

Keys to Effective and Legally Defensible Sign Regulations

Professor Alan C. Weinstein
Cleveland-Marshall College of Law
216-687-3758
alan.weinstein@law.csuohio.edu

Goals for This Meeting

- Understanding the legal basics about sign regulation and what has been happening recently in litigation challenging sign regulations.
- Understanding how to use legally defensible sign regulations to improve our cities, townships and villages.
- Discussing the problems you face with sign regulations and what you might do about them when you leave here.



Goal One

- Understanding the legal basics about sign regulation and what has been happening recently in litigation challenging sign regulations.



First: The Legal Basics for Sign Regulation

- Content-neutral vs. content-based
- Commercial speech vs. non-commercial speech



What Are “Content-Neutral” Sign Regulations?

- “Content-neutral” regulations make no distinctions based on the content of a sign; i.e., what it says.
- “Content-neutral” regulations are based entirely on the “structural” attributes of signs: size, height, form, location, number, orientation, lighting, etc.

Defining Types of Signs in a “Content-Neutral” Manner

- freestanding signs
 - pole
 - monument
- temporary vs. permanent signs
- portable signs
- “snipe” signs
- building signs
 - roof
 - wall
 - window
 - marquee/awning
 - projecting and suspended
- “A-frame” signs
- “wind-signs”

What Are Content-Neutral “Time, Place or Manner” Sign Regulations?

- Maximum size and height
 - Maximum number per
 - lot/building
 - support structure
 - Specify locations
 - prohibitions
 - corner lots
 - setbacks
 - Regulate
 - lighting
 - flashing/animation
 - neon
 - materials/colors
- Note: Regulating color may be a problem when applied to federally-registered trademarks.

Defining Types of Signs Based on Their Content

- Real estate signs
- Construction signs
- “Identification” signs
- Political signs
- Nameplate signs
- Price signs
- Home occupation signs
- “Directional” Signs

Typical “Content-Based” Provision in Sign Code

“Identification signs may include the principal type of goods sold or services rendered; however, the listing of numerous goods or services, prices, sale items, and telephone numbers shall not be permitted.”

What does that mean?

A Daimler-Chrysler dealer can't display a sign -- regardless of allowable size -- that reads
Classic Chrysler – Certified *Five Star* Dealer
Saturday Service 7am to 3 pm

Commercial vs. Non-Commercial Signs

Non-Commercial Signs

- Political signs
- Personal Signs
- Public Service Signs
- Official Signs
- Directional Signs

Commercial Signs

On-premise and off-premise signs that advertise products and services.

Second: The Rules for Sign Codes are Changing

- Heightened judicial scrutiny for all governmental regulation of expression, including sign codes.
- Higher status accorded to commercial signs.
- Combination of these two means less judicial deference to government and greater judicial scrutiny of sign codes.



Examples of How the Rules are Changing

- Termination of Non-Conforming Signs
- Ban on Neon Signs
- Ban on Lawn Signs
- Ban on Temporary Signs
- Ban on “For Rent” Signs
- Exemption for “Time & Temperature” Signs
- Exemption for Government Flags
- Time Limits on Political Signs
- The *North Olmsted* and *Broadview Hts.* Cases



Termination of Non-Conforming Status

Kevin-Gray v. Nyack

566 N.Y.S.2d 795 (N.Y. App.
1991)

Local business changed hands and owner wanted to reflect this on legal non-conforming sign. Ordinance allowed non-conforming signs to remain, but banned any change in copy. Court found this was unlawful content-based regulation: “truthful commercial speech may not be prohibited on the basis of its content alone.”



Termination of Non-Conforming Status

Budget Inn of Daphne, Inc. v. City of Daphne

789 So.2d 154 (Alabama 2000)

State Supreme Court struck down code that required removal of legal non-conforming sign if there was: (1) a change in ownership, even if the name remained the same, (2) a change in the name, even if the ownership remained the same, or the sign was “altered” in any way.



Ban on Neon



Ban on Lawn Signs

Cleveland Area Board of Realtors v. City of Euclid,
88 F.3rd 382 (6th Cir. 1996)

City argued that the ban was justified because:

- (1) Real estate signs “can damage the image and perception about the viability and desirability of a neighborhood as a good place to live and invest for persons of all races.”
- (2) Ban would promote and preserve neighborhood aesthetics and safety.



Ban on Lawn Signs

The Court recognized that aesthetics may constitute a significant government interest. “However, the wholesale ban on lawn signs in the name of aesthetics in this case is, simply, not sufficiently narrowly tailored to withstand constitutional scrutiny.”



Ban on Lawn Signs

The Sixth Circuit Court also affirmed the district court's finding that window signs are "a completely ineffective alternative channel of communication to lawn signs."



Ban on Temporary Signs

Pica v. Sarno,
907 F.Supp. 795 (D.N.J. 1995)

Federal trial court struck down a municipal ban on “temporary signs, or lettered announcements used or intended to advertise or promote the interests of any person,” as content regulation banning “an entire category of speech, inconsistent with *Ladue*.”



Ban of “For Rent” Signs

CUFFS v. Long Beach,
802 F.Supp. 1223 (D.N.J. 1992)

Ban on “for rent” signs (but not “for sale” signs) during summer season struck down as content-based regulation of commercial speech. Ban was also invalid because aesthetics was not a “substantial” interest and no evidence that regulation would advance that interest or was “narrowly tailored.”



Exemption for “Time & Temperature” Signs

Flying J Travel Plaza,
928 S.W.2d 344 (Ky. 1996)

State banned flashing and moving signs, with exemptions for “time, date, and temperature.” State Supreme Court found no proof the ban improved aesthetics or traffic safety, but said content-neutral regulation of “time limits” and electronic cycles is okay.



Exemption for Government Flags

Dimmitt v. Clearwater,
985 F.2d 1565 (11th Cir. 1993).

Code regulated the display of signs, flags, and other forms of graphic communication, but exempted government flags. Court ruled there was “meager evidence” that the restriction on graphic expression advanced the city’s interests in aesthetics and traffic safety, and was insufficient to justify exempting only government flags from the permit requirement.



Time Limits on Political Signs

City of Painesville Building Dept. v. Dworken & Bernstein Co., L.P.A., 89 Ohio St.3d 564, 733 N.E.2d 1152 (2000)

City ordinance prohibited the posting of “political signs” except during the period from 17 days before any general election to 48 hours after the election.

Time Limits on Political Signs

The City claimed that the ordinance was intended to:

- (1) limit “the amount of time that it is subject to the psychological and economic effects produced by these signs.”
- (2) promote aesthetic and traffic safety concerns.

Time Limits on Political Signs

(1) limit “the amount of time that it is subject to the psychological and economic effects produced by these signs.”

The Court noted that Painesville allows the posting of many types of commercial and non-commercial signs without limits, including: “for sale/lease” signs, yard sale signs, and sign advertising special events.

Time Limits on Political Signs

(2) promote aesthetic and traffic safety concerns.

The Court noted that these are important interests, but “[t]he ordinance could easily operate to prohibit the display of a political message at the very time it would be most relevant to an issue upon which the citizen wishes to speak.”

The North Olmsted and Broadview Heights Case

Chamber of Commerce v. City of North Olmsted,
86 F.Supp.2d 755 and
108 F.Supp.2d 792 (N.D.
Ohio 2000)



XXL of Ohio, Inc. v. City of Broadview Heights,
2003 WL 23219809 (N.D.
Ohio)



Content-Based Provisions

- “Identification signs may include the principal type of goods sold or services rendered; however, the listing of numerous goods or services, prices, sale items, and telephone numbers shall not be permitted.” (N.O.)



Content-Based Provisions

- “Identification sign.
Allowed name/address and “general type of goods sold, or services rendered; however, the listing of specific goods or services, brand names, prices, ‘sale’ or telephone numbers shall not be permitted.” (B.H.)



Content-Based Provisions

- “Informational signs (scheduled events, travel information, vehicle service, time, weather, historic and scenic data) allowed only for public and semi-public uses as integral part of identification sign.” (N.O.)



Content-Based Provisions

“Directional Signs” (N.O.)

“Indicating only the direction of pedestrian and vehicular circulation routes on the lot on which the sign is located.”

“Thus, a sign in the shape of an arrow in front of a business with either the words ‘Honda Service’ or the McDonalds ‘golden arches’ logo is in violation of the ordinance, while a sign with the words ‘Enter Here’ is not.”



Prior Restraint Provisions

- The design, *size*, scale, shape, *color*, *illumination*, *location* and orientation of the sign in relation to the site and topography, other structures on the site, adjacent and neighboring land uses, sites and buildings. (N.O.)



Prior Restraint Provisions

- The design, *size*, scale, shape, *color*, *illumination*, *location* and orientation of the sign in relation to the site and topography, other structures on the site, adjacent and neighboring land uses, sites and buildings.
- The visual impact and influence of the proposed sign in relation to and in conjunction with signs currently existing or those reasonably expected to be erected in the vicinity of the proposed sign.



Prior Restraint Provisions

“The sign ordinance requires the building official to consider the design, color, orientation, visual impact and influence, as well as the ‘regulations of this Zoning Code governing the use, location, size and character of signs’ in deciding whether or not to issue a permit.”



Prior Restraint Provisions

“... the ordinance lacks sufficiently narrow, objective, and definite standards which, therefore, gives government unfettered discretion in issuing a permit. The permit scheme provides the City’s officials with unbridled discretion; it is unconstitutional.”



Prior Restraint Procedural Safeguards

A permit scheme must contain three procedural safeguards:

- (1) The decision to issue a permit must be made within a “specified brief period”
- (2) If there is an appeal, the permit scheme must also assure a prompt judicial decision
- (3) The burden of proof is on the government

Prior Restraint Procedural Safeguards

“... The City’s ordinance does not adequately provide for any of the three procedural safeguards. *** The City’s permit scheme violates the First Amendment because it fails to provide the procedural safeguards that are necessary for a lawful system of prior restraint.”

Importance of the Cases

- Almost all sign codes regulate by “time, place or manner” controls; i.e., size, height, location, spacing, “no flashing, blinking ...,” etc.



Importance of the Cases

- Many, if not most, of these codes use the content of the sign, or the “identity” of the speaker, to impose differing “time, place or manner” regulations.



Importance of the Cases

- Many codes also lack sufficiently narrow, objective, and definite standards, which gives government unfettered discretion in issuing a permit.



The Costs of Illegal Codes

Challenges to sign codes are often brought under 42 U.S.C. §1983, which allows for money damages, and its companion statute, 42 U.S.C. §1988, which allows a prevailing party to sue for attorney's fees.



The Costs of Illegal Codes

Cabor v. City of Euclid, 965 F.Supp. 1017
(N.D.Ohio 1997).

“Before the Court is plaintiffs’ motion for attorneys’ fees and costs in the amount of \$390,078.71. For the reasons stated below, the Court grants the motion in the amount of \$308,825.70.”

The Costs of Illegal Codes

XXL v. Broadview Heights

“In the instant case, qualified immunity cannot protect the mayor and city council members of Broadview Heights from liability.”

Why not?

- 1/21/2000 North Olmsted decision
- 8/20/2000 BH issues citations to XXL

The Costs of Illegal Codes

XXL v. Broadview Heights

“Any reasonable official in the position of the mayor and city council members of Broadview Heights would have known in light of North Olmsted that enforcement of Broadview Heights’ sign ordinance against XXL violated XXL’s clearly established rights under the First Amendment.”

Goal Two

- Understanding how to use legally defensible sign regulations:
Responding to *North Olmsted*, *Painesville* and *Broadview Heights*.



How Planners Should Respond

- Adopt content-neutral sign regulations.
- Adopt a “substitution clause”
 1. Allowing a noncommercial sign in place of any commercial sign
 2. Allowing changes in content for any noncommercial sign
 3. Stating that this provision takes precedence over any other section in the code



How Planners Should Respond

Make sure the sign permit process has:

- Definite and objective standards for permits.
- Reasonable and certain time before there's a decision.
- Short and certain time for an “administrative” appeal of a permit denial.

Goal Three

- Discussing the problems you face with sign regulations and what you might do about them after you leave here.



What To Do After You Leave Here

- Sign Clutter on Lot
- Sign Clutter on Building
- Sign Clutter in Windows
- Signs in Strip Centers
- Multi-Tenant Center Sign
- Trademarked Logos and Sign Regulations
- Design of Signs



Sign Clutter on Lot

- Common Approach:
Limit the number of freestanding signs.
- Better Approach:
Enforce current code, strictly regulate temporary signs, allow for “flexible” approach to total amount of signage.



Sign Clutter on Building

- Common Approach: Limit the number of signs on the building.
- Better Approach: First, enforce current provisions against illegal and abandoned signs and eliminate pennants, banners, etc. After all the above is removed, consider what else may be needed.



Sign Clutter in Windows

- Common Approach: Limit the percentage of the window that can be covered by signs.
- Better Approach: Yes to above, but enforce!!



Signs in Strip Centers

- Common Approach: Total uniformity of size, design, color, and placement.
- Better Approach: Reasonable uniformity, but allow room for creativity via typefaces and color “palette” rather than specified hues. Be aware of restrictions on federally registered trademarks (logos).



Multi-Tenant Center Sign

- Common Approach: Limit number of messages on sign to number of anchor tenants.
- Above plus electronic message center for others plus “directory signage” with names, logos, arrows, etc.



Trademarked Logos and Sign Regulations

- Allow trademarked logos that are consistent with color palette.
- Allow a limited area on the sign in which trademarked logo may appear in trademarked colors.



Design of Signs

- Common Approach: Either overly restrictive regulation that kills creativity or highly discretionary design review that makes approval uncertain.
- Better Approach: Leave room for creativity in code plus provide bonus for excellence in design. Signs can add value to the commercial environment.



Where Do We Go From Here?

Resources

- APA Website www.planning.org/
“Context-Sensitive Signage Design”
- SBA Website
www.sba.gov/starting/signage
- “The Signage Sourcebook”