

**SIGN ORDINANCE FLAWS,
CHALLENGES, AND DEFENSES**

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I. INTRODUCTION

Despite considerable press coverage regarding numerous decisions striking down local governments' sign ordinances in recent years, many sign ordinances are still filled with flaws and constitutional traps that could render the ordinance void as a violation of the First Amendment if challenged. Local governments should be aware of these traps when reviewing their ordinances. The problem arises when a series of small errors allows the entire sign regulation to be stricken. Billboard companies frequently challenge provisions unrelated to billboards to get a sign stricken, in addition to challenge billboard regulations, under the broader standing rules that govern First Amendment Constitutional challenges. Such challenges have stricken sign ordinances in numerous cities. This paper discusses some of the flaws common to sign ordinances, the typical challenges brought, and potential defenses and solutions to such problems.

II. CONTENT-BASED PROVISIONS

The most common and most dangerous trap for a sign regulation is having "content-based" regulations. Sign ordinances should be "content-neutral," not "content-based." "Content-based" not only refers to ordinances that prohibit specific political or religious messages (which hardly any ordinance does these days), it also refers to ordinances that regulate in any way based on the content of a sign.

A. Political Signs

For example, many ordinances regulate “political signs,” and define them based on the message content being related to an election, advocating a position, and so forth. Local governments may believe that their ordinance is content-neutral because no particular position is banned and any candidate may be supported, but in fact the regulation is content-based because it limits the message as “related to the election.” In other words, if “We Buy Houses” signs, or other advertising, is not allowed, the regulation is content-based, and therefore unconstitutional.

B. Development-Related Signs

Likewise, “subdivision entrance signs,” “construction site signs,” and similar development related signs, are typically defined in a content-based manner. Authorizing a sign at a subdivision entrance that must reference the name of the subdivision is controlling content, and that is unconstitutional, because it favors commercial speech over non-commercial speech. Similarly, allowing the builder and architect to erect a sign that names the project and references the name of the company only, is a content-based restriction.

C. Real Estate Signs; For Sale Signs

Another area frequently regulated based on content are signs relating to subdivision developments, and restrictions relating to “for sale” signs. The goal is to allow some useful signage, such as signs erected on the weekend to point the way to development. Similarly, many residential areas try to allow a “for sale” sign without allowing a proliferation of other signs. However, both such restrictions are content bases.

D. Residential Sign Restrictions

An area of frequent attack by the sign industry are regulations regarding residential signs. Many ordinances, assuming persons in subdivisions have limited need for signage (since no business can operate in a home, typically), severely restrict residential signs, based on content. As mentioned above, an ordinance might allow a small “for sale” sign. In a nutshell, the Courts have found that citizens have a basis constitutional right to express themselves from their homes, and so messages protesting war or politicians, or any other political message, cannot be excluded. A sign ordinance needs to permit at least one sign with any content, per residence.

E. On-Premises / Off-Premises

The “on-premise” and “off-premise” distinction is another major pitfall of many ordinances. While the Federal courts have upheld this distinction (finding that non-commercial speech is on-premise) in Southlake Property Associates, Ltd. v. City of Morrow, Ga., 112 F.3d 1114, (11th Cir. 1997), the Georgia Supreme Court has found that non-commercial speech is off-premises, and regulations favoring on-premise signs over off-premise signs are therefore typically unconstitutional. Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996). This distinction should be eliminated, as should any attempt to link the content of a sign to the business being conducted on the premises.

III. PROPER REGULATION OF SIGNS

The proper solution is to regulate signs based only on size, location, construction, illumination, duration and so forth: criteria that are not based on content. For example, it is acceptable for an ordinance to authorize signs to be erected “from 5 p.m.

Friday to 12 midnight Sunday.” The ordinance could also require a permit, that the owner of the sign be printed on the back, that the signs be constructed of durable material, and that such signs are prohibited in rights-of-way. This would authorize the typical “weekend directional sign.”

What an ordinance cannot lawfully do is restrict the content of the sign to messages “providing directions to new developments” and so forth. Any content, other than obscenity or nudity under state law, must be allowed, or else the local government is making a choice favoring one type of speech over another. If “Henderson Mill Subdivision” can put up signs, then “We Buy Houses” or “Stop Abortion” can as well. Similarly, “political signs” can be defined as signs which can be erected for a certain period of time around any federal, state or local election. Again size, construction, location and so forth can be regulated--but any content must be allowed.

As a practical matter, not explicitly limiting “construction signs” to builders, architects and so forth constructing the project, will have little effect. In reality, if an ordinance allows one or two signs to be erected during the construction phase of a development, the companies involved are not going to waste them on political messages. Similarly, a subdivision is not likely to put an ad or a political message on the pair of monument signs authorized at the entrance of a subdivision. Areas where unwanted effects may arise include the weekend directional sign and the political sign, but that cannot be helped.

In terms of billboards, they can be regulated by limiting the maximum size of such signs. A typical way to do this is to refer to underlying zoning districts, allowing very small signs in residential districts, larger in commercial, and larger still in industrial. However, there is no constitutional right to a 672 square foot sign. No case

has discussed the maximum allowable size for signs, but 200 or 300 square feet should withstand scrutiny. Likewise, reasonable limits on height can satisfy the constitution.

IV. REVIEW OF A CONTENT-NEUTRAL ORDINANCE

If a local government's ordinance is content-neutral, it gets reviewed under a much more relaxed standard by the courts, and it has a much better chance of being upheld from challenge. That in turn allows the sign ordinance to be much tougher than many local governments believe possible.

A content-neutral ordinance is valid "if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

The Eleventh Circuit applied this test in Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992). The Court quoted the very passage cited above, and restated the constitutional requirements as follows: "Thus, to uphold a viewpoint-neutral regulation of speech, a government must show that 1) it has the constitutional power to make the regulation, 2) an important or substantial government interest unrelated to the suppression of free speech is at stake, and 3) the ordinance is narrowly drawn to achieve its desired ends, leaving other channels for the communication of information." Messer, 975 F.2d at 1509.

A. Aesthetics is a Legitimate Government Purpose

It is of no doubt that governments have the power to regulate signs, so the first prong is easily satisfied. The second prong is also easily satisfied. The Supreme Court in Vincent, supra, held, “It is well settled that the state may legitimately exercise its police powers to advance esthetic values.” 466 U.S. at 805. The Court continued, “We reaffirm the conclusion of the majority in Metromedia [i.e. Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)]. The problem addressed by this ordinance--the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property--constitutes a significant substantive evil within the City’s powers to prohibit. The city’s interest in attempting to preserve or improve the quality of urban life is one that must be accorded high respect.” 466 U.S. at 807 [cits. and quotes omitted]. Most directly, the Vincent court states, quoting Metromedia, “It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as esthetic harm.” 466 U.S. at 807; 453 U.S. at 510. The Court in Metromedia also explicitly held that there can be no doubt that aesthetics and traffic are substantial governmental goals. Those are frequently used to justify sign regulations, and any sign ordinance should have a purpose section referencing aesthetics and traffic safety among the purposes of the ordinance.

B. Analyzing The Scope Of The Restriction

Therefore, the final question of the analysis is whether the restriction on speech is no greater than is essential to the furtherance of the government’s interest. Put another way, the questions are whether an ordinance is narrowly tailored to achieve its interest

in advancing aesthetics and safety, and whether alternative channels of communication remain open.

The question is not necessarily whether some one particular sign at issue achieves the purposes of the ordinance, nor is the question whether there is a less-restrictive means to achieve those ends: “So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative. The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.” Ward v. Rock Against Racism, 491 U.S. 781, 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

Instead, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Ordinances limiting the number, size and location of signs accomplish these purposes, and would be exactly targeted. Referring to an ordinance banning billboards, the Supreme Court wrote, “By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy.” Vincent, 466 U.S. at 808. The “evil” is billboards and they are specifically curtailed. Such an ordinance “curtails no more speech than is necessary to accomplish its purpose.” 466 U.S. at 810.

Regarding specifically billboards, Federal Courts at all levels recognize that billboards can be entirely banned. The Metromedia Supreme Court commented that, if a local government objects to billboards on the basis of aesthetics and safety, “then

obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.” 453 U.S. at 508. The Eleventh Circuit has similarly recognized that all billboards can be banned in Messer v. City of Douglasville, Georgia, 975 F.2d at 1510.

Therefore, a content-neutral sign ordinance, drafted with consideration of this three- part analysis, is likely to be upheld.

V. ISSUES REGARDING ADOPTING SIGN ORDINANCES

Two issues are worth discussing regarding adopting sign ordinances. First, the use of the moratorium, and second, the application of the Zoning Procedures Law. Often, learning of potential billboard applications, a local government will quickly adopt a sign application moratorium and then amend its ordinance. Those moratoria were frequently struck down as not complying with the Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq., which requires at least 15 days public notice prior to adopting a zoning ordinance amendment.

However, in 2001, the Supreme Court clarified that an emergency moratorium is not “final legislative action” and so does not fall under the definition of a “zoning decision” in the Zoning Procedures Law (“ZPL”). City of Roswell v. Outdoor Systems, 274 Ga. 130, 549 S.E.2d 90 (2001). Justice Benham, in the dissent, was unhappy with that reasoning and instead urged the Court to rule that sign ordinances are not subject to the ZPL simply because they are not zoning ordinances.

However, in City of Walnut Grove v. Questco, Ltd, 275 Ga. 266, 564 S.E.2d 445 (2002), the Supreme Court rejected that argument, and applied the Zoning Procedures Law to a sign ordinance. The Court looked at the ordinance at issue and determined

that it regulated signs based on zones, and therefore was essentially a zoning ordinance. That Court also cited to Fairfax MK, Inc. v. City of Clarkston, 274 Ga. 520, 555 S.E.2d 722 (2001), for the proposition that a regulatory ordinance is not governed by the ZPL in those circumstances where it is clear from a reading of the ordinance *as a whole* that it is intended to regulate a particular occupation, rather than to regulate the general uses of land.

In light of this decision, whether a sign ordinance is a zoning ordinance will turn on how it attempts to regulate signs. Perhaps if the sign ordinance were keyed to the use of the property rather than the zoning district, it may survive a ZPL challenge, but that is not assured. The better bet is to adopt sign ordinances in compliance with the ZPL.

VI. CONCLUSION

As a police power regulation, local governments have much more power to regulate signs than the outdoor advertising industry wants them to believe. That industry has been attacking sign ordinances riddled with content-based provisions, and by this means forcing local governments to allow billboards. If local governments clean up their sign ordinances from these defects, they will be in position to toughen the size and height maximums to more reasonable levels, which coincidentally can severely restricts billboards, if that is desired. Local governments should adopt a moratorium on billboard applications and permits, conduct a proper and thorough legal review and identify faults in the existing ordinance, and adopt a revised, constitutional and, if desired, much tougher ordinance.

VII. APPENDIX: RECENT SIGN CASES

1. City of Walnut Grove v. Questco, Ltd., 275 Ga. 266, 564 S.E.2d 445 (2002).

The City of Walnut Grove appealed the trial court's holding that the city's 1998 comprehensive sign ordinance was enacted in violation of the Zoning Procedure's Law, O.C.G.A. Chapt. 36-66. The city's sign ordinance used the existing zoning districts to regulate signs depending on the zoning district in which the sign was placed. The Zoning Procedure's Law applies to zoning ordinances which regulate or classify property by separate districts. Since signs were restricted by the districts in which they were located, the city's sign ordinance fit within the ZPL's definition of zoning ordinance and was subject to the notice requirements of the ZPL. The city's sign ordinance, having been adopted in violation of the ZPL notice provisions, was invalidated by the court, and the city was ordered to issue permits to the applicant.

The court makes clear that not every sign ordinance is subject to the ZPL, and this is true even if the sign ordinance is placed within the zoning code. If the sign ordinance does not regulate use by zoning district, then the sign ordinance is not subject to the ZPL.

2. Outdoor Systems, Inc. v. Cobb County et al., 274 Ga. 606, 555 S.E.2d 689 (2001).

Cobb County adopted a sign ordinance which prohibited new outdoor advertising signs but allowed existing signs to remain as nonconforming signs. The ordinance permitted only minor maintenance and upkeep of nonconforming signs provided that when a sign was destroyed or toppled by an act of God, a variance would not be issued to re-erect it. Outdoor Systems' restored its outdoor advertising sign after it was damaged by a tornado. Cobb then revoked Outdoor's sign permit relying on its ordinance which prohibited more than minor repairs. The court found the Cobb County ordinance in

conflict with O.C.G.A. § 32-6-83 which requires payment of “just compensation” when the county acquires an owner’s interest in nonconforming outdoor advertising signs. Since the county ordinance made no provision for compensating the owners, the ordinance violated the state statute and was unenforceable. For these reasons, Outdoor Systems was entitled to a permit to continue use of the nonconforming sign.

3. City of Roswell et al., v. Outdoor Systems, Inc., 274 Ga. 130, 549 S.E.2d 90 (2001).

After the City of Roswell’s sign ordinance was struck down as unconstitutional, the city enacted a temporary moratorium on applications for billboard signs, but in enacting the moratorium the city did not follow the notice requirements of the Zoning Procedures Law, O.C.G.A. § 36-66-4(a). In a challenge to the moratorium, the Supreme Court found that the temporary moratorium on receiving applications for billboard signs was not a “zoning decision” as defined in the Zoning Procedures Law. The ZPL defines “zoning decision” as a “final legislative action by a local government” that adopts an ordinance, grants a special use permit, or approves an amendment to the text of the zoning ordinance, rezones property, or zones annexed property. Therefore, according to the court, the temporary billboard sign moratorium was not “final legislative action” as defined by the ZPL, and thus adoption of the temporary moratorium was not subject to the notice requirements of the ZPL. In addition, the Supreme Court approved the moratorium on the grounds that it was temporary; it was limited in scope to billboards exceeding a specific size; and it was enacted in response to a prior court order invalidating existing sign regulations. Thus the court found specifically that the moratorium was a reasonable interim action and exempt from the procedural requirements of the ZPL.

4. State v. Hartrampf, 273 Ga. 522, 544 S.E.2d 130 (2001).

In this case, a sign had become non-conforming pursuant to an ordinance change in Cobb County. The sign was destroyed in a tornado, and the County refused to let the permit holder erect a replacement, and revoked the sign permit. Repair continued, and stop work orders and citations were issued. The Court held that the ordinance operated to create the situation prohibited by O.C.G.A. § 32-6-83 (which required just compensation for forcing removal of signs): assuming that a sign has been damaged and, under the ordinance is in a condition so as not to be repaired, the ordinance effects its removal without compensation. Here, criminal charges were based on the premise that, under the ordinance, the sign was in a condition such that repair was prohibited, and the Court held this application of the ordinance violates O.C.G.A. § 32-6-83. Local ordinances may not conflict with State statutes. Ga. Const. of 1983, Art. III, Sec. VI, Par. IV(a). Thus, the proposed application of the ordinance would violate the State Constitution.

5. Union City Board of Zoning Appeals et al. v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996).

In a multifaceted challenge to the Union City sign ordinance, the court made the following holdings, among others:

- 1) The city's sign ordinance which distinguishes between "off-premise signs" and "on-premise signs" violates the First Amendment to the United States Constitution and the Free Speech Clause of the Georgia Constitution. Since the city restricts the content of a sign based upon its location, it will not survive strict scrutiny. The city effectively prohibits signs bearing non-commercial messages in zoning districts where a sign of the same size and

structure may display commercial messages.

- 2) The city's sign ordinance is also unconstitutional to the extent that it limits the messages on specific categories of signs, which are principal identification signs, marketing signs, construction signs, instructional signs, real estate directional signs, real estate signs, and special event signs. The effect of the ordinance was to limit the message of certain signs to those identifying the type of sign that may be used.
- 3) The ordinance provisions which restrict signs in residential zoning districts to on-premise signs and certain temporary or special signs, such as political signs, is likewise unconstitutional. The court reasoned that the ordinance prohibits vital expression through the unique medium of residential signs without providing a viable alternative.
- 4) The city's time limitation on political signs during a period of six weeks prior to and one week after an election is likewise unconstitutional. Since the ordinance does not place time limits that a resident may post a sign selling his house, for example, restrictions on political signs are necessarily content based and unconstitutionally restricted.