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PRACTICE WISE SIGN CONTROLS



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Decision Making in Sign Codes: How to Comply with the First Amendment and Avoid Litigation

By Daniel R. Mandelker, FAICP

Sign codes often contain discretionary decision-making procedures.

They may contain a permit requirement, may permit some signs only as conditional uses, and may authorize hardship variances. Officials may also be allowed to waive or modify some regulations, such as setback requirements. More creatively, sign codes can authorize a design review for customized signs that meet design criteria. These discretionary decision-making procedures raise free speech problems because they are prior restraints on the expressive content that signs contain. This article reviews the prior restraint problem and explains how sign codes can be drafted to avoid it.

WHAT THE PRIOR RESTRAINT PROBLEM IS

A prior restraint exists when a sign code prevents someone from exercising his free speech rights. Suppression of speech in this manner can occur through the discretionary review procedures in sign codes that require government approval. Speech is suppressed prior to the time the sign is approved. A prior restraint problem can arise when a sign code does not provide clear standards for decision making. Government bodies and officials then have the opportunity to refuse approval of a sign arbitrarily because the standards are not clear. Another prior restraint problem arises when a sign code does not contain time limits on decision making or contains time limits that are too long. Government bodies and officials can then suppress speech by unreasonably delaying decisions.

The law that applies to prior restraints is free speech law, but it is different from the free speech law usually applied to sign regulation, which prohibits discrimination against noncommercial speech and almost always holds a sign code invalid if it regulates a sign's content. The law that applies to prior restraints is more demanding and less forgiving. The rule that requires regulations like sign codes to contain

clear standards under which discretionary decisions are made is one example. As the U.S. Supreme Court explained, if there are no standards or the standards are not clear, it is difficult for courts to distinguish between a "legitimate denial of a permit and its illegitimate abuse of censorial power." (See *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 758 (1988).)

This is a difficult requirement. Courts accept standards that are objective or require

a ministerial decision, such as whether a sign complies with specific height and area requirements contained in the code. Standards that require the exercise of discretion have more trouble. Assume that a provision in a sign code authorizing setback variances for on-premise signs does not contain standards or authorizes a variance "in the public interest." This standard is probably invalid as too vague to meet prior restraint clarity standards, though courts may uphold such a standard when free speech is not involved.

Special care must especially be taken with the standards that are adopted for design



➡ Imagination—and good geometrics—always makes a sign more attractive and outstanding, as shown by these freestanding signs.

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About the Author

Daniel R. Mandelker is Stamper Professor of Law at Washington University in St. Louis. He has served nationally as consultant to local governments in the defense of sign code litigation and in sign code revision. This article is based on an earlier article published by the author, “Decision Making in Sign Codes, The Prior Restraint Barrier,” in *Zoning & Planning Law Report*, September 2008. It contains an extensive review of the legal issues discussed in this article.

review. These standards often provide that a design may be approved if it is “compatible” with surrounding uses and with the design of the building on which it will be displayed. In a federal court case, *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), for example, a sign code authorized the issuance of a permit if the sign “will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses.” The court held the ordinance was an unconstitutional prior restraint, noting that “[c]ity officials have unbridled discretion in determining whether a particular structure or sign will be harmful to the community’s health, welfare, or ‘aesthetic quality.’”

Time limits on decisions are another problem under prior restraint rules. An unreasonable delay in decision making is a prior restraint on speech because it improperly delays the time when a sign can be displayed. This problem has received attention in the U.S. Supreme Court, but the results are not clear. (See *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002).) Although earlier cases held that time limits are required to avoid a prior restraint, this case appears to have held that time limits are required only if an ordinance does not regulate content. An example of a content regulation in a sign code is one that authorizes signs only for certain causes, such as saving the environment. This type of regulation may seem innocent, but it is unconstitutional because it regulates what a sign can say.

The difficulty is that it is impossible to tell in advance of a court decision whether a sign code is or is not content-based, because the law on this problem is not clear.

The only safe advice is to provide time limits for decisions to guard against a finding that a sign code regulates content. Otherwise the decision-making process, and perhaps the entire code, will be held invalid. Neither are the courts clear on how long a time limit for decision making is acceptable. A decision by one court that 60 days is adequate is probably good advice; see *Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994).

sign code are so essential to its structure and purpose, a court may then decide the entire sign code is invalid, even if the rest is constitutional. The entire code will fall if the invalid decision-making procedures are so critical to the code that the rest of the code cannot stand. A sign company that challenged the sign code because it was denied a permit under arbitrary standards can then claim a vested right to its permit. It can argue the code is invalid retroactively so that no code was in effect when it applied for a permit, which must therefore

➡ Neon and light media can add interest to signage if they’re done right.



HOW PRIOR RESTRAINTS AFFECT THE VALIDITY OF SIGN CODES

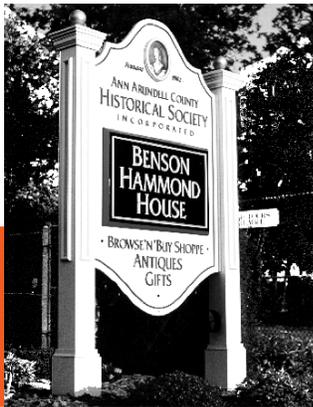
Decision-making procedures in sign codes will be held invalid if a court finds that the standards for decision are not clear, or that the time limits for decision are too short or nonexistent. Because the decision-making procedures in a

be granted. This a complicated argument that sometimes succeeds and sometimes doesn’t, but it is worth thinking about.

Litigation over sign codes can also be very expensive. Cases costing a million dollars in combined legal fees are common. Moreover, a sign company plaintiff can recover its legal fees from a local government under a federal statute if it “prevails” in a case, and that means it can recover fees even if the local government settles.

HOW LOCAL GOVERNMENTS CAN GET SUED

A local government can get sued in a number of ways because of a prior restraint problem in its sign code. One way, of course, is a suit by an applicant for a sign permit or other approval who is denied a permit, and who sues claiming the standards contained in the code are too vague or that time limits on decisions are



➔ These post and panel signs reflect good graphics and images.

missing or too long. This may not happen if the discretionary review process for signs works well and if litigation would be expensive.

What local governments may not know is that sign companies with a much bigger stake in holding a sign code invalid can attack a discretionary review process. This is true even if the process does not apply to them; it is still possible to have a court hold the review process invalid.

This strategy requires a sign company that plans to put up signs, such as billboards. It applies for permits, but the local government denies them because its sign code prohibits billboards or because the billboards violate the code's size and height requirements. The sign company then brings a lawsuit in federal court in which it attacks the ordinance as applied to it through the permit denials. It can also attack other discretionary review procedures by claiming they violate the prior restraint doctrine. Even though these procedures do not apply to the sign company's permit application, the company can attack them in addition to making its as-applied attack against the denial of its permits.

This litigation opportunity arises because of a free speech doctrine adopted by the Supreme Court called the overbreadth doctrine. Usually a litigant cannot sue in federal court unless it can show it has standing because it was injured by the government's decision; the sign company in this example was not injured by the discretionary review provisions that were not applied to it. The overbreadth doctrine is an exception to this rule. It allows the sign company to attack these provisions even though it was not injured by them. The U.S. Supreme Court has explained that this exception is necessary so that a regulation that violates the free speech clause can be struck down, even if it means allowing a party that has not been injured by the regulation to bring the case. Overbroad, standardless statutes are an example of overbroad regulations subject to a facial attack under the overbreadth exception by a plaintiff that was not injured by them.

Nor does a plaintiff need to apply for a permit under the discretionary review procedures it claims are unconstitutional in order to sue to

invalidate them. The Supreme Court explained this in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988). The plaintiff sued when the city adopted an ordinance giving the mayor the authority to grant or deny applications for annual news rack permits. Instead of applying for a permit, the plaintiff brought suit challenging the permit ordinance as facially unconstitutional. The Court granted standing:

[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge.

This means a sign company is "subject to" and may challenge discretionary review procedures in a sign code even if it has not applied for a permit or an approval under these procedures. It can attack these procedures in court and possibly invalidate the entire sign code if it convinces the court that the discretionary procedures violate the prior restraint doctrine.

HOW TO DRAFT SIGN CODES TO AVOID THE PRIOR RESTRAINT PROBLEM

Local governments thus have considerable incentive to review their sign codes and correct problems in their discretionary review procedures that might raise prior restraint problems subject to judicial attack. Nor should local governments wait for litigation to carry out this review and make any necessary changes. While a local government can revise its sign code to meet constitutional problems after litigation is brought, and may possibly be able to get a court to dismiss any challenges to the code, it will not be able to avoid claims for damages or attorneys fees.

Here are some suggestions for making sign code revisions to avoid prior restraint problems:

- Time limits must be provided for all discretionary decisions, including decisions on sign permits, variances, and design review, and appeals from any of these decisions. Often the procedures for these approvals, such as variances, will be in other sections of the zoning ordinance or land development code. When this is the case, an amendment is necessary to those sections to specify time limits

for sign applications that meet prior restraint requirements. Case law is not specific enough to suggest a clearly defensible time limit, though 60 days is probably safe. Consult the case law in federal decisions that apply to you. Be careful to include any decisions on electrical or other permits within the time limits set by the sign code; otherwise, the time limit for these permits will be added to the sign code permit, and the cumulative time limit may be too long.

- Do not authorize the approval of signs as conditional uses. This is an invitation to judicial attack because the criteria usually adopted for conditional uses are too vague to satisfy prior restraint requirements, as the *Moreno Valley* case discussed earlier indicates. Acceptable criteria are hard to specify. Conditional uses are also unnecessary as they require decisions on each conditional use application one at a time, which invites the objection that decisions are arbitrary. It should be possible to specify locations for different types of signs that are compatible with their visual environment if the drafting job is done right.
- Variances should either be prohibited or allowed only in strictly controlled circumstances. This is another discretionary procedure that invites judicial attack, though it is easier to specify criteria for variances that meet prior restraint principles than it is for conditional uses. Variances can be prohibited entirely in a carefully drafted sign code, but occasional circumstances may arise in which a variance is necessary. An example is a sign whose required placement prevents it from being viewed adequately.

Use variances that authorize a sign type not permitted by the code, such as a ground sign in place of a wall sign, should never be permitted. Variances that are allowed should be limited to area variances that authorize a change in height and setback requirements. This is the approach taken in the author's *Street Graphics and the Law* (Planning Advisory Service Report No. 527 (2004)), which describes the content of an effective and defensible sign code and contains a model ordinance. The model ordinance authorizes variances only from height and setback requirements, and recommends that the variance vary not more than 25 percent from code requirements.

- Criteria for the approval of sign permits that are needed to display a sign should be objective and ministerial. One option is to provide that a permit will be granted if the sign

complies with all the requirements for the display of the sign in the sign code, but these must be objective: height, size, spacing, and similar requirements. The requirements for a sign permit application should require all the information needed to make a decision that the requirements of the sign code have been satisfied.

- Landscaping requirements for ground signs should be objectively specified and should not require the discretionary review of a landscape plan. If this review is required in the zoning ordinance or land development code, a separate and objectively specified landscaping requirement should be provided for ground signs. Otherwise, the discretionary review of landscaping plans for signs will require highly specified review criteria and time limits, and these requirements are always subject to attack as prior restraints. This is unnecessary as landscaping requirements for ground signs are not difficult to specify.

- Planned unit developments present a special problem as the procedures for their review and approval are in a separate part of the zoning ordinance or land development code. One option is to require signs within planned unit developments to comply with the requirements in the sign code, but a specially designed sign program may be preferred so it can be integrated with the design of the development. One option is to include specially drafted sign regulations in the development plan for the project. Another is to include a design review process to be applied to individual sites as development on these sites is approved. These can be based on design review criteria similar to those discussed next.
- Design review is a discretionary review procedure that deserves encouragement. It can allow the approval of creative signs that do not meet code requirements but are aesthetic improvements on these requirements. The model ordinance in *Street Graphics and the Law* authorizes a design review process called a Program for Graphics. This option provides a "creative incentive" for two or more owners who plan to display signs to make "a unified visual statement that integrates the design of street graphics with the design of the building on which they will be displayed and with



➡ Monument signs are often an attractive option for institutions and places of general interest.

➔ The lettering displayed on building signs can be fanciful.

➔ Words don't always tell the story when it comes to projecting signs.



the surrounding area.” Criteria in the model ordinance require signs in a Program for Graphics to be compatible “with the theme, visual quality, and overall character of the surrounding area.” They must also be “[a]ppropriately related in size, shape, materials, [lettering, color, illumination] and character to the function and architectural character of the building or premise on which they will be displayed, and . . . compatible with existing adjacent activities.” The terms in brackets are optional. *Street Graphics and the Law* is cautionary about the validity of these criteria, but the cases have upheld similar requirements. In *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir.

2006), for example, the Ninth Circuit upheld similar criteria and distinguished its *Moreno Valley* case discussed earlier.

Compatibility requirements are useful in design review, but a sign code can more positively provide criteria for improved design. The West Hollywood, California, zoning ordinance, for example, authorizes procedures for the approval of creative signs. Design quality standards for signs state that signs shall:

- a. Constitute a substantial aesthetic improvement to the site and shall have a positive visual impact on the surrounding area;
- b. be of unique design, and exhibit a high degree of thoughtfulness, imagination, inventiveness, and spirit; and
- c. provide strong graphic character through the imaginative use of graphics, color, texture, quality materials, scale, and proportion.

This ordinance also contains standards for design criteria, contextual criteria, and neighborhood impact. Illustrated design guidelines provide further guidance. The ordinance and guidelines are available on the city's website and at www.law.wustl.edu/landuselaw.

CONCLUSION

Prior restraint requirements that carry out free speech principles are a real concern in sign regulation. Careful attention to the drafting of sign codes with these requirements in mind can avoid free speech problems and create a more effective and constitutionally defensible set of sign regulations.

Design review is a discretionary review procedure that can allow the approval of creative signs that do not meet code requirements but are aesthetic improvements on these requirements.

NEWS BRIEF

COURTS DECIDE SIGN CASES

By Lora Lucero, AICP

From coast to coast, sign regulations are under scrutiny. Three recent court decisions illustrate some of the challenges planners face when they are drafting or revising their sign codes.

On January 6, 2009, the Ninth Circuit Court of Appeals ruled in favor of the City of Los Angeles in a challenge to that city's sign code. The case is *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898 (Jan. 6, 2009). The code bans most off-site commercial signs, typically billboards, but the city exempts itself from this ban and contracts with a company to install such signs on city-owned transit stops. Traffic safety and aesthetics are the primary reasons given for the billboard ban.

Following an open bidding process, the city awarded the successful bidder the exclusive right to install and maintain commercial signs on the city's transit shelters, automated self-cleaning public toilets, trash receptacles, public amenity kiosks, and news racks. In exchange, the successful bidder agreed to install the shelters and public amenities, make annual payments, and post public service announcements when requested by the city. At the time the sign code was adopted, there were approximately 18,500 transit stops in the city.

Another sign company challenged the city's sign code, claiming the city was “auctioning off First Amendment rights” to the highest bidder. The Ninth Circuit concluded that another famous sign case from California controlled its decision in this case. In 1981, the U.S. Supreme Court ruled in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), that San Diego's ban on off-site commercial signs, including the 12 exceptions to the ban, was constitutional. The sign code in Los Angeles is “virtually identical,” the court reasoned. The company argued that the city undermined its stated concerns about aesthetics and traffic safety when it allowed commercial signs on city-owned property, but the court disagreed. Even though a sign code might be unconstitutional if it restricts speech too narrowly, because an exemption is discriminatory or diminishes the government's rationale for restricting speech, the court was persuaded that was not the case with Los Angeles's sign code.

The company presented a photograph that showed two off-site signs, one on a bus shelter

and one on an adjacent building, both the same size with the same message. The photograph, it argued, illustrates how the city's exemption undermines its concerns about aesthetics and traffic safety. But the court concluded just the opposite. The photograph illustrated that the sign code actually halved the clutter on the street shown in the photograph. "Ultimately, whether one considers the sign ordinance from the perspective of the city's interest in traffic safety or aesthetics, the [contracts with successful bidders to install signs on city-owned transit stops] do not work at inexorable cross-purposes to it." In its decision the court reaffirmed the importance of *Metromedia* as the controlling case on free speech problems in sign control.

RLUIPA IMPLICATIONS?

On December 24, 2008, Maryland's highest court ruled that Baltimore County did not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.A. § 2000cc(a)

failed to properly consider RLUIPA, which requires the county to demonstrate a compelling governmental interest if a land-use decision places a substantial burden on the church's religious exercise.

This was the first opportunity Maryland's highest court has had to examine a RLUIPA claim. The court decided that, under RLUIPA, "a land-use regulation, or a zoning authority's application of it, imposes a substantial burden on religious exercise only if it leaves the aggrieved religious institution without a reasonable means to observe a particular religious precept." The court was not impressed with the church's "rote application of RLUIPA." The church claimed that the requested digital sign constitutes religious exercise and the county's denial substantially burdens the church's religious exercise. The court essentially said, however, that such a claim effectively trivialized RLUIPA's substantial burden requirement.

'The industry size standards are not automatically controlling in determining what size sign restriction can be deemed de facto exclusionary.'

(1), when it denied a church the variances it requested to erect a digital sign. The case is *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, 2008 WL 5352919, December 24, 2008 (Md.).

The church is located on 15 acres at the intersection of West Joppa Road and the Baltimore Beltway in a low-density residential zone. The church wished to replace its two existing signs (36 square feet and 24 square feet, respectively, in face area) with a new, single-faced sign 250 square feet in area, standing 25 feet tall. The proposed digital sign was needed, the church explained, "because it would identify the church for would-be parishioners and allow [the church] to evangelize by disseminating scripture or uplifting messages, via changeable copy features, to eastbound travelers on the Beltway."

Baltimore County denied the height and square-footage variances requested by the church, finding that the physical attributes of the property were not unique, and compliance with the sign code would not result in "practical difficulty" for the church. At trial, the church argued, among other things, that the county

SIZE MATTERS

In Pennsylvania, a sign company argued that the township must adopt the industry's standard billboard sizes in its local sign code, but that state's highest court rejected the idea. The case is *Township of Exeter v. Zoning Hearing Board of Exeter Township*, 2009 WL 144567, January 22, 2009 (Pa.). Although the court concluded that the local sign code was a de facto exclusion of billboards because it limited the sign face to 25 square feet, Pennsylvania is peculiar because it has a rule that a municipality may not adopt exclusionary ordinances for commercial uses.

The sign company wanted to erect billboards with either 300 or 672 square feet of signage per side, consistent with the industry's standard sizes for such signs. The company argued before the zoning hearing board that the township's restriction amounted to a de facto exclusion of billboards. In response, the township showed photographs of existing 25-square-foot advertising signs in the community and said the restriction on size was justified based on concerns about aesthetics and traffic safety issues along the highway running through the township.

The zoning hearing board concluded that the size restriction in the sign code was an invalid de facto exclusion of billboards throughout the township but made no findings as to whether this exclusionary effect was validated by the township's concerns for aesthetics and traffic safety along the highway. The board declared the maximum surface area for a billboard must be 300 square feet, but billboards would be prohibited along the highway corridor. The township then sued its own zoning hearing board over the decision.

The appeal eventually ended up in the state's highest court. "The industry size standards are not automatically controlling in determining what size sign restriction can be deemed de facto exclusionary," the court said, but the zoning hearing board's decision was supported by substantial evidence. The case was remanded back to the lower court to determine whether the board's ruling to exclude billboards along the highway corridor was proper.

Lora Lucero is editor of Planning & Environmental Law and staff liaison to APA's Amicus Curiae Committee.

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