

Bettman Symposium: Reading the Signs



**APA National Planning
Conference
Atlanta, GA
Tuesday, April 29, 2014
S656
4 pm
Georgia Ballroom 3**

Continuing education credits for this session



Credits approved thus far:

- 1.5 hours of CM credits
- 1.5 hours of law credits (MCLE Illinois)

Overview



- New sign technologies
- Key regulatory issues raised by those technologies
- Issues you should look for in sign regulation
- Some “best practices” to include in a sign code regulating new technologies

New sign technologies



Examples: digital billboards



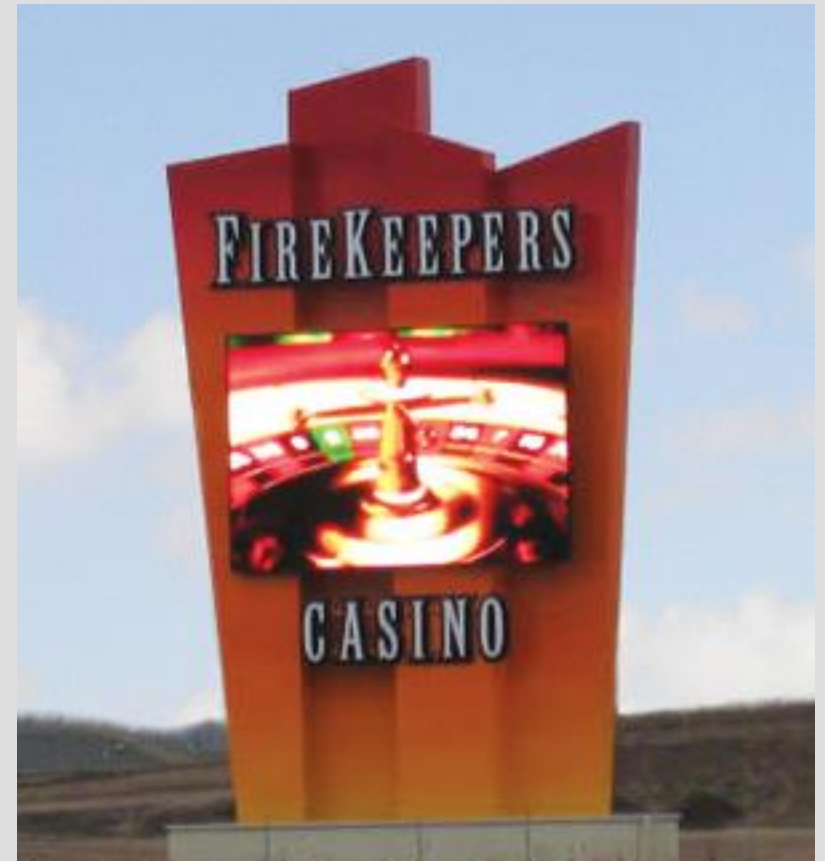
- Current technology: LED (Liquid Crystal Display) screens
- Capable of full-motion video, but commonly used for sequential static displays
- The future: low-power displays reflecting ambient light



Examples: full-motion video displays



- Signs, or portions of signs, that effectively function as big-screen television monitors
- Usually, these appear in non-regulated areas





Examples: Multiple, synchronized, displays

In a “Times Square”
type setting,
presentation of a
message through
several coordinated
displays



Key regulatory issues



- Whether, and under what conditions, to permit motion, animation, or video messages
- The minimum interval between display changes
- The appropriate level of brightness
- The appropriate placement and spacing of signs
- Whether to treat on-site and off-site signs differently
- Size: size of signs, and size of sign text

Old rationales, and new technologies: safety



- Courts have long recognized that –
 - Billboards can distract drivers, and
 - Cities can regulate (or even ban) billboards for that reason
- Legitimate sign studies form pieces of a broader puzzle
 - They support the conclusion that replacement of static signs with frequently-changing dynamic signs can create an added safety hazard
 - See “LED and Video Display Signs” by Marya Morris, at <http://landuselaw.wustl.edu/powerpoint/Digital%20Signs%20Marya%20Morris.ppt>

Old rationales, new technologies: safety



- “It is a given that a billboard can constitute a traffic hazard. It follows that EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous.”
 - *Naser Jewelers v. City of Concord, N.H.*, 513 F.3d 27, 35 (1st Cir. 2008)

Old rationales, new technologies: aesthetics



- “it would seem well within the City’s legitimate discretion to conclude that bright, colorful, electronic signs that change color and messages – or signs similar to those, are inconsistent with the aesthetic values the City seeks to promote.”
 - *Naser Jewelers Inc. v. City of Concord, N.H.*, 2007 WL 1847307 (D.N.H. June 25, 2007) (district court decision, later affirmed)

Digital displays and outdoor advertising statutes



At the federal level:

- Most federal-state agreements that carry out the Highway Beautification Act include a prohibition of new highway signs “which contain, include, or are illuminated by any flashing, intermittent, or moving light or lights.”
- In 2007, the Federal Highway Administration interpreted this phrase as *allowing* electronic billboards

Digital displays and outdoor advertising statutes



At the federal level (continued):

- In October 2013, a federal court allowed Scenic America Inc. to bring a suit alleging that the federal agency's interpretation is wrong, and that electronic billboards on federal-aid highways fall within the scope of such prohibitions
- The suit remains pending

Digital displays and outdoor advertising statutes



At the state level:

- In 2011, Arizona’s Court of Appeals found that a city’s conditional approval of a use permit for an electronic message board violated the Arizona Highway Beautification Act’s prohibition of highway signs that display “intermittent or moving light or lights.”

Digital displays and outdoor advertising statutes



At the state level (continued):

- The following year, the Arizona Legislature amended that statute to provide cities greater latitude to allow electronic outdoor advertising in certain areas.
- However, the court's conclusion that such signs display "intermittent lights" may influence disputes in jurisdictions with statutes using the same phrase

Issues you should look for in sign regulation



- The content-neutrality requirement deserves its own session – and has it:
 - Attend tomorrow morning’s session, “Coming to Grips with Content Neutrality,” with presenters Randal Morrison, Alan Weinstein and Brian Connolly
 - 10:30 to 11:45 am
 - Room C206
 - 1.25 CM credits available

Issues you should look for in sign regulation



- Even if the regulation is content-neutral, does the justification satisfy the proper tests?
 - Regulation of commercial speech:
 - ✦ Is the asserted governmental interest *substantial*?
 - ✦ If so, does the regulation *directly advance* the governmental interest asserted?
 - ✦ If so, is it *not more extensive than is necessary* to serve that interest?
 - *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980)

Issues you should look for in sign regulation



- Even if the regulation is content-neutral, does the justification satisfy the proper tests?
 - Test for time, place, and manner regulations:
 - ✦ Is the regulation justified without reference to the content of the regulated speech?
 - ✦ If so, is it narrowly tailored to serve a significant government interest?
 - ✦ If so, does it leave open ample alternative channels for communication of the information?
 - *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)

Issues you should look for in sign regulation



- The importance of self-restraints on how, or when, discretion is exercised on permit applications
 - First Amendment law in sign cases is rooted in “parade permit” cases from the 1960s, which recognize that undue discretion or delay can suppress valuable speech
 - Reserving too much discretion may be fatal to the code
 - The absence of any reasonable time-limit for approval or denial may also be problematic

Digital conversions and nonconforming use law



- In communities where new off-premises signs have become unlawful, digital sign networks are based on conversions of static billboards into digital billboards
- In many cases, no permits were sought for such conversions
- Instead, the company claimed a right to maintain or improve the sign through the digital conversion
- However, electronic sign faces are usually thicker than the static (vinyl) sign faces that they replace

Digital conversions and nonconforming use law



- Does the added thickness of an electronic sign face cause the conversion to be an “expansion” (which is generally forbidden by nonconforming use laws)?
- The Virginia Supreme Court said “yes” in *Adams Outdoor Adv. v. Bd. of Zoning Appeals of City of Virginia Beach* in 2007.
- A St. Paul MN District Court followed *Adams* in a digital display case, *Clear Channel Outdoor v. City of Arden Hills*, in 2008.

“Sign swaps” – trading digital for static signs



- The underlying principle: one sign that is dynamic allows consolidation of many
- Minnetonka, Minnesota’s “incentives” provision
 - The City had a restrictive ordinance and restrictive enforcement stance
 - Clear Channel Outdoor proposes: we’ll take down half the billboards in town (and keep at least 1/2 of the rest static) if up to eight others can become dynamic and change every eight seconds.

Minnetonka's incentives approach



- The City proposed which signs should come down (based on safety and planning criteria)
- A side agreement keeps more than one dynamic billboard from being visible from any single place
- The eight-second duration was hard for the city to swallow, but Minnesota law allowed no better way for the City to get rid of so many billboards without having to condemn them for a premium price

“Best practices”



Ideas for planners and public lawyers when drafting and adopting zoning ordinances related to new sign technologies, and when responding to applications for such uses

1. Include an *effective* purpose statement



- Not just “to protect the health, welfare, safety”
- A statement that –
 - Tracks objectives courts view as legitimate,
 - Shows respect for citizens’ need for self-expression, and
 - Will assist your city to justify all distinctions between legal and illegal signs.

1. Include an *effective* purpose statement



- Don't just recite the purposes of *restricting* these kinds of signs
 - If your ordinance *exempts* certain types of signs from a restriction, recite objectives that are furthered by those exceptions.
- The purposes should be unrelated to sign content

Often-omitted lawful objectives



- Objectives for *restrictions and prohibitions*
 - Eliminating visual clutter
 - Reducing the number and types of distractions experienced by drivers
 - Channeling commercial activity to commercially-zoned areas

Often-omitted lawful objectives



- Objectives for *exceptions*
 - Way-finding
 - ✦ Furthered by exemptions for off-site directional signs
 - ✦ Furthered by allowing on-premise signs where off-premise signs are disallowed, particularly if a portion of the message is not allowed to change
 - Enabling the exercise of the most fundamental property rights
 - ✦ Furthered by allowing at least one yard sign, and signs on real and personal property that is for sale, even in a residential zone

2. Do not reserve too much discretion



- Do not authorize denial of a permit even if the application satisfies all of the specific requirements
- Do not make digital displays subject to generic conditional use permit criteria in the zoning ordinance.
- If you allow a local board to exempt a sign from the standards –
 - Do not use ordinary “variance” provisions, because they are probably too general, and sometimes open-ended
 - Ensure that your criteria for those exemptions are specific, content-neutral, and tied to stated objectives

Poor approval criteria



A sign permit would issue only if a 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.
- *Desert Outdoor Adv. v. City of Moreno Valley*, 506 F.3d 798 (9th Cir. 2007)

Better approval criteria



The city may deny permits only when –

- A sign does not comply with reasonably specific size and type criteria, or
- Is not compatible (explicitly defined) with the surrounding environment (explicitly defined)

This sign code limited the scope of review to the sign's relationship -

- with other nearby signs,
 - other elements of street and site furniture, and
 - with adjacent structures.
- *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006)

3. Set sound time-limits to act on applications



- Include in your sign code a self-imposed, formal time limit on the ability of staff (or a board or council) to refrain from acting on the application or on an appeal
- These *may* be required unless you're sure that no judge will consider your sign code content-based, or require a time limit regardless of content-neutrality

Resources



- “Free Speech Law for On Premise Signs,” available as a free download at <http://landuselaw.wustl.edu/>
- “The Modern Tower of Babel: Defending the New Wave of First Amendment Challenges to Municipal Billboard and Sign Regulations,” *Planning and Environmental Law* Vol. 58, No. 10.

Questions?



Other resources

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- For links to this and earlier presentations at the APA planning conference, go to law.wustl.edu/landuselaw

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