

GETTING THE SIGN ORDINANCE RIGHT

by

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Does your sign ordinance impose limits on the time a resident may display a political sign or a “for sale” sign? Does your ordinance specify certain districts in which a sign may only display a message related to an activity on property other than where the sign is located? (the so-called off-premises sign) If either or both of these provisions are found in your sign ordinance, it probably is unconstitutional and unlikely to withstand a legal challenge to its validity.

Both federal and state courts have laid down rules we must follow to protect against unconstitutional restriction of speech guaranteed under the First Amendment of the U.S. Constitution and the Free Speech Amendment of the Georgia Constitution. Yes, putting a message on a sign is a form of speech, and local governments may not restrict that speech in a sign ordinance unless constitutional protections are put in place.

The First Amendment and the Free Speech Amendment permit a local government to prohibit sign messages promoting unlawful activity or messages that are misleading. But any other restriction of otherwise protected speech is valid only if it “...seeks to implement a substantial government interest, ...directly advances that interest, [and] reaches no further than necessary to accomplish the given objective.”¹

Some specific rules or conditions must be included in a sign ordinance for it to survive constitutional scrutiny. Following is a list of constitutional safeguards that often are missing from sign ordinances. Hopefully, this article will help you examine your sign ordinance and apply these judicial rules and thus determine if your sign ordinance will withstand a lawsuit challenging its constitutionality.

Rule No. 1 Adopt a Statement of Legislative Purpose²

A sign ordinance, to be constitutional, must satisfy a “substantial government interest;” otherwise, it restricts speech without a basis for imposing limits on speech. We, as a government, are authorized to restrict signs if it advances the aesthetic interests of a local government, e.g. limits clutter and protects the visual landscape, or it promotes traffic safety. These purposes as justification for imposing limits on signs must be amply laid out as the underlying basis and purpose for a sign ordinance. Accompanying this purpose should be studies, including treatises, which have demonstrated the benefit of sign restrictions to advance the aesthetic and safety interests of a local government. These studies and treatises should be

incorporated into and made a part of the preface or introduction to the sign ordinance. It is only upon showing that a local government's aesthetic interests and traffic safety are advanced that it may constitutionally limit speech and thus restrict sign usage within a local government's jurisdiction.

Rule No. 2 Sign Ordinances must be Content-Neutral³

Content-neutral means that a sign ordinance must not regulate signs based upon the message. The introduction to this article shows an example of this, i.e. signs identified and regulated by a political message. There are exceptions to this rule, but the better practice is to regulate signs by the size, construction, materials, number, and location, but not by the message on the sign. If your ordinance identifies a sign by its message, it probably is not content-neutral.

Rule No. 3 Sign Ordinances must have Standards for Granting or Denying Sign Permit Applications⁴

Your ordinance must set forth standards which an administrative official or board must apply in determining whether a sign may be permitted. Giving the permit official unbridled discretion to decide whether a sign may be permitted is typically a constitutional problem. The better approach is to grant a permit for a sign if it satisfies the ordinance provisions; that is, an objective standard not based on the discretion of an administrative official or a board. In any event, the sign ordinance should set out those standards which have to be applied in determining whether a sign permit should be granted.

Rule No. 4 Limit the Time in which a Decision on Sign Permit Applications must be Made⁵

If your ordinance does not specify the time within which a decision for a sign permit application must be made, it has serious constitutional problems. According to many court decisions, allowing a sign permit application to languish indefinitely without a decision is a denial of free speech. Fifteen to thirty days is usually adequate for a decision to be made, and your ordinance should state a specific time within which an applicant may expect a decision.

Rule No. 5 Include a Provision that a Decision Denying a Sign Application Permit may be Judicially Appealed within 30 Days⁶

A local government may establish a procedure for appeal of an initial decision denying a sign permit application to a separate administrative official or board. That is to say, an initial decision may be made by an administrative official, and an aggrieved applicant may then appeal to a planning commission or even the city council or the board of commissioners. But what is essential as mandated by a number of court decisions is that a judicial appeal be provided within the ordinance. That is, an ordinance should provide that an unhappy applicant for a sign permit may appeal the final decision of the local government to the appropriate superior court within 30 days of the decision. Such a provision will satisfy the requirement that an aggrieved applicant has a right to immediate judicial review of the local government's decision.

These rules are not intended to be exhaustive of all constitutional requirements necessary for a local government's sign ordinance, but these are the most significant deficiencies in sign ordinances and the ones most often subject to challenge in either the federal or the state courts. Put your ordinance on the examining table, and if any of these rules are violated, you should immediately revise the ordinance or it may not withstand a judicial challenge.

¹ Tinsley Media, LLC v. Pickens County, Georgia, 203 Fed.Appx. 268, 273 (11th Cir., 2006)

² Tinsley Media, LLC v. Pickens County, Georgia, 203 Fed.Appx. 268, 273 (11th Cir., 2006)

³ Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir., 2005); Dimmitt v. City of Clearwater, 985 F.2d 1565 (11th Cir., 1993); Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274 (11th Cir., 2004); and Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996)

⁴ Camp Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11th Cir., 2006)

⁵ Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274 (11th Cir., 2004)

⁶ Boss Capital, Inc. v. City of Casselberg, 187 F.3d 1251 (11th Cir., 1999) (applying free speech safeguards to adult entertainment ordinances)