

GIVE ME A SIGN:

REGULATING STREET GRAPHICS

presented to:

TEXAS CITY ATTORNEY ASSOCIATION
SEMI-ANNUAL CONFERENCE

presented by:

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TABLE OF CONTENTS

1. INTRODUCTION.....	3
2. FOUNDATION	3
3. CLEAR STANDARDS.....	7
4. POLITICAL SIGNS.....	8
5. NONCONFORMING SIGNS.....	11
6. NATIONAL-INTERNATIONAL CHAINS.....	12
7. ENTRANCE CORRIDORS.....	12
8. HISTORIC PRESERVATION.....	13
9. MORATORIUMS.....	13
10. LEGAL CHALLENGES.....	14
11. CONCLUSION	15
12. REFERENCE MATERIAL.....	15
13. APPENDICES.....	16
Appendix A: Internal Sign Questionnaire for City Staff.....	17
Appendix B: New Sign Questionnaire for P&Z.....	28
Appendix C: Review of Legislation.....	20
Appendix D: Sample Sign Ordinance	21

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1. INTRODUCTION

A. Street Graphics

Current terminology used by the American Planning Association employs the term “street graphic,” rather than “sign.” *Street* because the recommended system is concerned with communication along roads and highways, and *Graphic* because the system deals with symbols and letters as they appear on all kinds of signage in the urban environment.¹ This paper sticks with the word *Sign*, and addresses common methods of regulating signs and identifies some emerging trends.

B. Purpose

The primary function of signs is to index the environment (i.e., to tell people where to find what). A good sign ordinance can serve this function by contributing to the effective communication between people and their environment that is also aesthetically pleasing and contributes to automobile traffic safety – it encourages graphic expression that is compatible with the surrounding area.

2. FOUNDATION

A. Key Requirements

In order to withstand judicial scrutiny, it is generally required that sign regulations:

1. be content-neutral time, place, and manner restrictions;
2. be justified without reference to the content of the regulated speech;
3. serve a significant governmental interest; and
4. leave open ample alternative channels for communication of the information.²

B. Justifications

Sign ordinances are typically justified as a legitimate exercise of municipal police power to:

1. regulate aesthetics; and
2. improve traffic safety.

A majority of US courts have upheld sign ordinances that are based solely on aesthetic considerations.³ Sign regulations, like other land use tools, can be utilized to *preserve*, or in some cases *create*, the look and feel of a community. With the explosive growth that is occurring across Texas, maintaining or accentuating the appearance of a community is becoming an increasingly difficult task. New residents, businesses and industries come to town. The desire for new amenities sometimes conflicts with the desire to preserve the *status quo*.

¹ *Street Graphics and the Law*, Daniel Mandelker with Andrew Bertucci and William Ewald, American Planning Association, Planning Advisory Service Report Number 527 (2004).

² *Valley Outdoor, Inc. v. County of Riverside, California*, 337 F.3d 1111 (9th Cir. 2003).

³ *Id.* at 89 [fn. 17].

In small doses, signs, may not be intrusive to the average person. However, an unrestricted abundance of such structures can dramatically affect the landscape of a quaint, rural community. According to the organization Scenic America:

“Billboard control is especially important for communities that depend on tourism. According to the Travel Industry Association of America, travelers spent \$541 billion nationwide in 1999. The President’s Commission on American Outdoors reported that natural beauty was the most important criteria for adults choosing a site for outdoor recreation. The more a community does to enhance its unique natural, scenic, historic and architectural assets, the more tourists it attracts.”⁴

C. Authority to Regulate

With certain restrictions, Texas municipalities are granted specific statutory authority to enact regulations for the relocation, reconstruction, or removal of signs within the city limits and extraterritorial jurisdiction (ETJ).⁵ A person may not place a sign on the right-of-way of a road or highway maintained by a city without municipal authorization.⁶ The Texas Department of Transportation (TxDOT) exercises regulatory authority over signs along certain roadways. No outdoor advertising sign that is visible from the main-traveled way of an interstate or primary highway may be erected or maintained along a regulated highway, except in accordance with state regulation, which includes receiving a permit.⁷ If a city has established a program regulating signs, a permit issued by the city shall be accepted in lieu of a permit issued by TxDOT. The city must certify to TxDOT that it has established and will enforce standards and criteria for size, lighting, and spacing of outdoor advertising signs.⁸

D. Aesthetics

Addressing citizen concerns over aesthetics and falling property values (actual or perceived) is clearly a legitimate government interest.⁹ Texas cities have authority to regulate the community’s aesthetic interests through broad municipal police powers. Cities have the authority to adopt ordinances that are “for the good government, peace, or order of the municipality or for the trade and commerce of the municipality.”¹⁰ Cities may adopt zoning regulations promoting “public health, safety, morals or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance or significance.”¹¹

That being said, signs warrant a level of free speech protection as an important media for communication. The protections must balance the often devastating aesthetic impact signs

⁴ Facts for Action, Scenic America.

⁵ Tex. Loc. Gov’t Code § 216.003.

⁶ Tex. Transp. Code Ann. § 393.0025(a).

⁷ 43 TAC § 21.146.

⁸ 43 TAC § 21.151.

⁹ *CMH Manufacturing, Inc. v. Catawaba County*, 994 F.Supp.697, 710 (W.D. N.C. 1998), citing *Texas Manufactured Housing Association, Inc. v. City of Nederland*, 101 F.3d 1095, 1101 n. 10 (5th Cir. 1996), cert. denied, 521 U.S. 1112 (1997) (“There can be no dispute that the governmental interest at stake is legitimate. Maintenance of property values has long been recognized as a legitimate objective of local land use regulation.”).

¹⁰ Tex. Loc. Gov’t Code § 51.001(1).

¹¹ *Id.* § 211.001.

have on an otherwise picturesque community. A billboard that goes without notice in *Austin* can be a tremendous eyesore in *Fredericksburg*. State and federal highway beautification efforts, combined with traditional local zoning authority have given cities a sound basis for the reasonable regulation of these communications devices. Common elements of local sign regulations include durational limits, setbacks, surface area parameters, height restrictions, limitations on illumination and animation, color palettes, and required building materials. However, regulators must always be aware of statutory and constitutional limitations on their power to regulate signs.

The U.S. Supreme Court has recognized that cities can perceive billboards, by their very nature and wherever located and however constructed, as “esthetic harm.”¹² Such aesthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only public rationalization of an impermissible purpose (e.g., suppression of speech).¹³ The Court recognized that 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.¹⁴ It is interesting to note that in *Metromedia, Inc. v. City of San Diego*, the US Supreme Court ultimately found the ordinance at issue to be unconstitutional on its face, because it reached too far in into the realm of protected speech by allowing on-site billboards and non-commercial off-site billboards while prohibiting off-site commercial billboards.¹⁵

E. Safety

In the landmark *Metromedia* case, a plurality of the US Supreme Court, and three of the dissenters, agreed that, as a matter of law, billboards and other forms of signage are intended to divert, and do divert, a driver’s attention away from the roadway.¹⁶ A few years before the *Metromedia* opinion, a study done by the University of Texas concluded:

1. Any number or color of distractions (e.g., signs) will quite likely cut down on a driver’s ability to react appropriately; and
2. The presence of signs within view, especially close to the roadway, distract from driving tasks.¹⁷

F. Administrative Process

Sign ordinances that contain clear permitting procedures can help municipalities avoid litigation, or at least help municipalities prevail in litigation. Applicants should be made to exhaust their administrative remedies prior to challenging municipal sign regulations in court.¹⁸

¹² *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981).

¹³ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

¹⁴ *Metromedia, Inc.*, 453 U.S. at 502.

¹⁵ *Id.*

¹⁶ *Id.*, at 490

¹⁷ Relationship Between Roadside Signs and Traffic Accidents: A Field Investigation (1978), Holahan, Charles, Campbell, Michael, Culler, Ralph, and Veselka, Celia; Texas Office of Traffic Safety at the University of Texas at Austin, as reported in Warning Signs: Billboards, Signs, and Traffic Safety, Scenic America (1996).

¹⁸ See *National Advertising Co. v City of Miami, Florida*, 402 F.3d 1335 (11th Cir. 2005)(The company never properly pursued its claim through the administrative process that the city's zoning ordinance made available to

G. Extraterritorial Jurisdiction

State law grants municipalities the authority to regulate signs in both the city limits and the ETJ. If the city is going to attempt to regulate in the ETJ, it should make certain that the ordinance expressly applies to the ETJ. A mere reference to the ETJ in the caption may not be sufficient. Ordinance writers are urged to clarify throughout the ordinance that the rules apply to the city limits and ETJ.¹⁹

H. Content Neutral

Avoiding the constitutional landmines involving Freedom of Speech and the First Amendment require the crafting and enforcement of sign regulations that do not discriminate based on the message being communicated by the sign. The more neutral and objective the regulation, the better off the city is going to be.²⁰ There are circumstances, however, when differentiating between categories of signs (such as commercial v. non-commercial) are justified.²¹ Just be careful when the message being targeted by the regulations can be construed to be political in nature.²²

them. The claim was not ripe. The company, at a minimum, had the obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the city regarding the application of the zoning scheme to the company's permits.).

¹⁹ *Brown Outdoor Advertising v. Town of Prosper* (The Town's ordinance prohibited commercial billboards in the town's ETJ. The advertising company unsuccessfully sought a declaratory judgment that the ordinance did not have such effect. The court, noting that the ordinance's caption and its general statement of purpose specifically stated that the ETJ was to be regulated, concluded that the ordinance included the ETJ within its sign regulations. The court gave great weight to the fact that the ordinance, which prohibited commercial billboards, did not refer only to areas within the town limits.).

²⁰ See *TxDOT v. Barber*, 111 S.W.3d 86 (Tex. 2003)(Essentially, the Texas Highway Beautification Act (the Act), Tex. Transp. Code § 391, prohibits signs on non-commercial, non-residential property that was located within a certain distance of an interstate highway, if the sign related to an activity being conducted on the property. The landowner posted a billboard on his non-commercial, non-residential property that overlooked an interstate in Texas. The billboard advised drivers to "Just Say No to Searches" and gave a telephone number where callers could receive a recorded message about the landowner's opinions about illegal searches being conducted on the highway. The Act, as applied to the landowner's billboard, did not impermissibly infringe upon the landowner's free speech rights under the United States Constitution. The Act was content neutral and constituted a valid time, place, and manner restriction on speech.).

²¹ See *Lehman v. Shaker Heights*, 418 US 298 (1974)(A political candidate wanted to buy advertising space inside public transportation vehicles. The city refused to accept the ads, under their policy that only commercial and public service ads were accepted. The court upheld the city's policy, with the prevailing plurality explaining that "a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.").

²² See *Boos v. Barry*, 485 US 312 (1988) (The Court invalidated a sign display portion of the District of Columbia Code, enacted by Congress, which forbade the display within 500 feet of any foreign embassy of any sign "tending to bring a foreign government into public odium or public disrepute." Without deciding if the protection of the dignity of foreign diplomats was a compelling state interest, the Court concluded that the provision was not narrowly tailored to serve such interest, because a less restrictive alternative – 18 U. S. C. § 112, which prohibits intimidating, coercing, or harassing foreign officials or obstructing them in the performance of their duties – served that purpose with far less restriction on speech.).

I. Practical Substitute

A key characteristic of any successful sign regulation is that it leaves available alternate means of communicating the message restricted by the sign regulation.²³ This is especially true of many political signs, even in residential areas.²⁴

3. CLEAR STANDARDS

A. Limit Discretion

Because of the constitutional implications of sign regulations, it is important that municipal ordinances contain clear, specific standards in order to avoid unbridled administrative discretion.²⁵ Procedural safeguards regarding the permitting process can protect the city from liability for abuse of discretion.²⁶

In addition to helping a municipality avoid content-based allegations, clear standards can also prevent an ordinance from being found void for vagueness. This is especially true in the Design Review phase of the permitting process. Design Review procedures may violate the First Amendment as a prior restraint on the exercise of free speech through the display of a sign.

B. Timelines

A good sign ordinance includes a schedule for submissions, administrative action, and council approval (if required).²⁷

²³ See *Linmark Associates v. Township of Willingboro*, 431 US 85 (1977)(The town passed an ordinance which forbade the posting of "For Sale" signs in residential neighborhoods, with the purpose of trying to stop "white flight" panic selling. The court declared the ordinance unconstitutional, saying that all other options for expressing the same message were inadequate because of cost and lower likelihood of reaching persons who were deliberately seeking the information.).

²⁴ *Ladue v. Gilleo*, 512 US 43 (1994)(The court struck down a city ordinance which prohibited the posting of political signs in residential neighborhoods. The ordinance restricted too much speech and did not leave adequate alternatives for expressing the same message. The court said "Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window signs may have no practical substitute.").

²⁵ See *Café Erotica of Florida, Inc. v. St. Johns County, Florida* 360 F.3d 1274 (11th Cir. 2004)(The court held that the ordinance lacked specific and definite statutory checks on the county administrator's discretion, thereby impermissibly creating the potential for content-based discrimination. The county's stated goals to protect the safety and aesthetic interests of its citizens, while "substantial," could not justify allowing billboards to be built up to 560 square feet while allowing a maximum of only 32 square feet for political message signs. Severance of just this one provision would not address the court's concerns with the Administrator's unfettered discretion).

²⁶ See *THG Enterprises, Inc. v. City of El Cajon, California*, 60 Fed. Appx. 711; (9th Cir. 2003); 2003 U.S. App. LEXIS 6624 (A person of ordinary intelligence would not have reasonably known whether placing an off-site real estate sign on public property was prohibited. The municipal code was an unconstitutional prior restraint on speech. Even if it was assumed the ordinance was content neutral, it did not provide adequate procedural safeguards governing when, where, or how a permit was granted.).

²⁷ *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Florida*, 348 F.3d 1278 (11th Cir. 2003)(Although the lack of a time limit for consideration of applications could be used to arbitrarily suppress disfavored speech, that alone did not render the sign ordinance unconstitutional. The ordinance was content-neutral, based upon considerations of uniformity, aesthetics, and safety, and did not permit the exercise of unlimited discretion by the city, but rather contained adequate standards to guide official decision-making based

C. Inspections

An aspect of the municipal regulatory process may call for the inspection of certain signs, and impose a corresponding fee to pay the administrative costs of those inspection programs.²⁸

D. Specifications

To prevent the hazards posed by signs that divert and distract motorists, municipalities may limit a sign's dimensions.²⁹

- Height³⁰
- Moving Images³¹
- Numbers³²
- Illumination³³

Legal challenges to the structural regulation of signs are rare.³⁴

4. POLITICAL SIGNS

A. Proceed with Caution

Restricting political signs is risky business. Cities can establish reasonable, nondiscriminatory restrictions on such traits as size.³⁵ However, cities cannot enact blanket

upon the objective criteria set forth in the ordinance. Rejection of permit applications was not permitted based on proposed content, and administrative and judicial review of the denial of permits was available).

²⁸ See *Clear Channel Outdoor Inc. v. City of Los Angeles, California*, 340 F.3d 810 (9th Cir. 2003) (The Court deemed it okay to require the inspection of exterior signs in the city, differentiating between off-site and on-site signs. Los Angeles' ordinance subjected all off-site sign structures to regular inspection and required the person in control of an off-site sign structure to pay an annual fee for inspection. The on-site/off-site distinction was not unconstitutional. Moreover, the fee was imposed on off-site structure regardless of whether they carried a noncommercial message, and the designation of on- or off-site was a function of the permittee's choice).

²⁹ *Sun Oil Co. v. City of Madison Heights*, 199 N.W.2d 525, 529 (Mich. App. 1972).

³⁰ Height restrictions, by their very nature, require that a maximum be established at some level deemed adequate to the specific community. See *Prime Media Inc. v. City of Brentwood, Tennessee*, 398 F.3d 814; (6th Cir. 2005) (The court stated that the question was not whether a municipality could explain why the 120-square-foot limitation detracted more from the aesthetics of the city than signs with smaller sign face sizes, but whether the regulation was substantially broader than necessary to protect the city's interest in eliminating visual clutter and advancing traffic safety).

³¹ Courts have upheld a city law which prohibited signs with moving images. See *State of Minnesota v. Dahl*, 676 NW2d 305 (Minn. App. 2004).

³² The Courts have generally upheld limitations on the number of signs allowed. See *People v. Goodman*, 290 N.E. 2d 139 (N.Y. 1972); *Sun Oil Co. v. City of Upper Arlington*, 379 N.E. 2d 266 (Ohio App. 1977); *Judd v. Zoning Hearing Board*, 460 A.2d 202 (Pa. Cmwlth 1983).

³³ The cases have upheld restrictions on the illumination of signs, in part, because light migration can have a measurable adverse impact on the valuation and marketability of nearby properties and affect traffic safety. See *Ellen Media Co. v. City of Tucson*, 7 P.3d 136 (Ariz. App. 2000); *Wallace v. Brown County Area Plan Commission*, 689 N.E.2d 491 (Ind. App. 1998); and *City of Fayettevill v. S&H, Inc.*, 547 S.W. 2d 94 (Ark. 1977).

³⁴ Sign Regulation for Small and Midsize Communities, American Planning Association, Planning Advisory Service Report Number 419 (1989).

prohibitions on all political signs in residential neighborhoods.³⁶ When faced with the issue, the U.S. Supreme Court rejected a city’s “time, place and manner” defense, finding that there was no adequate substitute for a political sign on a home.

While signs are certainly a form of speech worthy of First Amendment protection, they may be subject to municipal regulation because, “unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.”³⁷

B. Durational Limits

Political subdivisions cannot impose overly strict durational limits. In striking down one post-election removal requirement, a court stated has that “there is no natural termination date for a ‘cause’ sign; a cause and a private resident’s passion for it exists as long as the cause exists.”³⁸ The Court held that although traffic safety and aesthetics are *significant* interests, they are not *compelling* interests, especially given the nature of the First Amendment rights at stake.³⁹ Although restrictions imposed on political signs but not commercial signs are not content-neutral, they may still survive constitutional scrutiny if they are narrowly tailored. In order to narrowly tailor such restrictions, the city must be prepared to demonstrate how its interests in aesthetics justify a durational limit on political signs.⁴⁰

C. Size & Locations

In 2003, the Texas Legislature enacted a statutory provision that restricts the ability of municipalities to regulate signs that contain primarily a *political* message if the political signs

1. are on private property;
2. are not located within the public right-of-way;
3. do not exceed a surface area of 36 square feet;
4. are not artificially illuminated;
5. and do not have moving parts.⁴¹

There are also state (and sometimes local) limitations on the ability to place certain signs within a certain proximity to polling places. These types of limits are generally upheld.⁴²

D. Broader than Elections

Speech that may be protected as “political” is not necessarily limited to communications regarding elections, government, or partisan politics. Religious speech is afforded similar

³⁵ *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976).

³⁶ *Ladue v. Gilleo*, 512 U.S. 43 (1994).

³⁷ *Id.*, at 48.

³⁸ *Curry v. Prince George’s County*, 33 F. Supp.2d 447.

³⁹ *Id.*, at 452.

⁴⁰ See *Whitton v. City of Gladstone*, 832 F.Supp. 1329, 1335 (W.D.M.O. 1993).

⁴¹ Tex. Loc. Gov’t Code §216.903.

⁴² *Burson v. Freeman*, 504 US 191 (1992)(The Court upheld a 100 foot protection zone -- no signs or electioneering of any kind – around entrances to polling places on election day. Although this was a total ban on speech at the core of First Amendment protection, in a public forum, the Court approved the law as narrowly tailored to serve compelling state interests in preventing voter intimidation and preventing election fraud.).

protections, including the constitutional right to post certain signs on one's own property in residential areas. Consequently, municipalities should use caution when requiring permits for signs rendering political, social or religious messages.⁴³ Such requirements can have a chilling effect on Free Speech.

E. Commercial Speech

Although *Central Hudson Gas and Electric v. Public Service Commission*,⁴⁴ is not a sign case, it is important in the law of signs because it states the test for constitutionality of restrictions on commercial speech. The steps are:

1. Is the speech protected by the First Amendment? If it is false or misleading, or concerns illegal activity, it is not protected.
2. Does the regulation serve a substantial governmental interest?
3. Does the regulation directly advance the substantial governmental interest?
4. Is the regulation more restrictive than necessary to serve the governmental interest.⁴⁵

Metromedia is the court's only modern case on regulation of billboards ("offsite advertising").⁴⁶ The case produced five different opinions. Scattered among these opinions were five or more votes (a majority of the 9 votes on the court) for the following points:

- while the government has a legitimate interest in controlling the non-communicative aspects of billboards, First Amendment concerns place some limits on billboard regulation;
- commercial speech has less First Amendment protection than noncommercial speech;
- regulations on commercial speech are measured under the *Central Hudson* test;
- the government's interests in traffic safety and community esthetics are enough to justify a complete ban on offsite commercial billboards.
- San Diego's sign ordinance was unconstitutional because it had two fatal flaws:
 1. it allows commercial messages in certain places where noncommercial messages (advocacy) are not allowed; this is a violation of the principle that noncommercial speech is entitled to a higher degree of First Amendment protection than commercial speech; and
 2. the ordinance results in the city showing a preference for certain kinds of noncommercial speech over other kinds of noncommercial speech; this was a violation of the principle that regulations may not be based on message content.

⁴³ See *Sybil Peachlum v. City of York, Pennsylvania*, 333 F.3d 429 (3rd Cir. 2003)(City unsuccessfully sought to bar woman from posting a sign in her front yard that included the words, "Peachy News. Jesus is Alive." The existence of the permit system chilled speech.).

⁴⁴ 447 US 557 (1980).

⁴⁵ This last element, the "degree of fit" between means and ends was refined in *Board of Trustees v. Fox*, 492 US 469 (1989), to "a means narrowly tailored to achieve the desired objective."

⁴⁶ 453 US 490 (1981).

5. NONCONFORMING SIGNS

A. Definition

The enactment of new regulations will often have the effect of classifying many existing signs as nonconforming uses (n/c/u). A common definition of nonconforming use is:

An activity or use (e.g., a sign) that was lawful prior to the adoption, revision, or amendment of the ordinance, but fails by reason of such adoption, revision or amendment to conform to the present requirements.⁴⁷

These signs are often referred to as being “grandfathered,” and as such are typically allowed to remain as-is, so long as they are not materially altered.

B. Registration

Some municipalities chose to regulation n/c/u signs by creating a registry. Signs not registered within a specified period are said to lose their grandfathered status.

C. Condition for Future Signs

One option for hastening the removal or upgrade of n/c/u signs is to condition the approval of permits for additional signage at the site upon bringing the site into full compliance. Such a condition should be expressly stated.⁴⁸

Courts have upheld regulatory provision requiring that signs come into compliance in order to receive permit approval for non-sign related construction projects.⁴⁹

D. Amortization

The specification of a reasonable amortization period can be a means of forcing nonconforming signs to come into compliance, or be removed, without constituting a compensable taking of property.⁵⁰

⁴⁷ The New Illustrated Book of Development Definitions, Moskowitz & Lindbloom. p. 185 (1999).

⁴⁸ *City of Fredericksburg v. Bopp*, 126 S.W.3d 218 (Tex. App.—San Antonio 2003) (The trial court made specific findings regarding the defenses of unclean hands and estoppel and found that, *inter alia*, the permit issued was not conditioned on the removal of the old pole sign and a city employee represented to the owner that the new sign application was in compliance with the city code. The city was not entitled to equitable relief because it had unclean hands, and its actions estopped it from enforcing the sign ordinance. The evidence established that the city's own conduct was marked by a want of good faith and violated principles of equity. The evidence reflected that the city issued a valid permit without any conditions and the owner relied on the permit by expending substantial monies to build a wall sign that complied with the permit. The city's evidence that the owner represented that he would remove the pole sign was disputed, and the trial court chose to believe the owner.)

⁴⁹ See *OutdoorSystems, Inc. v. City of Mesa, Arizona*, 997 F.2d 604 (1993)(The court upheld an ordinance that read: “Any [specify permit] that authorizes the development of a premises, any building addition, an increase in gross floor area of 25 percent or more, or any exterior structural remodeling of a building facade on which a nonconforming sign is located, shall require all nonconforming signs on the premises for which the [specify permit] is issued to be brought into conformity with the provisions of this Chapter.”)

⁵⁰ *Eller Media Company v. City of Houston*, 101 S.W.3d 668 (Tex. App.—Houston (1st) 2003) (The amortization periods of 17 years and 21 ½ years permitted by the city’s sign code were deemed sufficient for the sign company to recoup its investment).

6. NATIONAL-INTERNATIONAL CHAINS

Strict sign regulations sometimes stem from a growing aversion in some communities to the proliferation of national or internationally franchised chain stores and restaurants. An increasing number of residents and tourists are becoming opposed to *The GAP-ification* of small-town Texas. It can be frustrating for a tourist to travel a great distance to experience the unique character of a particular city, only to encounter a McDonalds, Starbucks, or Barnes & Noble on every corner. Consequently, impacted local governments have legitimate concerns that the culture of a community (which may be its economic lifeblood) will be diluted or destroyed by fast food restaurants or chain retail stores that visitors can easily find in their home towns. As noted in a recent article about Arizona cuisine,

“All across America, chain restaurants are driving independent owners out of business and becoming the new vanguard- the arbiters, improbably, of taste.”⁵¹

In the Tucson area, associations of locally-owned eating establishments are being formed in order to educate the public, establish cooperative purchasing programs, job exchange programs, national credit card processing, and group insurance rates. Tucson may be a “hotbed” for the “local is beautiful” movement, but the trend is being embraced across the country. According to an Arizona café owner and founder of *The Tucson Originals*,

“Chains have their place. But we are trying to prevent them from dumbing down the American palate to such a degree that food no longer possesses regional character, individuality, or sense of place. Chains are about sameness; independent restaurants are about originality and excitement.”

Restrictions on sign characteristics and prohibitions on menu boards might deter some chains.

7. ENTRANCE CORRIDORS

Thoroughfare Overlay Districts can be designed to provide for the diverse uses along a major arterial without sacrificing the integrity of the thoroughfare in its primary function as a means of moving vehicular traffic. Such a district can establish or protect an attractive, higher intensity use corridor composed, perhaps, of office, retail, limited light industrial and commercial uses, hotels, motels, or restaurants. The district would likely be created to enhance the image of key entry points, major corridors, and other areas of concern as determined by the city council, by maintaining a sense of openness and continuity. Signage is often key to these districts.

To protect the integrity of the thoroughfare, lot sizes are typically required to be larger, setback requirements are preferred to be greater, and more stringent access restrictions are imposed within the THOR District than in districts located outside the THOR district. Properties in the THOR District should typically be expected to have increased water, sewer, and drainage capacity, and increased fire protection to accommodate the higher intensity uses typically found

⁵¹ Rentschler, Kay, “Breaking the Chains,” *Gourmet* (October 2003).

in the district. The THOR District is an “overlay” district, meaning that the regulations within the district are in addition to the base zoning district that is being overlaid.

THOR Districts often include special sign regulations that only apply to those districts and supercede the general sign ordinance.

8. HISTORIC PRESERVATION

A typical feature of municipal sign ordinances are regulations that are designed to specifically protect historic areas. In these instances, the sign regulations are part of a larger historic preservation program.

The United States Supreme Court has recognized that historic preservation is a legitimate government purpose, and that restrictions on alteration and demolition are an appropriate way to carry out historic preservation goals.⁵² Many challenges to historic preservation ordinances are made on the basis of the vagueness or arbitrariness of the regulation. Thus, it is important for an ordinance to provide “adequate legislative discretion” to a historical preservation commission “to enable it to perform its functions consonant with the due process clause.”⁵³ To satisfy due process, however, the Fifth Circuit has stated that “guidelines to aid a commission charged with implementing a public zoning purpose need not be so rigidly drawn as to prejudge the outcome in each case, precluding reasonable administrative discretion.”⁵⁴

9. MORATORIUMS

If time is needed to explore how to integrate some of the regulatory tools presented in this paper, perhaps a *time out* would be justified. Moratoriums can be used to allow municipalities time to conduct research, confer with experts, solicit input from the regulated community, public feedback, prepare new sign regulations and structure administrative procedures. In 2002, the US Supreme Court held that a regulation that affects only a *portion* of the parcel whether limited by time, use, or space does not deprive the owner of all economically beneficial use. In the *Lake Tahoe* case, the Supreme Court upheld a series of local government moratoriums which totaled three years. While the Court did not expressly provide any particular guidelines for adopting moratoriums, the author offers the following suggestions:

- Clearly articulate the legitimate public purpose that is being served by the moratorium, such as the development of a comprehensive sign program or creation of administrative land use approval procedures.⁵⁵
- Specifically define the sign-related activities that are covered by the sign moratorium.
- Ensure that the sign moratorium is not discriminatory and is adopted in good faith.⁵⁶
- Ensure the temporary nature of the sign moratorium by expressly stating a termination date or duration. It may be wise to also provide means for extending the moratorium.

⁵² *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

⁵³ *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975).

⁵⁴ *Id.*, see also *Mayer v. City of Dallas*, 747 F.2d 323, 325 (5th Cir. 1984).

⁵⁵ See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, No. 00-1167 (April 23, 2002).

⁵⁶ See *Almquist v. Town of Marsham*, 245 N.W.2d 819 (Minn. 1976).

Note that in the *Lake Tahoe* case, neither the ordinance nor the resolution contained an express termination date.

- Keep the duration of the sign moratorium brief. They should only last as long as reasonably necessary. In *Lake Tahoe*, the majority stated any moratorium that lasts for more than one year should be viewed with “special skepticism.”
- Review the moratorium statute located in Chapter 212 of the Texas Local Government Code. The statute applies to a moratorium imposed on property development affecting “only residential property.”⁵⁷ Chapter 212 requires certain public notices, hearings, and written findings, and limits the duration and extension of moratoriums.

The most controversial aspect of moratoriums is the issue of public notice (generally) and notice to local developers (in particular). Builders often scream “fowl” when they perceive that a moratorium was snuck in. Unfortunately, if unscrupulous sign companies are forewarned that a moratorium is being contemplated, they typically rush to file shoddy plans and applications for inappropriate signs in an effort to get in under the wire.

10. LEGAL CHALLENGES

A. Remedial Action

The law seems to support the ability of municipalities to update or revise their regulations when faced with a legal challenge.⁵⁸ Thus, city officials should not be hesitant to fix sign regulations when glitches are discovered.

B. Severability

Like any good ordinance, a municipal sign regulation will include a severability clause that protects the remaining provisions should others be successfully challenged. At least one court has concluded that a billboard company had standing (the right to sue) to challenge only those portions of the sign ordinance under which its permits were denied.⁵⁹

⁵⁷ New legislation may expand the provisions of this statute to apply to moratoriums that effect: (a) on residential only, (b) commercial only, or (c) commercial and residential, only.

⁵⁸ See *National Advertising Co. v. City of Miami/Miami-Dade County, Florida*, 402 F.3d 1329 (11th Cir. 2005)(The appellate court held that, in the absence of any indication that the ordinance was amended to avoid jurisdiction or that the challenged statute would be reenacted, the company's claim was moot and the court thus lacked jurisdiction to decide the issue. The city, as a governmental entity, was entitled to a presumption that the city was unlikely to resume illegal activities, and the city's defense of its ordinance in the action did not by itself indicate that the city would subsequently adopt its prior version of the ordinance. The company's mere speculation concerning the city's future conduct did not satisfy the company's burden of presenting concrete evidence that the city was likely to reenact the prior ordinance.).

⁵⁹ *Granite State Outdoor v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003), rehearing en banc denied Feb. 18, 2004, 2004 U.S. App. Lexis 10522. The Clearwater case is binding precedent in the Eleventh Circuit (Alabama, Florida, Georgia) and may be used as persuasive authority in other parts of the country.

11. CONCLUSION

The courts have generally recognized the principle that *appearances matter*. Reasonable municipal regulations designed to stem the adverse effects of aesthetic harm caused by signs are legitimate and can withstand judicial scrutiny, provided the regulations fall within the broad parameters established by state and federal law. In addition to clearly establishing any public safety justifications for the regulations, it is always wise to carefully document the anticipated negative impacts the offending sign(s) will have on property values or the cultural / historical aspects of a community or neighborhood.

Municipalities undertaking the regulation of signs should:

- Document what the municipality had yesterday, has today, and wants tomorrow.
- Make sign regulations part of a comprehensive scheme of land use control.
- Establish clear standards and guidelines.
- Avoid crafting sign regulations that require judgment calls, or that provide city officials with too much discretion without adequate criteria.
- Provide a sound administrative procedure with an adequate appeals process.

*This paper is presented for educational purposes only
and in no way should be considered to constitute legal advice.
Recipients are encouraged to consult with their attorneys.*

12. REFERENCE MATERIAL

The Author recommends that drafters of sign ordinances consult the following materials:

- www.signlaw.com
- Sign Regulation for Small and Midsize Communities, American Planning Association, Planning Advisory Service Report Number 419 (1989).
- www.scenic.org
- Street Graphics and the Law, Daniel Mandelker with Andrew Bertucci and William Ewald, American Planning Association, Planning Advisory Service Report Number 527 (2004).

13. APPENDICES

APPENDIX A: Internal Sign questionnaire for city staff

APPENDIX B: New Sign Ordinance: Questionnaire

APPENDIX C: Review of Legislation

APPENDIX D: Sample Sign Ordinance

City Hall Solutions, LLC
12325 Hymeadow Drive
Building 3, Suite 200
Austin, Texas 78750



Phone: (512) 250-3457
Fax: (512) 250-0749
CityHallSolutions.com

INTERNAL SIGN QUESTIONNAIRE FOR CITY STAFF

circle one

1. Have you inventoried or compiled a sampling of existing signs? Yes / No
2. Do you want to require sign permits? Yes / No
- If yes:*
 - (a) Are permits required to remodel, repair or upgrade signs? Yes / No
 - (b) Will a city employee administer the permitting process? Yes / No
 - (c) Must permit applications be approved by P&Z? Yes / No
 - (d) Must permit applications be approved by Council? Yes / No
3. Will the City track and monitor existing nonconforming signs? Yes / No
4. Will the City charge an administrative fee for permit applications? Yes / No
5. Will the City grant sign variances? Yes / No
- If yes:*
 - (a) Will a city employee administer the variance process? Yes / No
 - (b) Must variances be approved by P&Z or another board? Yes / No
 - (c) Must variance be approved by Council? Yes / No
6. May sign variances be requested at any time during site development process? Yes / No
7. Are there unique weather conditions that influence sign regulations? Yes / No
8. Are there unique traffic conditions that influence sign regulations? Yes / No
9. Should the sign regulations vary according to Zoning district? Yes / No
10. Will sign regulations be enforced through municipal court? Yes / No
11. Will sign regulations be enforced through civil court? Yes / No
12. Have stakeholders been engaged in the sign regulation process? Yes / No



MEMORANDUM

TO: Planning & Zoning Commission
FROM: Alan J. Bojorquez & Walter Brown
DATE: May 24, 2005
RE: **New Sign Ordinance: Questionnaire**

This questionnaire is an exercise in decision-making. The data generated by this instrument will help the City staff and consultants prepare Draft "A" of the new Sign Ordinance. The choices provided below are not the only options, and do not necessarily reflect the limits that will be eventually codified.

Circle One

1. Can a desirable standard be discerned among existing signs? Yes / No
2. May individual tenants in a Shopping Center erect ground signs? Yes / No
3. Should businesses that share a sign be eligible for size variances? Yes / No
4. Wall signs with street frontage may only comprise what % of the wall? 50 / 60 / 70
5. Should signs be allowed to move (be animated) or change copy automatically? Yes / No
6. Should new portable signs be allowed? Yes / No
7. Should new Billboards (large, off-premises signs) be allowed? Yes / No
8. Should certain types of signs require landscaping? Yes / No
9. Do you want to restrict the glare from illuminated signs? Yes / No
10. A business with frontage on one street should be allowed to have how many signs? 1 / 2 / 3
11. A business with frontage on two streets should be allowed to have how many signs? 1 / 2 / 3
12. If the speed limit on the street is 45 mph, signs should be spaced how far apart? 100 / 200 / 300
13. If the speed limit on the street is 55 mph, signs should be spaced how far apart? 100 / 200 / 300
14. If the speed limit on the street is 70 mph, signs should be spaced how far apart? 100 / 200 / 300
15. If the speed limit on the street is 30 mph, signs should be spaced how far apart? 100 / 200 / 300

- | | |
|---|----------------|
| 16. How many signs may a Shopping Center display at each entrance and exit? | 1 / 2 |
| 17. What is the minimum street frontage for a sign with more than 6 feet in area? | 75 / 100 / 125 |
| 18. How close can one sign of 6 square feet be to another sign of 6 square feet? | 75 / 100 / 125 |
| 19. How many feet should signs be setback from street rights-of-way? | 10 / 15 / 20 |
| 20. Should the City regulate political signs? | Yes / No |
| 21. Should the City regulate signs erected by churches or religious institutions? | Yes / No |
| 22. Should the City regulate signs erected by schools or educational facilities? | Yes / No |
| 23. Should the City strive to get rid of nonconforming signs? | Yes / No |
| 24. Should the City provide incentives for nonconforming signs to comply? | Yes / No |

REVIEW OF LEGISLATION

SB 1375 (Staples) Relating to billboards.

- provide that if a billboard within a city or its extraterritorial jurisdiction (ETJ) cannot be continued because of highway widening or construction, the owner of the billboard is entitled to relocate the use, structure, or permit to another location within the city or its ETJ, even if the city must enact a special exception to an existing ordinance; and
- provide that if the city prohibits the relocation, it must pay just compensation, just as if it had condemned the billboard.

HB 997 (Geren) Relating to procedures for compensating owners of outdoor advertising that is subject to condemnation or obstruction by certain governmental entities or public utilities.

- Creates a number of new protections for outdoor advertising.

HB 2950 (Geren/SB 1375 Staples) Relating to the regulation of outdoor advertising and the establishment of a scenic byways program.

- The House bill changes the way billboards are valued in condemnation to make them subject to a real property valuation, as opposed to personal property, which is the current practice. In cases of highway construction, the bill gives sign owners the right to relocate the sign anywhere where outdoor advertising is permitted under Section 391.031 of the Transportation Code in the city or its ETJ and requires the city to allow the relocation by special exception. If the city fails to approve the relocation then it must paying damages for the sign. The bill also gives the sign owner the right to adjust the height of a sign or reorient it in certain circumstances.
- SB 1375 removes some of the worst aspects of HB 2950. SB 1375, however, still changes the way billboards are valued in condemnation to make them subject to a real property valuation, as opposed to personal property, which is the current practice. And In cases of highway construction, it creates relocation rights and entitles billboard owners to special exceptions necessary for sign relocation.
- Creates a number of new rights for billboard owners.

HB 2658 (Krusee) Relating to erecting an off-premise sign adjacent to and visible from certain roads.

- Bans off-premise sign adjacent to and visible from certain roads including US 290 between Austin and Fredericksburg.

HB 2051 (Krusee) Relating to the adoption of a state scenic byways program.

- Instructs TxDOT to establish a scenic byway program for certain roads and then prohibits outdoor advertising prohibit outdoor advertising in a manner consistent with 23 U.S.C. Section 131(s) on a State Scenic Byway.

Sample Sign Ordinance

To receive a sample ordinance, send an email to: alan@texasmunicipallawyers.com .

You will receive a document based, in part, on the APA Model Street Graphics Ordinance.