electronic signs with moving images will distract drivers for longer durations (or intervals) than do electronic signs with no movement. The study also noted that the expanded content of a dynamic sign also contributes to extended distraction from driving. Specifically it found that signs that use two or more frames to tell a story are very distracting because drivers are involuntarily compelled to watch the story through to its conclusion.

technology or in response to a sign owner having replaced an existing sign face with a digital display. Some cities, like Minnetonka, were required by a court settlement with a billboard company to allow the technology. Although regulations for digital signs are still relatively new, we can group the regulatory approaches (or lack thereof) into three general categories:

- 1) Most sign ordinances are still silent on the issue of digital video displays, but almost all do regulate electronic message centers and also prohibit or restrict signs that move, flash, strobe, blink, or contain animation.
- 2) A smaller but growing number of sign ordinances contain a complete prohibition on dig-

Definitions. The definitions section must be updated to include a detailed definition of digital display signage and the sign's functional characteristics that could have an effect on traffic safety and community aesthetics.

Zoning districts. The ordinance should list the districts in which such signs are permitted and where they are prohibited. Such signs are commonly prohibited in neighborhood commercial districts, historic districts, special design districts, and scenic corridors, in close proximity to schools, and in residential districts. On the other end of the spectrum, East Dundee, Illinois, for example, expressly encourages digital video signs in two commercial overlay districts, but only a

RESOURCES

- Belfer, D. and A. Smiley. 2005. "Observed Driver Glance Behavior at Roadside Advertising Signs." *Transportation Research Record*.
- Dudek, C. L. et al. 2005. "Impacts of Using Dynamic Features to Display Messages on Changeable Message Signs." Washington, D.C.: Operations Office of Travel Management, Federal Highway Administration.
- "Dynamic Signage: Research Related To Driver Distraction and Ordinance Recommendations." Prepared by SRF Consulting Group, Inc. for the City of Minnetonka, Minnesota. June 7, 2007 (www.digitalooh.org/digital/pdf/2007_minnetonka_digital_srf_consulting_treport06-08-07.pdf).
- "The Impact of Driver Inattention on Near-Crash/Crash Risk: An Analysis Using the 100-Car Naturalistic Driving Study Data." 2006. National Highway Traffic Safety Administration, U.S. Department of Transportation. April.
- McBride, Sarah. "Seeing the Light in Billboard War: Digital Signs Spark a Truce." *Wall Street Journal*, February 3, 2007.
- Smiley, A. et al. 2004. "Impact of Video Advertising on Driver Fixation Patterns." *Transportation Research Record*.
- *Unsafe at Any Speed: Billboards in the Digital Age*, 2007. Scenic America Issue Alert 2. Available at www.scenic.org/pdfs/eh.pdf. The Scenic America website has a number of excellent resources for planners and citizens interested in regulating digital signage, including a downloadable PowerPoint presentation, research summaries, and model ordinances.
- Wachter, J. and R. Netherton. 1986. "Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable Message Signage." Report No. FHWA-RD-80-051. Washington, D.C.: Federal Highway Administration.

few land uses—new car dealerships, multi-tenant retail centers, and amusement establishments—are permitted to have them.

Placement and orientation. A minimum spacing requirement between signs and residential areas should be considered, as should a provision requiring that the sign face be oriented away from residential areas and other scenic or sensitive areas. The Baker and Wolpert study recommended that dynamic signs be limited or prohibited at intersections, in demanding driving environments, and in places where they obstruct a driver's view. In Seattle, the sign face of on-premise digital signs must not be visible from a street, driveway, or surface parking area, nor may it be visible from a lot that is owned by a different person.

Sign area. For on-premise signage, many ordinances include a limit on the percentage of the sign face that can be used for digital display. Thirty percent is common although in some areas, such as entertainment districts, that proportion may be much higher.

Illumination and brightness. The ordinance should address the legibility and brightness of a sign both during the day and after dark. During the day the issue is reducing or minimizing glare and maintaining contrast between the sign face and the surrounding area. At night the issues are the degree of brightness and its impact on driver distraction and on light trespass into residential areas. In the study for the City of Minnetonka, researchers noted the challenge posed by this aspect of digital signs: "There is no objective definition of excessive brightness because the appropriate level of brightness depends on the environment within which the sign operates."

Message duration and transition. The ordinance must include a minimum duration of time that a single message must be displayed. Typically this is expressed in terms of seconds. The San Antonio billboard ordinance requires each image to remain static for at least eight seconds and that a change of image be accomplished within one second or less.

The city's ordinance requires any portion of the message that uses a video display method to have a minimum duration of two seconds and a maximum duration of five seconds. Further, it requires a 20-second "pause" in which a still image or blank screen is showed following every message that is shown on a video display.

Public service announcements. In exchange for permission to use digital displays, owners of billboards in Minnesota and San

Antonio have agreed to display emergency information such as Amber Alerts and emergency evacuation information. Such a requirement can be included in an ordinance or imposed as a condition of approval.

Whether undertaking a comprehensive revision of a sign ordinance or more limited, strategic amendments to address digital technology, there are other common provisions related to electronic and digital signage that should be revisited as part of the rewrite. At the top of the list would be updating standards for conventional electronic message centers to reflect the latest research regarding driver distraction and message duration. Also, the boilerplate provisions common to so many ordinances that prohibit signs that flash, are animated, or simulate motion should also be rethought. These provisions could conceivably be used to prohibit digital displays without additional regulations. The problem is that these characteristics are very rarely defined in the ordinance and remain open to interpretation. Also, whenever new regulations are being considered for digital billboards, jurisdictions should take the opportunity to draft new provisions to address digital technology for on-premise signs as well. And, finally, any time the sign ordinance goes into the shop for repair—whether to address digital signage or to make broader changes—is a good time to remove or revise any provisions that violate content neutrality rules.

NEWS BRIEFS

SMART GROWTH TAKES A HIT IN MARYLAND

By Lora Lucero, AICP

The *Baltimore Sun* hit the nail on the head when it reported on March 12 "[t]he state's highest court declared that Maryland law does not require local governments to stick to their master plans or growth-management policies in making development decisions."

Trail, et al. v. Terrapin Run, LLC, et al. presented an important question for the court to address: What link is required between the community's adopted plan and the decision by the Zoning Board of Appeals (ZBA) to grant or deny a request for a special exception? In a 4 to 3 vote, the majority concluded that Article 66B, the state planning law, is permissive in nature and plans are only advisory guides, so a strong link between plans and implementation is not required. The court affirmed the county's

The majority concluded that the state planning law is permissive in nature and plans are only advisory guides, so a strong link between plans and implementation is not required.

approval of the special exception and determined that the “in harmony with” traditional standard in applications for special exceptions remains the standard, in the absence of specific legislative language to the contrary. The court’s decision is available at www.planning.org/amicusbriefs/pdf/terrapinrundecision.pdf.

Terrapin Run, LLC, the developer, proposed to build an “active adult” community of 4,300 homes on 935 partially wooded acres in Allegany County, a rural area of mountainous Western Maryland. The land is primarily zoned District “A” (Agricultural, Forestry, and Mining), with a portion located in District “C” (Conservation). In addition to the homes, the developer proposed to build an equestrian center, a community building, and a 125,000-square-foot shopping center.

The residential density is 4.6 units per acre. A planner who testified at trial indicated that the density of the proposed development would approximate that of Kentlands, in Montgomery County. The initial phase of development would use individual septic tanks, but the project would eventually require its own sewage treatment plant. Significantly, the property is not located in one of Maryland’s priority funding areas.

The zoning ordinance divides Allegany County into urban and nonurban areas. “A” and “C” are classified as nonurban zoning districts. The zoning ordinance provides:

“Non-urban districts are designed to accommodate a number of non-urban land uses including agriculture, forestry, mining, extractive industries, wildlife habitat, outdoor recreation, and communication, transmission and transportation services, as well as to protect floodplain areas, steep slope areas, designated wetlands and habitat areas, and Public Supply Watersheds from intense urban development.” Allegany County Code, Chapter 141, Part 4 (Zoning) §141-5(B) (emphasis supplied).

Oponents to the project argued that the ZBA erred when it found that strict conformity with the plan was not required and that the proposed development would be “in harmony with” the Allegany County Comprehensive Plan

because Maryland Code (Article 66, § 1(k)) requires a special exception to be “in conformity with” the plan.

Gov. Martin O’Malley’s administration argued in its amicus brief that counties and municipalities are required to conform to the seven broad “visions” for growth in Maryland as listed below:

§ 1.01. Visions

- (1) Development is concentrated in suitable areas.
- (2) Sensitive areas are protected.
- (3) In rural areas, growth is directed to existing population centers and resource areas are protected.
- (4) Stewardship of the Chesapeake Bay and the land is a universal ethic.
- (5) Conservation of resources, including a reduction in resource consumption, is practiced.
- (6) To assure the achievement of items (1) through (5) of this section, economic growth is encouraged and regulatory mechanisms are streamlined.
- (7) Adequate public facilities and infrastructure under the control of the county or municipal corporation are available or planned in areas where growth is to occur.

APA and its Maryland Chapter jointly filed an amicus brief. We argued that “[p]lans are documents that describe public policies that the community intends to implement and not simply a rhetorical expression of the community’s desires.” APA’s position is that (1) the adopted comprehensive plan must be implemented; (2) effective implementation requires that the day-to-day decisions made by local officials be consistent with the adopted comprehensive plan; and (3) the court’s review of whether consistency is achieved should be more searching when local officials are acting in their administrative (quasi-judicial) capacity. APA’s amicus brief is available at www.planning.org/amicusbriefs/pdf/terrapinrun.pdf.

The lengthy majority opinion (52 pages) recounts much of Maryland’s legislative history in statutory reforms. “[T]his case, in one sense is a continuation of legislative battles that began in the early 1990s, where representatives of the

environmental protection and professional land planning interests attempted to establish that the State, or State planners, should exercise greater control than theretofore enjoyed over most aspects of land use decision-making that then reposed in the local jurisdictions” (*Trail, et al. v. Terrapin Run, LLC, et al.*, 2008 WL 638691, p.1). The majority concludes that the “in harmony” standard is synonymous with “in conformity.” However, the three dissenting justices said the majority “sets special exception considerations on a lubricious path” (*Trail, et al. v. Terrapin Run, LLC, et al.*, Minority Opinion, p.13). The statutory amendments made by the legislature in 1970, and subsequent case law, buttresses the argument that a stricter linkage is required between the adopted plan and the grant of a special exception, the minority opined.

Richard Hall, Maryland secretary of planning and past president of the Maryland Chapter of APA, said: “We think this is a time when we need more smart, sustainable growth, not less.” The O’Malley administration is going to study the ruling before deciding whether to advance legislation to reverse the court’s decision.

Lora Lucero, AICP, is editor of Planning & Environmental Law and staff liaison to APA’s amicus curiae committee.

Cover concept by Lisa Barton.

Photos: Sign © iStockphoto.com/David McShane; Screen © iStockphoto.com/Alexey Khlobystov

VOL. 25, NO. 4

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for \$75 (U.S.) and \$100 (foreign). **W. Paul Farmer, FAICP, Executive Director; William R. Klein, AICP, Director of Research.**

Zoning Practice (ISSN 1548-0135) is produced at APA. Jim Schwab, AICP, and David Morley, Editors; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.

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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



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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.

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).

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).

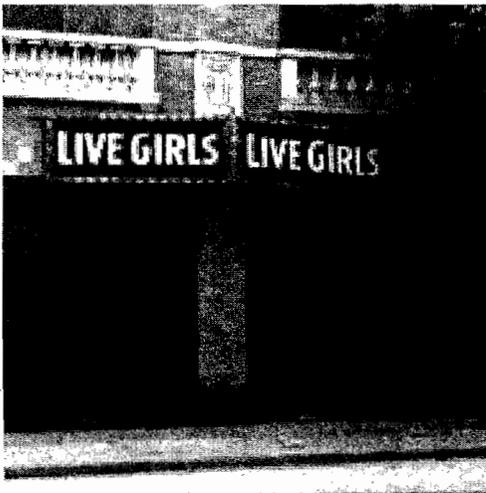
The "secondary effects" doctrine. Courts often apply the *O'Brien* test to judge the constitutionality of zoning ordinances that regulate sexually oriented businesses more severely than other, similar businesses. But what is the courts' rationale for using the *O'Brien* test, rather than strict scrutiny, 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-



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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).

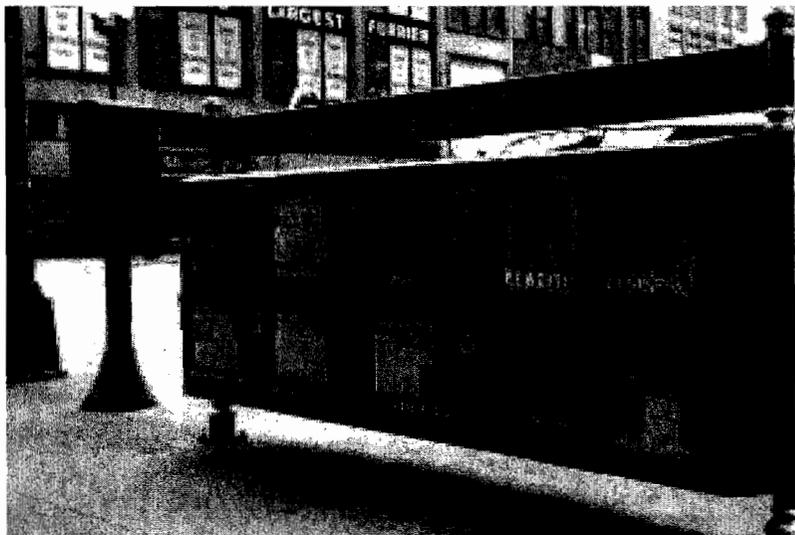
The Court also discussed the reasonable fit test to be applied to regulation of commercial speech in more general terms, noting that:

[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.



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.

Michael Davidson

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.



Maya Morris

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.

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

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.

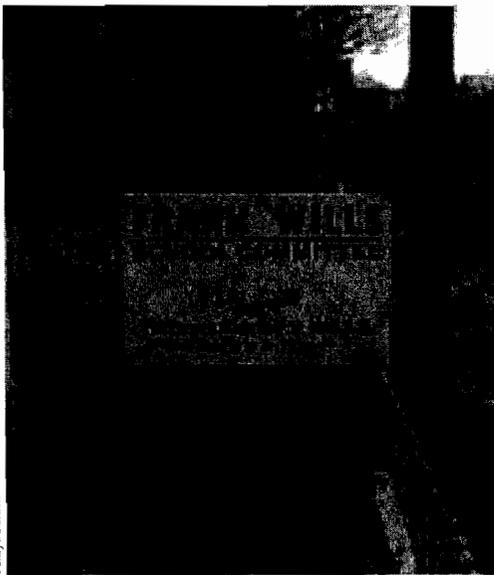
Courts have also upheld content-neutral time limits placed on all temporary signs. For example, in *City of Waterloo v. Markham*, 600 N.E.2d 1320 (Ill. App. 1992), a state appellate court upheld an ordinance limiting temporary signs to 90 days against claims that the ordinance unnecessarily restricted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



Marya Morris

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."

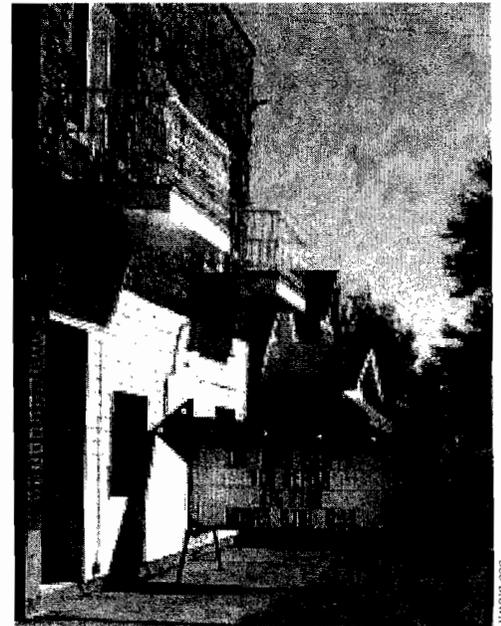
Regulating Real Estate Signs

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.



Marcy 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.

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.

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

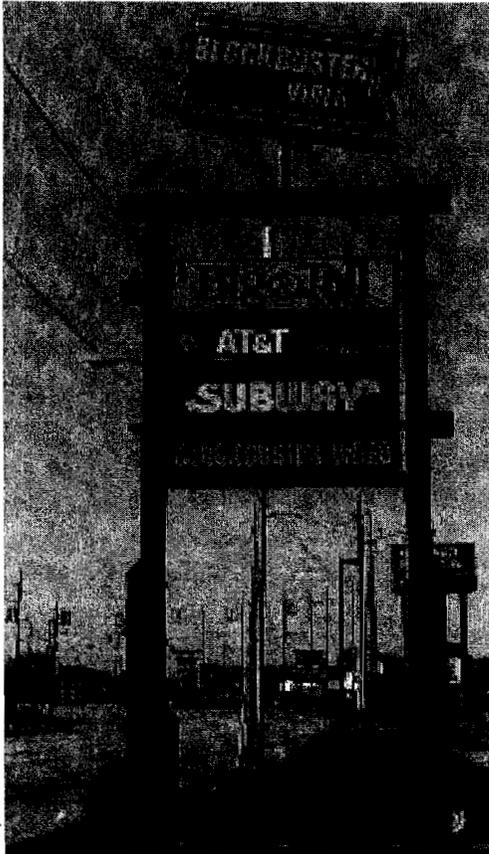
Although some state zoning enabling laws prohibit the forced termination of a lawful nonconforming use (e.g., Ohio and New Hampshire), a local government may, as a general matter, require timely compliance with all land development regulations, so long as this does not so diminish the value of the property 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



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.

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

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: *Naegle 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: *Dourey 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.F.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: *Battaglioli 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.

Variations

Variations 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 variations:

- 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 variations 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 variations, 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

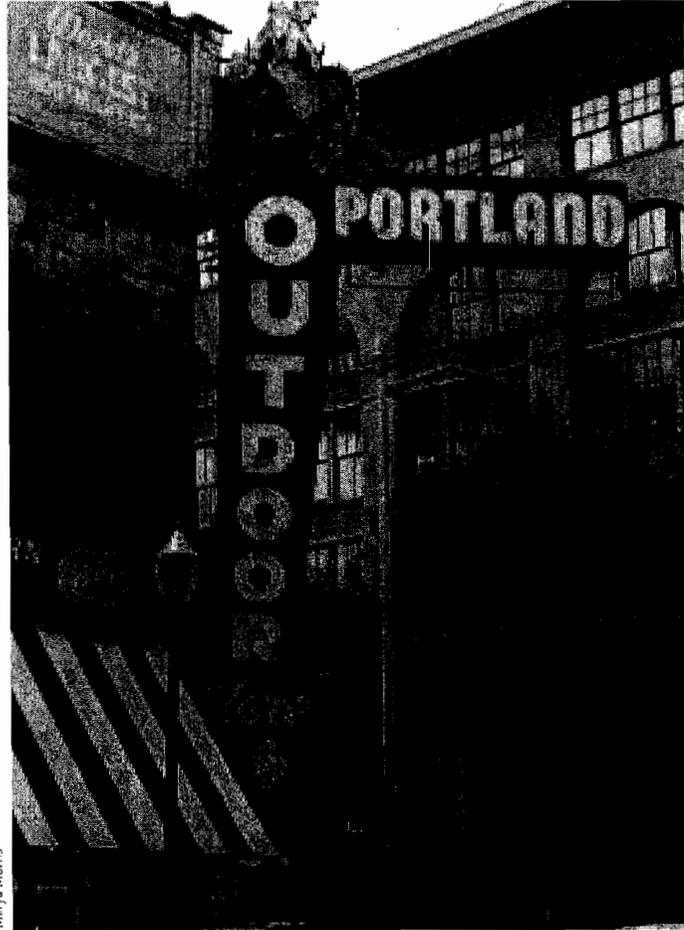
When local governments enact sign regulations that are entirely content-neutral, regulating only the size, location, type, and number of signs, courts have little difficulty in upholding the ordinance. For example, in *Bender v. City of St. Ann*, 816 F.Supp. 1372 (E.D. Mo. 1993), *aff'd* 36 F.3d 57 (8th 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.



Mireya Morris

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."

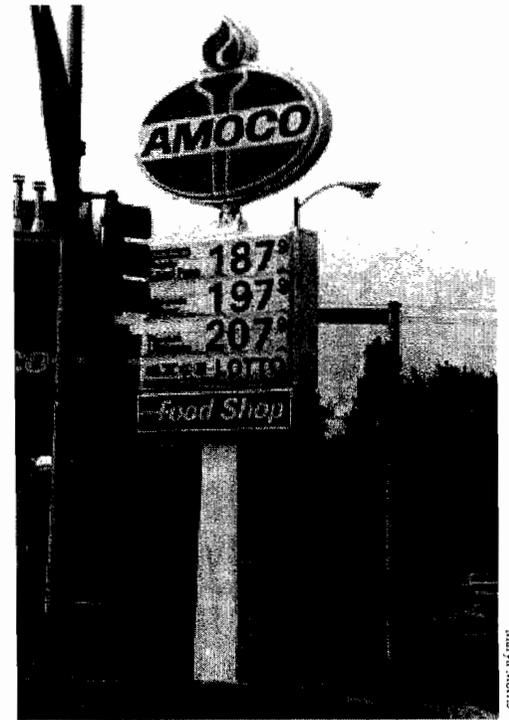
In another New York case, *Zoepy Marie, Inc. v. Town of Greenburgh*, 477 N.Y.S.2d 411 (App. Div. 1984), a state appellate court had no trouble finding that a sign restriction that banned advertisement of gasoline prices but not other commercial signs was an impermissible content-based restriction on 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.



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

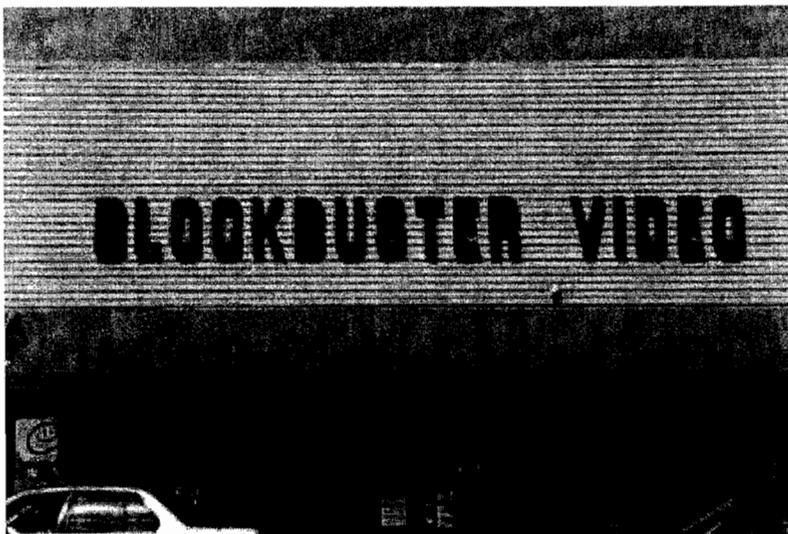
Several recent federal court decisions have considered whether the federal legislation protecting trademarks, the Lanham Act, prohibits the enforcement of local sign regulations that would require the "alteration" of a federally registered trademark. All of these cases turn on the interpretation of 15 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

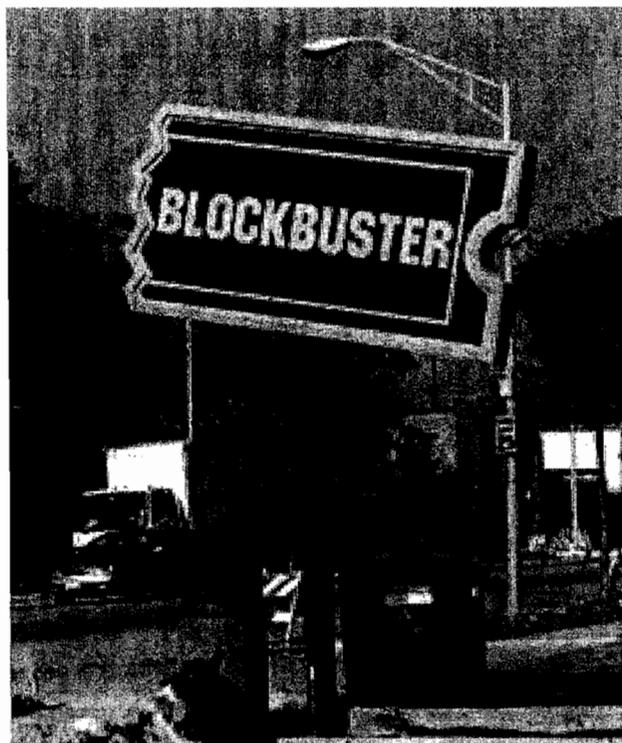
Subsequently, in *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2d Cir. 1999), the Second Circuit affirmed one of the earlier trial court rulings from the Western District of New York, arguing that “local uniform aesthetic and historic regulations simply limit color typefaces and decorative 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.



Marya Moras

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.



Marya Moras

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 *Rzadkowolski 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); *Harmish 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 Pinelurst*, 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.Cmwth.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.Cmwth. 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.

BANNERS

PLANO	McKINNEY	FRISCO	CARROLLTON	FORT WORTH	RICHARDSON	ALLEN	DALLAS
<ul style="list-style-type: none"> - Allowed two per calendar year / 30 days max - 30 days between permits - No max size or height - Shall be affixed to the front of building 	<ul style="list-style-type: none"> - Max 50 sq. ft. - 4 times a yr - 30 days in between - requires permit (\$25.00) 	<ul style="list-style-type: none"> - 14 days / 3 times a year may be consecutive - After C.O. a 6 week banner allowed - Banners allowed in parks with permission and removal after event - 48 sq. ft.-100 sq. ft. 	<ul style="list-style-type: none"> - Max 6' height if on uprights; 15' if on the building - Max 100 sq. ft. - Max 1 per business - Expiration date on banner limited to times: <ul style="list-style-type: none"> ▪ Grand opening- 30 days ▪ Coming soon/ construction – unlimited until C.O. issued ▪ Special occasion – 30 days/4 times per year ▪ Change of business/name – 90 days (until new sign permit issued) ▪ Real estate signs- 1 year (renewable each year) 	<ul style="list-style-type: none"> - 30 Days on, 30 days off - 180 days max per yr. - Max 60 sq. ft. - Can be on post - Max 8' height 	<ul style="list-style-type: none"> - 4 banners per year - 7 days between each permit - No more than 21 days each permit - ~exception if a grand opening – then 30 days allowed for first permit. 	<ul style="list-style-type: none"> - 21 days time limit - No max height - No max sq. ft. - Max three permits per yr - Minimum 90 days between 	<ul style="list-style-type: none"> - Banner signs as temporary use no longer active – see wall sign section - ~no more temporary signs allowed in City of Dallas as of June 25, 2008

	PLANO	McKINNEY	FRISCO	CARROLLTON	FORT WORTH	RICHARDSON	ALLEN	DALLAS
AWNINGS/CANOPY	<ul style="list-style-type: none"> - Combination of awning sign and any wall sign shall not exceed 2 times lineal footage - Shall not exceed 75% of the length of the awning 	<ul style="list-style-type: none"> - No letters/words otherwise will be an architectural feature - If letters/words, then will calculate as wall sign 	<ul style="list-style-type: none"> - Requires permit - internally illumination allowed - Attachments allowed 	<ul style="list-style-type: none"> - Regulated as wall signs - Can not be internally illuminated 	<ul style="list-style-type: none"> - 75% coverage of elevation (no blockbuster type awnings) - Internally illuminated requires permit - Any copy area treated as wall sign (see below) 	<ul style="list-style-type: none"> - If awning is lit, signage not allowed (back lit or external) - All signage regulated per wall signage 	<ul style="list-style-type: none"> - Same as wall sign regulations 	<ul style="list-style-type: none"> - Each side max 8 words - Equal to or exceeding 4" height - Max 25% for primary elevation - Max 15% for secondary elevations
ROOF SIGNS	<ul style="list-style-type: none"> - Not allowed 	<ul style="list-style-type: none"> - Not allowed 	<ul style="list-style-type: none"> - Not allowed - Secondary roof signs allowed that do not project above highest pt. of a building, but are above an entry canopy. 	<ul style="list-style-type: none"> - Prohibited (all signage must be below roof) 	<ul style="list-style-type: none"> - Not allowed 	<ul style="list-style-type: none"> - Not allowed ~~Exception: wall signs can extend up to 4' above roof line if attached to wall face 	<ul style="list-style-type: none"> - Same as wall sign regulations ~~ restricted to 4 ft over roofline when attached to wall 	<ul style="list-style-type: none"> - Not allowed - ~~if attached to wall may project up to 4 ft above the roofline

	PLANO	McKINNEY	FRISCO	CARROLLTON	FORT WORTH	RICHARDSON	ALLEN	DALLAS
WALL SIGNS	<ul style="list-style-type: none"> - Shall not exceed 2 times lineal footage of tenant storefront - Shall not exceed 75% coverage of lineal footage - Max 12" projection - If over 6 ft height then for every inch over, width of sign shall be reduced by 1% - Shall be placed directly over tenant space 	<ul style="list-style-type: none"> - Width of roadway times 1.5 = max allowed front footage - Max 12" projection - Other sides allowed max 25 square feet 	<ul style="list-style-type: none"> - Varies by a ratio of height of building and percentage of wall area 	<ul style="list-style-type: none"> - 200 sq. ft. per 75 ft of wall elevation (max 75% coverage for height and width) - Above business except that approved by CM or designee - Max 1 sign per 50 ft of wall footage ~~Exception: storage/warehouses /industrial max 3 per tenant; - No digital allowed 	<ul style="list-style-type: none"> - 1.5 times elevation; - Max 500 sq. ft. per elevation; - Max 1340 sq. ft. per structure (all elevations combined; - Max 10% of available wall are up to 15' max height. 	<ul style="list-style-type: none"> - Varies by district within city 	<ul style="list-style-type: none"> - Depending on zoning district for max height and max sq. ft. - Max 12" projection from wall 	<ul style="list-style-type: none"> - Max 8 words (any character) - Equal to or exceeding 4" height - Max 18" projection - Max 25% for primary elevation - Max 15% for secondary elevations
MULTI-STORY OFFICE	<ul style="list-style-type: none"> - Same as wall signs except: <ul style="list-style-type: none"> ▪ only two MSO signs per elevation ▪ Max 250 sq. ft. per sign - Does not need placement directly over tenant space 	<ul style="list-style-type: none"> - Allowed but limited square feet calculated per wall sign regulations 	<ul style="list-style-type: none"> - If over 5 stories must be located at or above 5th story - Corporate logo may exceed ratio by 40% 	<ul style="list-style-type: none"> - Only allow freestanding multi-tenants signs ~~Only two MSO located in city 	<ul style="list-style-type: none"> - Same as wall signs above (have not had problems with too many signs) 	<ul style="list-style-type: none"> - Varies by district within city 	<ul style="list-style-type: none"> - Depending on zoning district for max height and max sq. ft. - Max 12" projection from wall 	<ul style="list-style-type: none"> - Treated the same as business (wall) rules and by the zoning districts

	PLANO	McKINNEY	FRISCO	CARROLLTON	FORT WORTH	RICHARDSON	ALLEN	DALLAS
DIGITAL - LED'S	<ul style="list-style-type: none"> - Shall not exceed 75% of the allowable sq. ft. for any sign type - Message shall not change more than once every 30 min. except for time and temperature 	<ul style="list-style-type: none"> - Max 20 sq. ft - No flashing color (traffic hazard) - Revolving displays not exceeding seven revolutions per minute are exempt 	Prohibited	<ul style="list-style-type: none"> - Monument signs only and pole signs along Hwy 35 - Copy change every 7 seconds 	<ul style="list-style-type: none"> - Not allowed without BOA approval (\$400 fee) - Past 40-50 cases have been denied –only schools tend to get approval based on their “special exception rule” 	<ul style="list-style-type: none"> - Prohibited unless not a distraction - Copy can change once every 24 hours 	<ul style="list-style-type: none"> - Allowed - Message to change but once a day - No animation - Max sq. ft. determined by zoning district 	<ul style="list-style-type: none"> - Allowed with message to change every 20 seconds
FESTIVAL	<ul style="list-style-type: none"> - Max 100 sq. ft. - Max 15' height; -shall be limited to the property holding event - Can be placed 14 days prior to event; and removed within 24 hours of event 	<ul style="list-style-type: none"> - Not allowed ~~-Exception – on selected street (automobile dealerships) light poles attached by brackets, max 20 square feet 	** See Below	<ul style="list-style-type: none"> - No restrictions other than off-site prohibited and below <ul style="list-style-type: none"> ▪ Banners across streets ok ▪ One cold air inflatable (balloon, inflatable, etc) allowed per business (up to 7 days 2x per yr) ▪ Max 25' height from grade and must be anchored to ground only 	<ul style="list-style-type: none"> - Same as banner permits - All other city sponsored signage is exempt 	<ul style="list-style-type: none"> - Must request exemption with Building Official who has complete discretion 	<ul style="list-style-type: none"> - No signage allowed 	<ul style="list-style-type: none"> - Allowed and are placed on the street light poles in downtown

	PLANO	McKINNEY	FRISCO	CARROLLTON	FORT WORTH	RICHARDSON	ALLEN	DALLAS
3D SIGNS	- Max 12" projection and shall comply with wall sign regulations	- Max 12" projection; ~meritorious exceptions	** See Below	** See Below	** See Below	** See Below	- Not part of ordinance, not allowed	- Allowed on top of building entrances (60 square feet)
DIRECTIONAL SIGNS	- Max 30" height - Max 8 sq. ft. - Shall <u>not</u> contain any advertising (logos/ business name)	- Max 4 sq. ft. - Max 6' height - 1/2 of 4 sq. ft. can be used for advertising (logo, name) - Off-premise directional prohibited	** See Below	** See Below	** See Below	** See Below	- Max 2.5' height - Max 8 sq. ft. copy area - No advertising (logos/ business names)	- Max 2 square feet - No advertising/ logos, strictly directional
HUMAN SIGNS	- Enforced by Plano PD	- Not allowed	- Allowed on site only	** See Below	** See Below	** See Below	- Not allowed	- Not allowed
WINDOW SIGNS	- Shall not exceed 25% of the window area of that elevation, otherwise requires a wall sign permit	- Max 40% of window area w/o permit required	- Allowed but must not exceed 25%	** See Below	** See Below	** See Below	- Allowed with no permit no limit if an interior sign - If exterior window sign, treated as a wall sign	- Max 15% of the area of window - Signs in the upper two-thirds of a window/glass are prohibited

	PLANO	McKINNEY	FRISCO	CARROLLTON	FORT WORTH	RICHARDSON	ALLEN	DALLAS
POLE SIGNS	<ul style="list-style-type: none"> - Max 60 sq. ft. - Max 20' height – except if it fronts US Hwy 75 then: <ul style="list-style-type: none"> ▪ Max 100 sq. ft. ▪ Max 40' height - Pole signs not allowed in Overlay Districts. 	<ul style="list-style-type: none"> - Only allow specific areas on specific right-of-way - Up to 35' height - Up to 150 sq. ft. - Size will be based on R-O-W width and length of lot frontage 	<ul style="list-style-type: none"> - Prohibited except for kiosk approved signage 	** See Below	** See Below	** See Below	<ul style="list-style-type: none"> - Allowed only within 100 of US Hwy 75 for gas/ lodge/ food only - Max 150 sq. ft. - Max 40' height 	<ul style="list-style-type: none"> - The height and effective area are determined by the setbacks: <ul style="list-style-type: none"> ▪ Max 35' height ▪ Max 200 sq. ft. ▪ Minimum 15' setback from property line

PLANO MCKINNEY FRISCO CARROLLTON FORT WORTH RICHARDSON ALLEN DALLAS

~~City is addressing city council to tighten up sign codes:

- Especially real estate signage
- 80% occupied prohibits real estate signage
- Need tighter restrictions on construction / development signs

- City exempt from all signage regulations
- Any "lighter then air" exempt (i.e. inflatable's, balloons, etc.)

- They loosened up their "promotional type" signage -
- ~~ promotional type signage allowed without permits (except banners above) as long as needed any anywhere in city

~~This has caused problems with too much clutter and now they are looking at making the ordinance stricter again

Received info from Robert Wortley

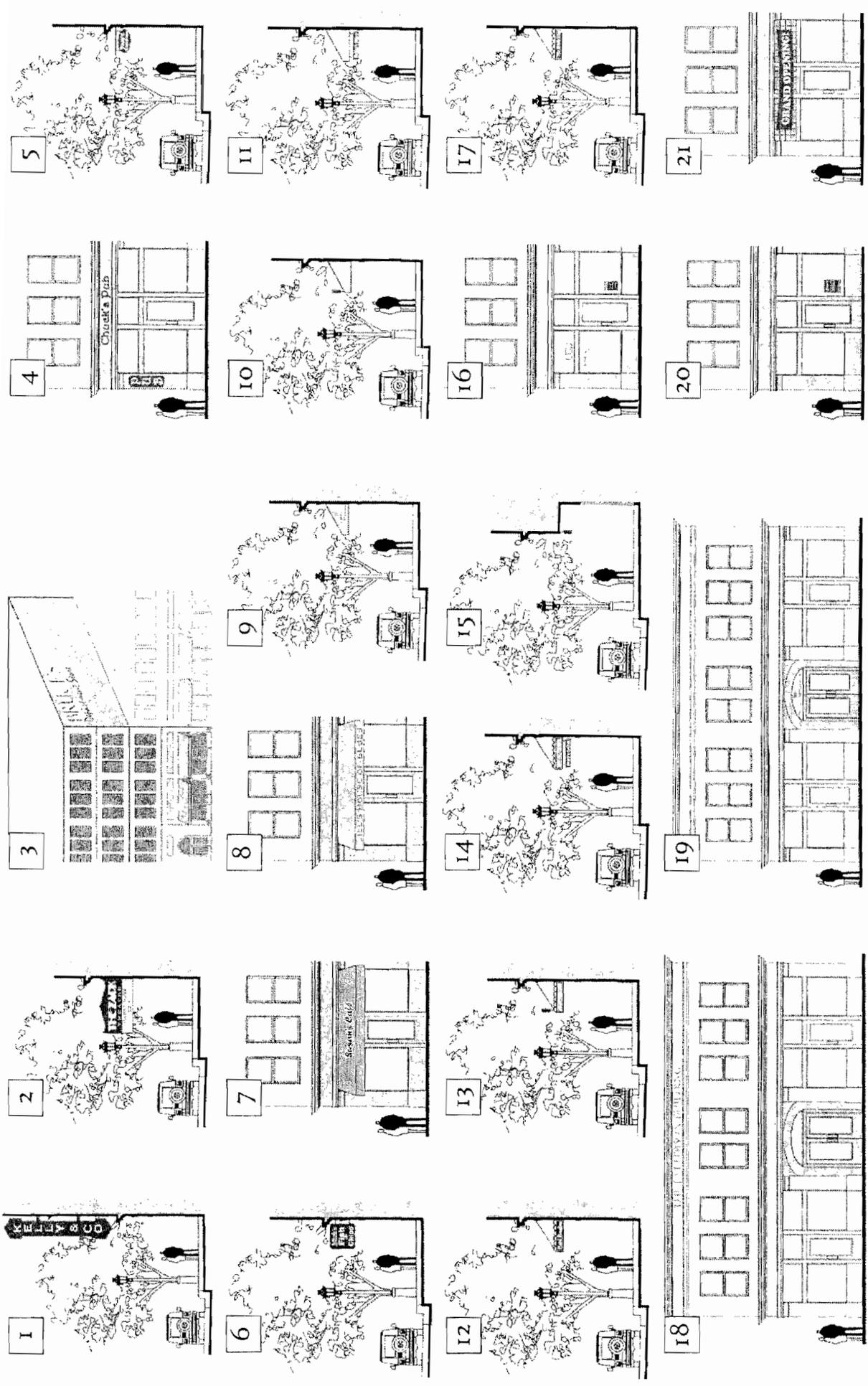
- Requests updates from us on our ordinance changes

- City is exempt from all sign regulations

~~Did advise that Irving, Grapevine, North Richland Hills and Rowlett have all changed their ordinance in making them stricter

This is a summary only

Any blanks indicate no information available at time of printing.



2.6.2. SUMMARY OF SIGN TYPES

Resources

“Section 2.6.2. Sign Type Standards & Guidelines,” from pages 92-101 of *Book II: Development Regulations of the Redwood City Downtown Precise Plan*. May 2007. The drawings are by Dan Zack, and the layout can be found in the **Downtown Precise Plan** within the city of Redwood City, California.

Key to the “Summary of Sign Types”

1) Grand Projecting Sign

Grand Projecting Signs are tall, large, vertically oriented signs which project from the building perpendicular to the facade and which are structurally integrated into the building.

2) Marquee Sign

Marquee Signs are large, canopy-like structures mounted over the entrance to a theater.

3) Grand Wall Sign

Grand Wall Signs are large signs located on, and parallel to, large unfenestrated building wall areas.

4) Wall Sign

Wall Signs are signs which are located on, and parallel to, a building wall.

5) Blade Sign

Blade Signs are signs which are oriented perpendicularly to the building facade and which are suspended under a bracket, armature, or other mounting device.

6) Projecting Sign

Projecting Signs are cantilevered signs which are structurally affixed to the building and oriented perpendicularly to the building facade.

7) Awning Face Sign

Awning Face Signs are signs applied to the primary face of an awning, including sloped awning faces and vertical “box” awning faces.

8) Awning Valance Sign

Awning Valance Signs are signs applied to the awning valance.

9) Awning Side Sign

Awning Side Signs are signs applied to the side panel of an awning.

10) Above Awning Sign

Above Awning Signs are signs which are mounted partially or entirely above the upper edge of a valance of an awning and oriented parallel to the building wall surface.

11) Under Awning Sign

Under Awning Signs are signs which are suspended under an awning, perpendicular to the building facade.

12) Canopy Fascia Sign

Canopy Fascia Signs are signs which are mounted to the front or side fascia of a canopy and contained completely within that fascia.

13) Above Canopy Sign

Above Canopy Signs are signs which are mounted partially or entirely above the front fascia of a canopy and oriented parallel to the building wall surface.

14) Under Canopy Sign

Under Canopy Signs are signs which are suspended under a canopy, perpendicular to the building facade.

15) Recessed Entry Sign

Recessed Entry Signs are signs which are oriented parallel to the building facade and which are suspended over a recessed entry.

16) Window Sign

Window Signs are signs which are applied directly to a window or mounted or suspended directly behind a window.

17) Building Identification Canopy Fascia Sign

Building Identification Canopy Fascia Signs are signs which are mounted to the front or side fascia of a canopy, contained completely within that fascia and oriented parallel to the building wall surface and which announce the name of a building.

18) Building Identification Wall Sign

Building Identification Wall Signs are signs located on, and parallel to a building wall which announce the name of a building.

19) Building Identification Window Sign

Building Identification Window Signs are signs applied directly to a window or mounted or suspended directly behind a window.

20) Temporary Window Sign

Temporary Window Signs are signs which are applied directly to a window or mounted or suspended directly behind a window and are designed, constructed and intended for display on private property for a period of not more than ninety (90) consecutive days per year. Examples include “grand opening,” “special sale,” and seasonal signage.

21) Temporary Wall Sign

Temporary Wall Signs which are located on, and parallel to, a building wall and are designed, constructed, and intended for display on private property for a period of not more than ninety (90) consecutive days per year. Examples include “grand opening,” “special sale,” and seasonal temporary banner signage.