ELEVENTH CIRCUIT DOCKET NO. 03-15516-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL ADVERTISING COMPANY,

Plaintiff/Appellant

v.

CITY OF MIAMI,

Defendant/Appellee

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF AMICI CURIAE SCENIC AMERICA, INC., AMERICAN PLANNING ASSOCIATION, CITIZENS FOR A SCENIC FLORIDA, INC. AND APA-FLORIDA CHAPTER IN SUPPORT OF DEFENDANT/APPELLEE CITY OF MIAMI AND AFFIRMANCE OF JUDGMENT

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National Advertising Company v. City of Miami
Eleventh Circuit No. 03-15516-GG

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1-1-3, Amici Curiae state that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations meet the criteria stated in Eleventh Circuit Rule 26.1-1:

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae, Scenic America, Inc. is a national nonprofit conservation organization that is based in Washington, D.C. and incorporated in the State of Pennsylvania. It has no corporate subsidiaries.

Amicus curiae, Citizens for a Scenic Florida, Inc. ("Scenic Florida"), is a Florida nonprofit corporation. It has no corporate subsidiaries. Scenic Florida is an affiliate of Scenic America.

Amicus curiae, the American Planning Association, is a nonprofit public interest organization based in Chicago, Illinois. It has no corporate subsidiaries.

Amicus curiae, APA-Florida Chapter, is a chapter of the American Planning Association. It has no subsidiaries.

NOTE: This Amicus Brief is filed with the consent of both Appellant and Appellee.

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PRELIMINARY STATEMENT AND NOTICE CONCERNING DEFINITIONS, REFERENCES AND ABBREVIATIONS

The district court consolidated the action below, Case No. 02-CV-20556 (known as "National II"), with a separate action between the same parties, Case No. 01-CV-3039 (known as "National I"), which is pending as a separate appeal in Case No. 03-15593-DD in this Court. As a result, citations to the record below are to the dockets in both cases. Amici curiae will follow the general approach taken in Appellant's Initial Brief, to wit: Reference to the docket and page number in Case No. 01-CV-3039 ("National I") is by "D1/(entry number):(page)" and to the docket in Case No. 02-CV-20556 ("National II") is by "D2/(entry number)/(page)."

Amici curiae will use the following definitions, references and abbreviations in this Amicus Brief:

City-II-Brief:	Answer Brief of City of Miami in Case No. 03-15516-GG
Miami:	City of Miami
Nat-II-Brief:	Appellant's Initial Brief in Case No. 03-15516-GG
National:	National Advertising Company
Zoning Code:	City of Miami's Zoning Ordinance in effect at the time of National's applications to erect billboards

INTRODUCTION: IDENTITY OF AMICI CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY

Scenic America, Inc. is a national nonprofit conservation organization that protects natural beauty and the distinctive character of this nation's communities. Citizens for a Scenic Florida, Inc. ("Scenic Florida") is a Florida nonprofit corporation that promotes policies that preserve, protect and enhance scenic beauty. The American Planning Association ("APA") is a national nonprofit, educational research organization representing the nation's land-use professionals -- those charged with addressing the public's interest in how land is used and drafting regulations to ensure that the impacts of adverse land uses is minimized. APA-Florida Chapter is the Florida affiliate of the APA and promotes growth management, comprehensive planning, and sound land development regulations in Florida.

Amici curiae are concerned with the increasing number of facial challenges to the entirety of local sign ordinances. This litigation explosion began several years ago and is now plaguing cities and counties across the nation. This amicus brief addresses the *vested rights* doctrine under Florida law. A flawed interpretation of the vested rights doctrine in an unpublished opinion of this Court has developed into the linchpin behind the current rash of billboard lawsuits. In the companion appeal (03-15593-DD) ("National I"),

amici curiae separately address three other recurring subjects common to these suits: content-neutrality, severability, and standing.

SUMMARY OF ARGUMENT

Billboards by their very nature can be perceived as an esthetic harm due to their intrusive qualities. Unlike other media, they cannot be turned off or avoided. The Florida Constitution elevates the conservation and protection of scenic beauty to a state policy. Since 1985, all local governments are required to have land development regulations that "regulate signage" given the obvious aesthetic impact that the lack of signage regulations may have on a community's character. See Chapter 85-55, Section 14, Laws of Florida; Section 163.3202(2)(f), Florida Statutes.

Utilizing an unpublished 1993 opinion by this Court, the billboard industry has developed a litigation strategy that involves a facial challenge to the entirety of a community's sign regulations. The goal is to strike down the entire sign regulations, creating a temporary vacuum, and then claiming a *vested right* to erect billboards that were the subject of unapproved applications submitted during the "void" when no sign regulations are in effect.

The billboard industry claims that the unconstitutionality of the entirety of a local government's sign regulations effectively denies it a "fair chance to rely" upon sign regulations, thereby removing the principle of "reliance" from the application of the *vested rights* doctrine that - at its core - is an equitable doctrine.

The unpublished opinion, however, never addressed the fact that sign regulations are a requirement of Florida law. Sign regulations must be included within a community's land development regulations. Sign regulations are not optional in Florida. National seeks to claim entitlement to a vested right (an equitable doctrine) based upon placing a local government in violation of state law. National cannot equitably claim that it was denied a "fair chance to rely" on the sign regulations through a litigation strategy that hinges upon there being "no" sign regulations at the very same moment that state law mandates sign regulations. Creating a vested right in that circumstance is neither equitable nor fair. When viewed in that context, the requisite "good faith" cannot exist as a matter of Florida law.

The other fundamental flaw in the application of vested rights in the case at bar is that it is dependent upon a facial challenge to the entirety of a regulation based upon the rights of third parties. One cannot have a "vested right" in the rights of others. No company should be able to claim, in equity, a vested right to something that is purely hypothetical as applied to itself.

ARGUMENT

I. THE DISTRICT COURT'S SUMMARY JUDGMENT IN FAVOR OF THE CITY OF MIAMI SHOULD BE AFFIRMED.

A. NATIONAL HAS NO VESTED RIGHT UNDER FLORIDA LAW TO ERECT ITS BILLBOARDS

Billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." Metromedia, Inc. v. City of San Diego, 453 U.S. 450, 510 (1981). While other forms of advertising are ordinarily seen as a matter of choice, billboards are different. Billboards cannot be turned off or avoided. They are intrusive by their very nature. Whatever its communicative nature, "the billboard remains a 'large, immobile and permanent structure which like other structures is subject to ... regulation.'" Id. at 502 (J. White for plurality) quoting Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 870 (1980). "Because it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development." Id.[1]

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[1] See also Infinity Outdoor, Inc. v. City of New York, 165 F.Supp.2d 403, 409-410 (E.D.N.Y. 2001), noting testimony before the City Planning Commission: "'[o]utdoor advertising has turned our neighborhoods into pages from a magazine, destroying our streetscapes, shining lights into our apartments, disfiguring our landmarks, bombarding our senses. It has stolen our sense of community, blasting a cacophony of advertising messages that drowns out all other information. We can no longer enjoy a walk through our own neighborhood without these monster signs shouting at us from every corner. . . . Our neighborhoods have become a nightmarish streetscape out of

In protecting the public welfare, which has long included the aesthetic as well as the monetary, the law of billboards has evolved into a "law unto itself" given the medium's undesirable secondary effects of adding visual blight to urban and rural landscapes, contributing visual clutter to the nation's open spaces, blocking scenic vistas, and diminishing the aesthetic quality of city streetscapes. Since 1968, the Florida Constitution has provided that it is the policy of the state to conserve and protect its natural resources "and scenic beauty." Article II, Section 7(a), Florida Constitution. Recognizing the impact that sign structures may have on a community's aesthetic character, Florida law now requires every city and county to regulate signage as part of their land development regulations. See Chapter 85-55, Sec. 14, Laws of Florida.; Section 163.3202(2)(f), Florida Statutes.

Utilizing the unpublished and nonbinding opinion[2] by this Court in National Advertising Co. v. City of Fort Lauderdale, No. 92-4750, 8 F.3d 36, 1993 WL 44061 (Table) (11th Cir. 1993) ("Ft. Lauderdale II"), National argues

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the movie *Bladerunner,* where every inch of every surface is covered in advertisements."

[2] 11th Cir. R. 36-2 Unpublished opinions. provides: "An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made."

that it acquired a "vested right" under Florida law to erect six-story tall multi-ton steel billboards structures along roadways in Miami's Restricted Commercial Zones. National devotes eleven pages of its Initial Brief to its "vested right" theory (Nat-II-Brief, pp. at 37-47). National repeatedly refers to its alleged vested right throughout its Initial Brief (Nat-II-Brief, at pp. 1, 2, 16, 24, 37, 39, 40, 41, 44, and 47), and repeatedly refers to this Court's opinion in Ft. Lauderdale II (Nat-II-Brief, at pp. 2, 41, 43-47).

The unpublished and nonbinding opinion in Ft. Lauderdale II has fueled a rash of lawsuits in Florida courts. The decision has been described as the "linchpin" in the billboard industry's mounting attacks on sign ordinances throughout Florida. Florida Outdoor Advert., LLC v. City of Boca Raton, 266 F.Supp. 2d 1376, 1379 (S.D.Fla. 2003).

In Florida Outdoor, Judge Middlebrooks summarized the billboard industry strategy as follows:

> This is another in a series of cases brought by outdoor advertising companies against municipalities alleging violation of the First Amendment. The now familiar strategy is to apply for a permit for erection of a billboard knowing full well that the permit will be denied under the city's existing sign ordinance but also aware that the ordinance is subject to legal attack. . . . For while the First Amendment issues in this case are interesting and difficult, the case is really about the use of the concept of vested rights to create a window of opportunity to build a large (sixteen feet by forty-two feet) and valuable billboard which would not be approved under the old or new ordinance. The linchpin of this strategy is an unpublished opinion of the Eleventh Circuit which has been

> followed by this Court. *See Nat'l Adver. Co. v. City of Fort Lauderdale*, Case No. 92-4750, 8 F.3d 36, 1993 WL 44061 (Table) (11th Cir. 1993); [citations].

Id. at 1379 (emphasis added).

These six-story tall steel billboard structures are intended to dominate the landscape wherever they are erected. One observer labeled them "acts of aggression" against which "the public is entitled, as a matter of privacy, to be protected."[3] According to a recent government study, such steel structures can have a normal lifespan of up to seventy years.[4] See also Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 695 (1996) (referring to billboards built more than thirty-seven years ago).

The elimination of these eyesores can be a Herculean task for local governments due to the billboard industry's argument that billboards should be valued on an income multiplier approach, not a cost approach. The income multiplier approach contemplates the revenue stream over the lifetime of a billboard and then reduces the same to present money value for compensation purposes. Although the income approach remains in dispute, the billboard

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[3] William F. Buckley, Jr., The Politics of Beauty, Esquire, July 1966, at 53.

[4] See Florida Legislature Office of Program Policy Analysis and Government Accountability, Special Review: Property Appraisers Use Cost Approach to Value Billboards; Guidelines Need Updating, Report No. 02-69, at 4 (December 2002) (available at http://www.oppaga.state.fl.us).

industry can be expected to claim that a modern steel structure (or even the right to erect such a structure) is worth into the millions of dollars, rather than the $40,000-$50,000 cost to fabricate and erect the structure. The mere prospect of a compensation claim using an income approach effectively chills any effort to free the landscape from a proliferation of such billboards. This aggressive valuation approach is incorporated into the damage claims against local governments in the now "familiar strategy" to erect billboards where they are otherwise prohibited.[5]

The domination of giant billboards across the landscape can have other adverse consequences (secondary effects) for municipalities beyond just the structures themselves.[6] Five hundred foot view-zones are created whenever a billboard structure is erected along a state highway in Florida. The presence of these view zones prohibits the planting of public trees on public property for beautification purposes. See Section 479.106(6), Florida Statutes; Rule 14-

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[5] At oral argument in the case at bar, the Panel should inquire of National the magnitude of its alleged damage claims. This will bring home the magnitude of the Hobson's choice faced by local governments in dealing with the billboard industry's new litigation strategy. It is the mere potential exposure to such claims that sends a chilling message to local governments.

[6] In his concurring opinion in City of Los Angeles v. Alameda Books, Inc., 536 U.S. 425 (2002), Justice Kennedy noted that speech can also cause secondary effects unrelated to the impact of the speech on its audience and gave as an example the fact that "a billboard may obstruct a view." Id. at 444.

40.003(3)(b), F.A.C. Moreover, existing trees along the public rights-of-way can be cut down under Florida law to create a view-zone when a billboard company turns in state permits for nonconforming billboards, even if they are obsolete and located hundreds of miles away. See Section 479.106(5), Florida Statutes; Rule 14-40.030, F.A.C. View zones can criss-cross medians and rights-of-way, turning urban landscapes into treeless pathways.[7] Such a result succumbs to the bleak materialism envisioned by Judge Tobriner two decades ago.[8]

As the City of Miami has posited (City-II-Brief, at page 39), this litigation is not about a *speech-licensing* scheme but is primarily about the erection of sign *structures* – a critical concern for land development regulation. The underlying foundation for sign ordinances is aesthetics and traffic safety. In Florida and many other states, aesthetics alone is sufficient justification for regulation. See City of Lake Wales v. Lamar Advertising Association of

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[7] See also American Society of Landscape Architects, Policy Statement on Billboards (R1990, R2001) (available at http://www.asla.org/governance/policies/pdf/BILLBOARDS.pdf. ("They deface nearby scenery in both the natural and built environment, rural and urban, and unlike other forms of advertising they cannot be turned off").

[8] In 1981, Justice Tobriner for the California Supreme Court put the matter bluntly: "To hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism." Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 886 (1980), partially rev'd on other grounds, 453 U.S. 490 (1981).

Lakeland, Florida, 414 So.2d 1030, 1032 (Fla. 1982). The regulation of signage is sometimes found within zoning ordinances, is sometimes self-contained in a separate "sign ordinance" within the overall land development regulations, and is often found in both zoning provisions and a separate stand-alone "sign ordinance". In the case at bar, the regulation of signage is found within the Miami Zoning Code. See e.g. Miami Zoning Code at §401. (D1/94:95-141.) For those sign-types that are permanent in nature, there are separate regulations in building codes that pertain to wind loads, methods of construction, and the like.[9]

The unpublished Ft. Lauderdale II decision did not gain much attention until the last few years, when it began appearing repeatedly as the linchpin argument in facial challenges to the entirety of a community's sign regulations across Florida and elsewhere. National itself reveals the role played by this Court's unpublished opinion:

> Other outdoor advertising [billboard] companies studied this Court's Fort Lauderdale II decision. Relying on Fort Lauderdale

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[9] See Florida Building Code, First Edition, Chapters 1 (Administration), 2 (Definitions), 16 (Structural Loads) and 31 (Special Construction [Section 3108-Signs]). (available at http://www.sbcci.org/floridacodes.htm). Since January 1, 2002, the Florida Building Code ""FBC") is the uniform building code applicable in every city and county in Florida. See Section 553.73, Florida Statutes; Chapter 2001-186, Laws of Florida; and Chapter 2001-186, Laws of Florida. The FBC was preceded in most local jurisdictions by various editions or versions of the Standard Building Code.

> II, those companies have looked for cities whose sign codes that have not been updated to exclude unconstitutional provisions, have applied for permits . . . and have sued those cities when they have refused to issue permits or to recognize either Metromedia or Fort Lauderdale II as authority, and the sign companies have prevailed.

Nat-II-Brief at p. 44.

Judge Middlebrooks observed that the billboard industry strategy involves circumstances where the billboard company is aware that the ordinance is "subject to legal attack." Florida Outdoor, 266 F.Supp. 2d at 1379. But what does "subject to legal attack" mean? The disappointing truth is that every sign ordinance today is "subject to legal attack" based upon the inconsistent and sometimes strange decisions governing this area of the law that make it nearly impossible for a local government to craft an ordinance.

Judge Moody recently described the "tenuous and near impossible position" faced by local governments in drafting sign regulations:

> Many courts, like this one, and many commentators, are concerned that local governments have been placed in a tenuous and near impossible position in drafting a constitutional or content-neutral sign ordinance. See, e.g., Cordes, Mark, "Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection," 74 Neb. L.Rev. 36 (1995); Bond, R. Douglass, "Making Sense of Billboard Law: Justifying Prohibitions and Exemptions," 88 Mich. L.Rev. 2482 (1990).

See Granite State Outdoor Adver. Co. v. City of Clearwater ("Granite-Clearwater"), 213 F.Supp.2d 1312, 1333 (M.D.Fla. 2002), aff'd in part and

rev'd in part on other grounds, 351 F.3d 1112 (11th Cir. 2003).[10] Comments from some panels have left even experts puzzled as to how to apply well-meaning suggestions to local sign regulations.

While sign companies have not always prevailed as National claims, there are many cities and counties that have either been threatened with suits or sued, some more than once when the tactic works. A recurring strategy is to apply for "X" billboard permits, and then settle for half that number. Once acquired, permits are often sold to one of the nation's largest billboard companies. See, e.g., Granite, 213 F.Supp. 2d at 1316.[11] The targeted cities are not always the size of Miami, but are sometimes the state's smallest municipalities with populations less than 5,000 or even less than 1,000 - where billboards have never been allowed. The threatened presence of giant billboards in the midst of some of these locales represents a dramatic and disturbing change to the community's aesthetic character. The cost of

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[10] The words "content based" in some contexts have made regulating signs "a risky business," in the words of Judge Moody. 213 F.Supp. 2d at 1330, n.29.

[11] "To date, Granite State has received profits from the sale of at least twenty-two billboard permits to Eller Media which were obtained from similar litigation brought against various cities and municipalities in the state of Georgia." Id. Eller Media is now known as Clear Channel Outdoor and is a subsidiary of Clear Channel Communications.

defending such suits and the mere exposure to oft-threatened damage claims[12] are a sobering reality for small governments with limited or shrinking budgets. Some are faced with a Hobson's choice - face the prospects of financial ruin or face a landscape changed for generations with giant billboards lining its gateway roads.

It is critical that this Court to take a closer look at the "vested rights" theory discussed in Fort Lauderdale II. This unpublished opinion is fatally flawed for a reason never raised or addressed by the Fort Lauderdale II panel. The opinion deserves to be revisited on equity grounds as well.

Missing from the panel's discussion in 1993 is the interplay of two critical factors. First, these schemes are premised upon a facial challenge to the entirety of a community's sign ordinance or sign regulations. In order to succeed in this approach, the billboard company must eliminate the sign regulations in their entirety and thereby leave a void.

The second factor is the missing link in this discussion of vested rights: every local government in Florida must have sign regulations as part of its required land development regulations. See Section 163.3202(2)(f), Florida Statutes. National's scheme rests upon an outcome where there are no sign

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[12] See discussion supra at pages 8-9 re the income multiplier approach advanced by billboard companies in the valuation of modern billboard structures and the associated damage claims when the structures are barred.

regulations. This scheme directly conflicts with the state law mandate that every jurisdiction shall have land development regulations that regulate signage. Id. The regulation of signage is a must for local governments in Florida. It is not an option.

In other words, the "now familiar strategy" depends upon placing the local government in direct violation of state law. This conflict was never raised by the parties in Fort Lauderdale II and has never been addressed by this Court. It should do so now.[13]

The requirement that land development regulations include sign regulations was added to Florida law in 1985. See Chapter 85-55, Sec. 14, Laws of Florida. Under Florida's Local Government Comprehensive Planning

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[13] As to the Ft. Lauderdale II opinion, District Judge James Moody expressed his concern at a hearing on November 7, 2002 as follows: "I will tell you that the issue of vested rights causes me concern. . . . I'm concerned by the Eleventh Circuit opinion in National Advertising. I'm not bound by it supposedly, although there is one case out there that says we should be bound by even unpublished opinions. But the fact is that that opinion was a unanimous opinion and was authored by Judge Edmondson who is now the chief judge of the Eleventh Circuit. So I'm not and I don't believe any district court is going to take lightly to just ignore as unpersuasive the case of National Advertising. I would hope that the Eleventh Circuit would revisit that issue, but they don't listen to me in setting their agenda." See Granite State Outdoor Adv. Co. v. City of St. Petersburg, in the United States District Court for the Middle District of Florida, Case No. 01-CV-2250 (Doc. 75, pages 22-23).

and Land Development Regulation Act,[14] each county and municipality must develop and submit for review a comprehensive plan and must adopt land development regulations that implement the comprehensive plan. See Section 163.3202(1), Florida Statutes. The mandatory local land development regulations shall at a minimum regulate signage in addition to other aspects of land development. See Section 163.3202(2)(f), Florida Statutes.

It is easy to see how practitioners in this area are aghast at how a doctrine grounded in equity could somehow evolve into a "vested" right when the billboard company knows that if it succeeds in a facial claim to strike down the entirety of sign regulations, then the local government is in direct violation of state law as it no longer has regulations that regulate signage. To take advantage of that temporary window (vacuum) between no regulations and new regulations, the billboard industry shockingly enlists "equity" to create a "vested" "right" to erect permanent structures six stories tall that will dominate a landscape for the better part of a century. There is nothing "fair" about this "misuse" of the "equity principle."

Florida's vested rights law developed in the context of local government application of its zoning law and prevented municipalities from *changing*

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[14] Chapter 163, Part II, Florida Statutes. See Section 163.3161(1), Florida Statutes: "This part shall be cited as the 'Local Government Comprehensive Planning and Land Development Act.'"

regulations to *disadvantage* permit applicants who reasonably relied on existing zoning or other land use laws. See e.g. City of Hollywood v. Hollywood Beach Hotel Co., 283 So. 2d 867 (Fla. 4th DCA 1973), aff'd in part and rev'd in part, 329 So. 2d 10 (Fla. 1974).

In City of Hollywood, the Florida Fourth District outlined the requirements for equitable estoppel: the applicant "(1) in good faith; (2) upon some act or omission of government; (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right acquired." 283 So.2d at 869, quoting Salkolsky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963) (emphasis added). On further appeal, the Florida Supreme Court noted that the Fourth District correctly stated the Salkolsky rule and that the developers had no "constructive" knowledge of any "impending zoning change." 329 So.2d at 15-16. However, the Court disagreed the Fourth District's determination that the developers had forfeited a vested right based upon "the unique facts which dominate the instant case" and "unfair dealing" by the City of Hollywood. 329 So.2d at 18. The "good faith" requirement, however, still exists for a developer in National's position.[15]

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[15] See generally Hanes, Grayson P. and Minchew, J. Randall, On Vested Rights to Land Use and Development, 46 Wash. & Lee L. Rev. 373, 398-400

In the present litigation, National did not obtain permits because billboards were not permitted within Miami's Restricted Commercial Zones due to content-neutral sign regulations, such as height and size restrictions on freestanding signs and the allowance of "onsite signs only." Zoning Code at §401. (D1/94:120-129.) Based upon Fort Lauderdale II, National in effect claims that "reliance" on its part is irrelevant, by claiming again that it was denied a "fair chance to rely" upon sign regulations because they do not exist. Nat-II-Brief, at p. 44. Equity cannot countenance National's assertion of no "fair chance to rely" where Florida law requires the existence of sign regulations in the first place. Florida law still requires "good faith" from one claiming entitlement to a "vested right." Good faith cannot be established if the vested right hinges upon a violation of state law.

The "announcement" of an intent to change an existing ordinance (the "Pending Ordinance Doctrine") will operate under Florida law to preclude a vested right where a permit application is made *after* the announcement. See Nat-II-Brief at p. 43. In a strategy that depends upon the entirety of the sign regulations being struck down in a facial challenge, there is no question but there will be an announcement of the adoption of a new ordinance. Florida law

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(1989); Jaslow, Craig A., Understanding the Doctrine of Equitable Estoppel in Florida, 38 U. Miami L. Rev. 187, 189-200 (1984).

requires it. The announcement and the adoption of a new sign ordinance is preordained under National's GOTCHA strategy. There is no need to await the preordained announcement in order to preclude the "vesting" of the asserted right to erect a billboard when (1) the adoption of sign regulations is required by state law and (2) there is a prior history of prohibiting or restricting billboards.

In Sharrow v. City of Dania, 83 So.2d 274 (Fla. 1955), the Florida Supreme Court noted that the alleged vesting was subject to the "warning" evidenced by the ordinance pending on first reading and, therefore, subject to the ultimately completed exercise of the police power that was "signaled" by the pending ordinance. Id. at 275. The Florida Supreme Court went on to observe:

> This is not a case of sudden, unexpected, arbitrary action by the public officials. Here the permittee was fully on notice that the City was proceeding to exercise its police power which ultimately emerged in the adoption of the ordinance on the third reading. See Bregar v. Britton, Fla.1954, 75 So.2d 753, and Texas Co. v. Town of Miami Springs, Fla.1950, 44 So.2d 808. In the cases last cited we held that under appropriate circumstances the doctrine of equitable estoppel may be applied against a municipality but as pointed out in Bregar v. Britton, supra, such cases are not to be compared with those similar to the one at bar where the party claiming to have been injured by relying upon an official determination had good reason to believe before or while acting to his detriment that the official mind would soon change.

Id. at 275-276 (emphasis supplied). Given the mandatory nature of sign regulations as part of a local government's land development regulations, can there be any doubt that National itself had "good reason" to believe that the temporary void of "no" sign regulations would be "soon" be corrected by new regulations?

There is a second fundamental flaw in National's "vested right" argument. It depends upon the facial unconstitutionality of the entirety of sign regulations. A facial challenge like the one brought by National allows an applicant to bring an action to vindicate the rights of others. Broaderick v. Oklahoma, 413 U.S. 601, 612 (1973). However, one cannot have a "vested right" in the rights of others.[16] No one has a vested right to something that is purely hypothetical as applied to itself. Taken it to its logical conclusion, National's argument would mean that any application filed, no matter how outlandish (e.g., a billboard that is one thousand feet high or the placement of 10 billboards on a single residential lot), would have to be permitted so long as the other unrelated portions of the ordinance, no matter how unrelated to the rejection of the application at issue, were found to be unconstitutional. What

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[16] Ordinarily, a party must demonstrate its own independent act of reliance to meet the "reliance" element of equitable estoppel. See Jones v. First Virginia Mtg. & Real Estate Inv. Trust, 399 So. 2d 1068 (Fla. 2d DCA 1981); City of Parkland v. Septimus, 428 So. 2d 681 (Fla. 4th DCA), pet. rev. denied, 440 So. 2d 353 (Fla. 1983).

National seeks to do is to use a very generous (and limited) aspect of First Amendment jurisprudence for its own selfish and purely commercial ends.

Public policy and good faith also play a role. It is well known that billboards have long been regulated by local governments throughout Florida. The restrictions on billboards in Metropolitan Dade County was the subject of a class action suit before this Court more than three decades ago, and was likewise the subject of litigation against Miami in state court at the same time. The litigation originated with land regulations adopted in the mid-1960's. See E.B. Elliot Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141, cert. dismissed, 400 U.S. 805 (1970); and Webster Outdoor Adv. Co. v. City of Miami, 256 So.2d 556 (Fla. 3rd DCA 1972).

In fact, the role of aesthetics was recognized in the 1950's, in Berman v. Parker, 348 U.S. 26 (1954), when Justice Douglas held:

> The concept of the public welfare is broad and inclusive ... [T]he 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 (emphasis added). See also Article II, Section 7(a), Florida Constitution ("It shall be the policy of the state to conserve and protect its natural resources and scenic beauty").

The law of billboards is still governed in part by the United States Supreme Court's decision in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). While few principles could be derived from the five opinions in Metromedia, one principle was quite clear, to wit: local governments may prohibit offsite commercial billboards in the interest of aesthetics.[17]

Recognizing the aesthetic harm caused by the presence of billboards across their urban and rural landscapes, four states have now prohibited billboards entirely, including Hawaii, Alaska, Maine and Vermont. The interest in aesthetics was so strong in Alaska that a statutory provision was enacted on March 4, 1999 through a statewide citizens' ballot initiative, providing: "It is

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[17] Seven of the nine justices agreed that there could be a total prohibition on billboards. "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them," id. at 508 (White, J. for plurality); "Thus, offsite commercial billboards may be prohibited while onsite commercial billboards [signs] are permitted," id. at 512 (White, J. for plurality); "a wholly impartial ban on billboards would be permissible," id. at 533 (Stevens, J.); "a legislative body can reasonably conclude that every large billboard adversely affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the city," id. at 560-561 (Burger, J.); "In my view, aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community," id. at 570 (Rehnquist, J.). See also Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 806-807 (1984) (summarizing Metromedia as "There the Court considered the city's interest in avoiding visual clutter, and seven Justices explicitly concluded that this interest was sufficient to justify a prohibition on billboards."); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425 and 444 (1993).

the intent of the people of the State of Alaska that Alaska shall forever remain free of billboards." Alaska Statute §19.25.075.

Interests in aesthetics have also led to initiatives restricting billboards at the local level. See, e.g., Eller Media Co. v. City of Reno, 59 P.3d 437 (Nev. 2002); City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So.2d 750 (Fla. 1st DCA 1994), approved 659 So.2d 1046 (Fla. 1995). As one appellate court ruled two decades ago:

> We find it hard to conceive that our constitutional founders believed that visual blight and ugliness were a fundamental aspect of our national heritage or that our state and local governments were to be powerless in protecting the beauty and harmony in our human as well as our natural environments.

Cumberland County v. Eastern Federal Corp., 48 N.C.App. 518, 524, 269 S.E.2d 672, 676, review denied 301 N.C. 527, 273 S.E.2d 453 (1980).

It was particularly appropriate for Justice White to equate the "law of billboards" as a "law unto itself" in 1981 in Metromedia. As Justice Brandeis observed in 1932:

> Billboards, street car signs, and placards and such are in a class by themselves. . . . Advertisements of this sort are constantly before the eyes of observers on the streets and in the street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see

> and read the advertisement. The radio can be turned off, but not so the billboard or street car placard.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932). See also Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974).

Alternative forms of advertising media have developed over the years since the decisions in Packer and Lehman. Today, in addition to traditional media such as newspapers, magazines, direct mail, radio (AM and FM), and television (VHF and UHF), alternative media include the internet, other television sources (cable and satellite), and other radio sources (internet and satellite). However, each of these additional forms of alternative media still carry with them the ability to turn them off or eliminate them, such as computer programs that block pop-up ads on the internet. Not so the billboard. It remains the one method of advertising that cannot be avoided. As a former advertising executive declared: "Nor is it possible for you to escape, the billboard inflicts itself unbidden upon all but the blind or the recluse." Howard Luck Gossage, Is There Any Hope for Advertising?, at 113 (Kim Rotzoll, Jarlath Graham and Barrows Mussey eds., University of Illinois Press 1986).

Given the history of the prohibition or strict regulation of billboards, in the Miami-Metropolitan Dade County area and elsewhere, can National or any other billboard company make a "good faith" claim to a "vested right" to erect billboards in the temporary absence of regulation based upon the facial

invalidity of regulations, through the assertion of the rights of others? The answer is no, and certainly not in Florida.

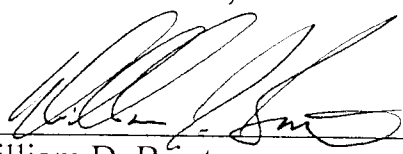
II. CONCLUSION.

For all the foregoing reasons, this Court should revisit the unpublished opinion in Fort Lauderdale II and hold that one cannot acquire a "vested right" under Florida law to erect billboards when the vesting is dependent upon the facial invalidity of the entirety of a community's sign regulations or sign ordinance. Given the fact that the "regulation of signage" is a mandatory element for land development regulations in Florida, the requisite "good faith" cannot arise as a matter of law; nor can there be "good faith" where the vested right is sought through a facial challenge asserting the rights of others.

The district court's summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of March 2004.

ROGERS TOWERS, P.A.

By 

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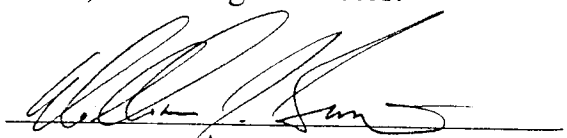

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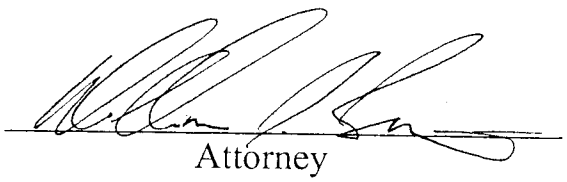

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