

Sign Ordinances and Right-of-way Encroachments

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I. CRAFTING AN EFFECTIVE SIGN ORDINANCE

1. **Why talk about sign regulation separately from other land use regulation?**

- A. The 1st Amendment to the U.S. Constitution
"Congress shall make no law...abridging the freedom of speech..."
- B. The Georgia Constitution
"No law shall be passed to curtail or restrain the freedom of speech or of the press."
- C. Speech is a fundamental right, and signs are a traditional and favored manner of speech.

2. **Sign ordinance litigation.**

- A. How does the sign ordinance challenge typically arise?
- B. What does it mean to be content-based?

The simple rule: If you have to read the sign to know whether or not it is permitted, the ordinance is content-based.
- C. Strict-scrutiny: (1) The *least* restrictive means of achieving a (2) compelling governmental interest.
- D. What happens if the local government loses?

3. **Avoiding content-based restrictions.¹**

Examples of problem language.

- A. Everything requires a permit except...
 - real estate signs
 - political signs
 - religious signs
 - governmental signs
 - holiday signs
 - construction signs
 - direction signs

¹ See Exhibit D for a list of sign ordinance cases, their facts, and their results.

- time and temperature
- B. On premises / off-premises
- C. Political signs
- D. Outdoor advertising signs

4. Other common problems.

- A. Properly adopting your sign ordinance
 - no evidence / studies
 - no findings
 - no purpose
- B. Permitting
 - discretion
 - no mandatory time constraints
 - no appeal

5. How do you do it right?

- A. Regulate structures only, and not message content. Exhibit A.
- B. Allow reasonable and adequate speech (and sign) opportunities.
- C. If you require a permit, tailor it to compelling government purposes, i.e. safety.

6. What other provisions should the local government have?

- A. Penalties and enforcement options.
 - fines
 - attorney fees
 - injunctions (Superior Court)
- B. Maintenance
 - track the IBC: Exhibit B
 - inspections
- C. Multi-message signs and LEDs
 - local governments do not have to permit
 - studies

II. Encroachments in the right-of-way.

1. A to-do list from the prosecuting attorney's perspective.

- Have a digital camera.
- Know your judge.
- Build a record
- Enforce against the builders if possible (and educate them)
- Know (and be able to prove) the location of the right-of-way.
- Dealing with grandfathering claims.
- Settling

2. Signs

Nuisance ordinance:

Signs in the public right-of-way. Pursuant to O.C.G.A § 32-6-51, as it may be amended from time to time, it shall be a violation of this ordinance for any person to erect, place, or maintain within the dedicated right-of-way of any public road any sign, except as expressly authorized by law. Signs erected in violation of this ordinance are declared to be public nuisances, and they may be removed by the City without notice to the owner, or the sign owner may be directed to remove the sign.

3. Mailboxes: Exhibit C

4. Landscaping: Exhibit C

5. Grandfathering issues: Permitted structures and Non-permitted structures

Exhibit B

Sign and sign structure maintenance:

1. The sign and sign structure shall be maintained in good repair, structurally sound, with proper anchorage capable of supporting the imposed loads, so as not to pose a threat to the public health, safety or welfare. All structural members shall be maintained free from deterioration, and shall be capable of safely supporting the imposed dead and live loads.
2. All exterior surfaces shall be maintained in good condition. Exterior wood surfaces, other than decay-resistant woods, shall be protected from the elements and decay by painting or other protective covering or treatment. Peeling, flaking and chipped paint shall be eliminated and surfaces repainted. When required, all exposed surfaces of metal or wood shall be protected from the elements and against decay or rust by periodic application of weather-coating materials, such as paint or similar surface treatment. Sign faces shall be maintained in good repair, and shall have neatly painted, posted or otherwise maintained display surfaces, free of defects such as holes, tears, cracks, breaks or missing portions, which are plainly visible from the public right-of-way.
3. When a sign or sign structure is found to be in need of maintenance, the code enforcement officer shall issue a notice of violation to the property owner, which shall describe the maintenance issue, and provide a reasonable amount of time to repair the violation.
4. If, after receiving the notice of violation, the property owner fails to remedy the maintenance issue within the time provided, it shall be a violation of this ordinance, subject to citation. The code enforcement officer may also institute the appropriate proceeding at law or in equity to restrain, correct or abate such violation, or to require the removal of the sign or sign structure. The reasonable cost of any action taken by the City or its agents to remedy the maintenance issue shall be charged against the real estate upon which the structure is located and shall constitute a lien upon such real estate.

Exhibit C

Section 1. Title

This Ordinance shall be known as the “Bartow County Right-of-Way Ordinance.”

Section 2. Purpose

The purpose of this Ordinance is to provide for the regulation of the Bartow County Road Rights-of-way, pursuant to the powers vested in the County by O.C.G.A. § 32-4-42 and § 32-6-1. It is further the purpose of this ordinance to:

- A. Protect the public health, safety and welfare by ensuring that new mailbox supports erected in the right-of-way are constructed so as not to pose a hazard to road users; and
- B. Prevent encroachments into the County rights-of-way and provide for removal of said encroachments, to secure the public health, safety and welfare.

Section 3. Definitions

The following words shall have the following meanings in this Ordinance. Except as specifically defined herein all words used in this Ordinance shall carry their customary meaning as defined by a standard dictionary.

“Encroachments” means any building, structure, or vehicle, or other object or thing (including but not limited to mailboxes, signs, cars, gates, walls, sprinkler systems, trees, posts, etc.) which is located in the right-of-way. “Encroach” means to be within the right-of-way.

“Materially injure” means damaging the pavement or right-of-way to the extent that a repair is or will be required by the Road Department in order to bring the pavement or right-of-way back to County standards. It shall also mean causing more than \$50 damage to the right-of-way or pavement, considering the labor cost and materials to repair the injury, whether or not such repair is undertaken by the Road Department.

“Obstruct,” includes without limitation, the causing of any buildup of rock, gravel, mud, dirt, chemicals, or other materials by continued ingress or egress of vehicles or of any natural waters dammed or redirected by diversion to an extent which presents a hazard to the traveling public. It shall also include negligently or intentionally dropping objects onto the road that present a hazard to the traveling public, including ladders, trash, debris, branches, cement, etc.

“Right-of-way” means any right-of-way that has been accepted by Bartow County into the County roads, and such term includes the full width of the right-of-way, and not just width of the pavement. Such term also includes rights-of-way acquired by prescriptive easement, or pursuant to O.C.G.A. § 44-5-163 or O.C.G.A. § 32-3-3, or any other means.

“Road Department Head” means the official who is the Department Head of the Bartow County Road Department, or his or her designee.

Section 4. Prohibitions

- A. It shall be unlawful for any person to obstruct, encroach upon, or injure materially any part of any County right-of-way or County road pavement.
- B. No encroachments are permitted in any right-of-way of Bartow County without permission of the Road Department Head, unless otherwise permitted by this Ordinance.
- C. No building, structure, service area, or required off-street parking and loading facilities, except driveways, shall be permitted to encroach on County rights-of-way.
- D. The County shall owe no compensation for removal of illegal encroachments or obstructions.

Section 5. Permitted Encroachments

- A. Driveways. Driveways (including paved, masonry, asphalt, etc) are permitted to encroach on the right of way. A driveway permit shall be required and the lot owner shall secure permission for any new driveway from the Road Department. Driveways must meet sight distance requirements of Road Department, and must be constructed in compliance with County requirements for stormwater drainage/piping.
- B. Landscaping. Limited landscaping is permitted in the County right-of-way, including grass, flowers and shrubs not in excess of two feet in height. Trees shall not be planted in the right of way. Irrigation systems shall not be installed in the right-of-way.
- C. Mailbox Support Structures. The County permits limited encroachment of the right-of-way for mailbox support structures, which meet the following standards:
 - 1. The use of massive mailbox support structures that, when struck, could damage vehicles and cause serious injury to vehicle occupants are prohibited. Heavy metal posts, concrete posts, brick bases, and miscellaneous items such as farm equipment or supports filled with concrete are also prohibited and cannot be used for mailbox supports.
 - 2. Acceptable mailbox supports include: a) a single 4-inch by 4-inch or 4 inch diameter wooden post; b) a metal post with strength no greater than a 2 inch diameter standard strength steel hollow pipe; or c) other support of no greater strength, as approved by the Road Department, as in accordance with the standards of the AASHTO Roadway Design Guidelines for mailbox structures, which are incorporated herein by reference. In the event the property owner has any question as to whether the proposed mailbox support will be permitted, the Road Department should be consulted.

3. Mailbox supports must be embedded no more than 24” into the ground. A metal post shall not be fitted with an anchor plate, but it may have an anti-twist device that extends no more than 10” below the ground surface.

4. Mailboxes. The post-to-box attachment details should be of sufficient strength to prevent the box from separating from the post top if a vehicle strikes the installation. The mailbox itself should be of lightweight steel, wood, or plastic/composite construction, and meeting U.S. Postal Service regulations.

Section 6. Non-Conforming Encroachments

A. All encroachments pre-existing the date of adoption of this Ordinance may remain as non-conforming encroachments, unless and until removal is ordered by the Road Department Head, for utility work, road work or other work necessitating access to the right-of-way. For pre-existing encroachments, the County shall give 30 days notice of removal (unless the encroachment presents a safety hazard).

B. Any structure pre-existing the Ordinance which is damaged or removed shall not be replaced in kind and must be replaced in accordance with the requirements of the Ordinance.

C. The County shall owe no compensation for removal of non-conforming encroachments.

Section 7. Administration and Enforcement

A. Administration. This Ordinance shall be administered by the Road Department Head. The Road Department Head shall have the authority to issue permits for encroachments in the rights-of-way not specified above, and any question of interpretation or administration shall be determined by that official. The appeal of any decision by the Road Department Head shall be to the Commissioner of Bartow County.

B. Enforcement Powers. The Road Department Head and the County Sheriff, as well as County Code Enforcement Officers, and County Attorney, are empowered to enforce this Ordinance. The foregoing shall be empowered to issue citations, seek other civil relief, or issue stop work orders for violations of this Ordinance. Any person, firm, partnership, corporation or other legal entity who shall do anything prohibited by this Ordinance as the same exists or as it may hereafter be amended or which shall fail to do anything required by this Ordinance as the same exists or as it may hereafter be amended shall be subject to an enforcement action.

C. Right of Removal. The Road Department shall have the authority to remove without notice any encroachment or obstruction of the right-of-way. The Road Department shall also have the authority to issue a notice of removal to property owners giving them up to 30 days to remove an unpermitted encroachment.

D. Criminal Prosecution. The Road Department Head, County Sheriff, or designated code enforcement personnel, or other authorized personnel, may issue criminal citations for violations of this ordinance, or violation of any stop-work order.

1. Criminal prosecutions for violation of this Ordinance shall be commenced by the completion, signing, and service of a citation by an authorized county official. No warning need be issued prior to a citation being issued. The original of the citation shall be personally served upon the accused, his or her authorized representative or, if a corporation, an officer of the corporation or its on-site representative or the person or persons in charge of the activity on the property, and a copy shall be promptly filed with the magistrate court. A stop-work order may be issued in conjunction with a citation.
 2. Each citation shall state the time and place at which the accused is to appear for trial in magistrate court, shall identify the offense with which the accused is charged, shall have an identifying number by which it shall be filed with the Court, shall indicate the identity of the accused and the date of service, and shall be signed by the deputy sheriff or other authorized officer who completes and serves it.
 3. Any Defendant who fails to appear for trial shall thereafter be arrested on the warrant of the Magistrate and be required to post a bond for his or her future appearance.
 4. The District Attorney, County Attorney, or another attorney designated by Bartow County may act as prosecuting attorney for violations of this Ordinance.
 5. Minimum fines for violations of this Ordinance shall be \$200 for the first violation, and \$400 for subsequent violations. The maximum permissible fine shall be \$1,000 per offense. The magistrate court may impose other penalties under its jurisdiction, including up to 60 days incarceration, probation, and restitution or reimbursement costs.
 6. Daily Violations. Each day during which the violation or failure or refusal to comply continues shall constitute a separate violation, subjecting the offender to a new citation, or other civil or criminal proceeding.
- E. Civil Fines and Proceedings. In addition to or in lieu of any other remedy, the County may seek injunctive, mandamus or other appropriate relief in superior court to enjoin or prevent a violation of any provision of this Ordinance. Such action may also seek civil fines at the mandatory rates specified in Section 7(D)(6) above for violation of this Ordinance, and may additionally seek the costs of restitution, and any other costs associated with the action to enjoin or prevent any violation of any provision of this Ordinance. The County shall be entitled to its reasonable attorney's fees and costs for bringing an action in superior court wherein any relief is granted or fine assessed.
- F. Stop Work Orders. Upon notice from the Road Department Head, work on any encroachment into the right-of-way that is being done contrary to the provisions of this Ordinance, or in a dangerous or unsafe manner, shall immediately cease. Such notice shall be in writing and shall be given to the owner of the property, or to his agent, or to the person doing the work, and shall state the conditions under which work may be resumed. Where an emergency exists, the Road Department Head shall not be required to give a written notice prior to stopping the work, with a written order to be provided within three working days.

G. False Statements. The Road Department Head may revoke a permit or approval, issued under the provisions of this Ordinance, in case there has been any false statement or misrepresentation as to the material fact in the application or plans on which the permit or approval was based.

H. Permit Revocation. The Road Department Head may revoke a permit or approval, issued under the provisions of this Ordinance, upon determination by the Road Department Head that the structure or encroachment for which the permit or approval was issued is in violation of, or not in conformity with, the provisions of this Ordinance.

I. Notice of Removal. Where the Road Department Head determines that an encroachment must be removed from the right-of-way for construction, maintenance or safety purposes, he may (but is not required to unless otherwise specified herein) issue a notice of removal, giving up to 30 days to remove the structure. After the deadline, the structure may be removed by the County with the costs to be charged to the property owner. The owner may also be cited, fined or have other enforcement action taken against him to secure compliance with this ordinance and/or reimbursement.

Section 8. Severability

Should any section or provision of this Ordinance be declared by the courts to be unconstitutional or invalid, such declaration shall not affect the validity of the Ordinance as a whole or any part thereof other than the part so declared to be unconstitutional or invalid. It is the intent that any provision declared unconstitutional shall be severed from the Ordinance, and the remainder of the Ordinance remain in effect.

Exhibit D

CONSTITUTIONALITY OF SPECIFIC ZONING ORDINANCE PROVISIONS

1. Sign ordinance allowed some noncommercial signs, but, by definition, limited billboards only to commercial messages. Because the section of the ordinance dealing with billboards limited these signs only to commercial messages, court struck provision in the ordinance which provided that “if not otherwise stated, any sign not specifically permitted in a zoning district as provided under the applicable section, shall be prohibited in that district.”²
2. Sign ordinance had a variety of regulations relating to the need for permitting and the form that a sign may take (no visible movement, no flashing, rotating, etc. lights, etc.)m but expressly exempted certain enumerated categories of signs such as: (1) “flags and insignia of government, religious, charitable, fraternal, or other organizations”; (2) government identification signs and informational signs; (3) holiday lights and decorations; and (4) religious displays.³
3. Sign ordinance required a permit to erect or alter a sign, but exempted certain types of signs including (1) flags representing a governmental unit or body; (2) public signs posted by the government; (3) temporary political signs; (4) real estate signs; (5) construction signs; (6) street address signs; (7) certain signs displayed on vehicles; (8) signs commemorating holidays; (9) menus posted outside restaurants; (10) yard sale signs; and (11) signs customarily attached to fixtures such as newspaper machines and public telephones.⁴
4. Sign ordinance limited on-premise signs to messages advertising a product, person, service, place, activity, event, or idea directly connected with the property, thereby limiting on-premise signs to commercial messages concerning goods and services available on the property or which specifically pertain to the type of activity being advertised. The provision, in effect, prohibited the display of noncommercial messages in places where commercial signs were permitted.⁵
5. Sign ordinance allowed noncommercial signs that carry or display religious symbols, commemorative plaques of recognized historical societies and organizations, signs carrying news items or telling the time or temperature, signs erected in discharge of any governmental function, or temporary political campaign signs, however did not allow any other noncommercial or ideological signs meeting the structural definition of the ordinance, regardless of their effect on traffic safety or aesthetics.⁶

² KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261 (C.A.11th 2006).

³ Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (C.A.11th 2005).

⁴ Dimmitt v. City of Clearwater, 985 F.2d 1565 (C.A.11th 1993).

⁵ Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393 (1996).

⁶ Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981).

6. Sign ordinance gave an exception for quasi-public institutions located off of major thoroughfares where such facilities cannot be seen by the motoring public from a major thoroughfare to have the right to place one off-premise directional sign in the City of Union City at least 50 feet from any intersection so as not to obstruct the view of the motoring public. Court held that the ordinance favored quasi-public institutions based on the classification of the speaker rather than the content of the message, and therefore an equal protection analysis was proper. Because the Plaintiff was not a suspect class and erecting a sign within 50 feet of an intersection was not a fundamental right, the Court applied the “rational basis test,” which the City was able to satisfy.⁷
7. Sign ordinance allowed temporary political on-premise signs in residential zoning districts identifying or urging support for a particular election issue or candidate. The ordinance, however, did not provide for permanent signs expressing the political, religious, or other noncommercial views of residents, nor did it provide an adequate substitute for communication through residential signs that the city prohibited.⁸
8. Sign ordinance provided that no sign shall contain statements, words or pictures of an obscene, indecent or immoral character such as will offend public morals. Court held provision was void for vagueness because it required the speaker to step outside of his or her own moral consciousness and independently determine the moral sensibilities of the general public. Court also held that the provision was overbroad because its broad, undefined terms necessarily sweeps within its ambit both protected and unprotected speech.⁹
9. Sign ordinance restricted signs which identified and urged voter support for a particular election issue, political party or candidate for public office to certain zoning districts for a period of six weeks prior to and one week after a duly authorized election. Because the restriction applied only to political signs it was content-based.¹⁰
10. Sign ordinance required a permit prior to erecting any new billboard and was, therefore, a prior restraint on speech. The Court held that the ordinance was an impermissible prior restraint because it failed to contain explicit limits on the County Administrator’s discretion to grant or deny a permit because the ordinance only stated that permits shall be reviewed by the County Administrator and issued in accordance with the Standard Building Code (SBC), however the SBC does not provide specific grounds under which an Administrator may deny a billboard permit application.¹¹
11. Sign ordinance limited political message signs to 32 square feet, except in residential districts where they could be no larger than six square feet. The Court found the

⁷ Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 399-400 (1996), But see Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1265-1266 (C.A.11th 2005).

⁸ Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 398-399 (1996).

⁹ Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 402 (1996).

¹⁰ Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 400-401 (1996).

¹¹ Cafe Erotica of Fla., Inc. v. St. Johns County, 360 F.3d 1274, 1282-1285 (C.A.11th 2004).

provision to be based on content by allowing commercial messages to be displayed more prominently than political messages. The Court applied strict scrutiny and struck the ordinance as unconstitutional because the County's goals of safety and aesthetics were not compelling reasons for the disparate treatment that were narrowly tailored to further those interests.¹²

12. Sign ordinance contained provision which identified 23 types of signs which were exempt from the permit requirements in all districts. Some of the exemptions included (1) signs located on fences or walls surrounding athletic fields or within sports arenas, stadiums and the like; (2) religious displays that do not constitute advertising; and (3) signs used as a construction sign by the general contractor of a development. Court found the provisions to be content-based and struck the provisions under a strict scrutiny standard.¹³
13. Sign ordinance contained a provision prohibiting signs mounted on a vehicle intended to attract attention for the purpose of advertising a business, product, service or the like, but not for other purposes, and also excluded certain prohibited signs based on the type of vehicle, including emergency vehicles, taxi cabs and delivery vehicles. The Court found this to be a double content-based provision and struck the provision under a strict scrutiny standard.¹⁴
14. Sign ordinance provision prohibited signs employing motions, visible parts, or the illusion of motion, but excluded time and temperature signs. Court found this provision to be content-based and struck the provision under a strict scrutiny standard.¹⁵
15. Sign ordinance provision banned all off-premise signs. Ordinance also contained a provision that grandfathered all existing off-premise signs, but provided that when an existing off-premise sign was removed or destroyed, no new off-premise signs will be permitted to be constructed in its place. The Court found the provision to be constitutional under an intermediate scrutiny standard.¹⁶
16. Sign ordinance provided that each commercial lot, building or tenant space may have one real estate 'for sale' or 'for rent' sign, provided such sign is located on the subject lot or premises" and does not exceed the size limitations. As to political signs, the ordinance provided that political campaign signs were allowed and that no permit was required for such signs, however, they could only be located in a residential zoning district on property which is improved with a dwelling. The Court found that because political signs were subject to more regulatory burden than real estate signs, the sign ordinance discriminated against political speech in favor of commercial speech and was, therefore, a content-based regulation.¹⁷

¹² Cafe Erotica of Fla., Inc. v. St. Johns County, 360 F.3d 1274, 1291 (C.A.11th 2004).

¹³ Bonita Media Enterprises, LLC v. Collier Co. Code Enforcement Bd., 2008 WL 423449 (M.D.Fla. 2008).

¹⁴ Bonita Media Enterprises, LLC v. Collier Co. Code Enforcement Bd., 2008 WL 423449 (M.D.Fla. 2008).

¹⁵ Bonita Media Enterprises, LLC v. Collier Co. Code Enforcement Bd., 2008 WL 423449 (M.D.Fla. 2008).

¹⁶ Bill Salter Advertising, Inc. v. City of Atmore, 2008 WL 793776 (S.D.Ala. 2008).

¹⁷ Beaulieu v. City of Alabaster, 454 F.3d 1219, 1233 (C.A.11th 2006).

17. Sign ordinance provision stated that “any property owner, business, tenant, agent, or contractor *may* be required to obtain a permit from the Public Works Department and/or the Department of Planning and Zoning prior to the erection, replacement, reconstruction, or relocation of a sign. Said permit *may* be required for all signs except those specifically exempted within this ordinance. *If* said permit is required, the fee for a sign permit will not be required in addition to the building permit.” The Court found that the ordinance lacked any time limit within which the City must grant or deny an application. Further, the Court found that the provision gave the City unbridled discretion as to whether or not to require a permit from a party wishing to construct a sign. The Court ultimately held that the lack of objective criteria to guide the City official’s decisions violated the First Amendment.¹⁸

¹⁸ Lamar Co., LLC v. City of Marietta, 208 WL 696683 (N.D.Ga. 2008).