

Importance of the North Olmsted Sign-Ordinance Decision

OVERVIEW OF LITIGATION

On April 7, 1998, the North Olmsted Chamber of Commerce and Sunnyside Cars Inc., the plaintiffs, filed a complaint and a motion for a temporary restraining order in the U.S. District Court for the Northern District of Ohio against the city of North Olmsted. The presiding judge was Donald C. Nugent, a 1995 Clinton appointee who served as a prosecutor before election to the Cuyahoga County (Ohio) Court of Common Pleas and then on the same county's 8th District Court of Appeals.

In filing the complaint, the chamber contended by enforcing its sign code the city violated the civil rights afforded the businesses by the U.S. Constitution and Ohio state laws. The chamber filed the claim under article 42 of the U.S. Code section 1983.

On April 10, 1998, Nugent held a hearing and both the plaintiffs and the city agreed that: "(1) it [the city] would take no action to enforce its sign code with respect to the removal or alteration of any sign which had become non-conforming on Jan. 1, 1998, pursuant to section 1163.26 of the code; and, (2) with respect to pending or future applications for sign permits or variances, the city would not take into consideration any non-conforming sign under section 1163.26, except for the calculation of permissible maximum square footage, in determining whether to approve the permit or variance. Subject to these exceptions, the city could continue to approve or disapprove permit applications and variance requests as provided for in the sign code."

In this case, as with most federal litigation, the time for parties to conduct the discovery phase of litigation – the period when both parties investigate the case's facts – took many months to complete. Meanwhile, the plaintiffs filed an amended complaint on July 22, 1998, adding Great Northern Dodge Inc. and Richard H. Moran to the complaint. The discovery phase ended Jan. 30, 1999, when the city filed its motion for summary judgment and brief in support, followed by the plaintiffs' filing their brief in opposition to this motion in March 1999.

In May 1999, the parties met with Nugent, who referred the case to Magistrate Patricia A. Hemann, who ordered a settlement conference for June 21. The

Contributing to this issue of "Signline" is Alan C. Weinstein, a professor at the Cleveland-Marshall College of Law at Cleveland State University. Weinstein provides his legal analysis of the recent federal court decision ruling that the city of North Olmsted, Ohio, sign code violated the First Amendment and, therefore, is unconstitutional. Both Weinstein and sign-industry observers believe the North Olmsted decision is one of the most significant rulings benefiting on-premise visual communications in recent history.

Particularly significant was the court's finding that North Olmsted's sign code contained "content-based regulation of commercial signs," making the ordinance unconstitutional.

Weinstein's discussion of the North Olmsted case begins with an overview of the litigation and a summary of the case, followed by an analysis of the legal issues and a conclusion.

plaintiffs responded by proposing a settlement with the city,¹ which rejected the proposal the following day.²

After subsequent settlement negotiations proved fruitless,³ the parties called Hemann "and advised her that we did not believe that the action was likely to settle." As a result, Hemann canceled the June 21 settlement conference and drafted her report and recommendation, submitting it to Nugent Aug. 17. Hemann's report recommended the district judge invalidate the North Olmsted sign code for violating the First and 14th Amendments to the U.S. Constitution.⁴ The city objected to Hemann's findings, filing official papers to that effect Oct. 1, 1999. The Ohio Municipal League came to the city's defense by filing an amicus curiae, or interested party brief. Nugent took the matter under consideration.

SUMMARY OF JUDGE NUGENT'S OPINION IN *NORTH OLMSTED CHAMBER OF COMMERCE V. CITY OF NORTH OLMSTED*, 86 F.Supp.2d 755 (N.D. Ohio 2000)

First Amendment Challenges

1. Content-Based Regulations

After determining the chamber and its fellow plaintiffs raised legitimate claims that the North Olmsted sign code violated their First Amendment rights, Nugent ruled the city applied content-based discrimination against commercial signage and non-commercial displays.

Applying the strict scrutiny standard of review to the content-based regulation of non-commercial signs, Nugent found the ordinance unconstitutional “[b]ecause the city has not shown that the content-based distinctions are necessary to serve their interests of safety and aesthetics, and because the ordinance is not narrowly drawn by the least restrictive means to achieve those interests.”

More importantly, Nugent also ruled the city’s content-based regulation of commercial signs unconstitutional under the less demanding intermediate scrutiny standard applicable

Content-based regulation that restricts the amount of information that can be presented on a sign is often done to “increase traffic safety.” However, such regulations may actually work contrary to public safety goals when signs fail to give the motorist pertinent information in time to safely maneuver through traffic to the business. In this example, the business is located along freeway frontage near an exit. However, once exiting it is very difficult to locate the business. The only access to the frontage road is obscured behind a berm and row of trees in the back of a shopping center parking lot, rather than at the first intersection, where one would instinctively look for it, and no off-premise signage is allowed to direct customers to this street. Further complicating the situation is the severe height limit put on the business’s entrance sign, which is hidden by landscaping. The great effort required to find the business could easily lead a frustrated driver to respond in a less safe manner.



to commercial speech regulations. The opinion stated: “The city has not provided any evidence to show why their content-based restrictions directly and materially contribute to their goals of safety and aesthetics. In fact, many of the city’s content-based restrictions completely fail to contribute to safety and aesthetics and seem to be unrelated to these goals. The city’s sign ordinance as a whole lacks rationality. In addition, the city has not demonstrated a narrow tailoring of the regulation to its asserted interests, nor has it demonstrated that it carefully calculated the costs and benefits associated with the burden on speech imposed by its regulation. The city’s content-based regulations on commercial speech are unconstitutional.”

2. The Selective Ban of Pole Signs

Nugent agreed with Hemann’s view that “the city’s purported ban on pole signs is an impermissible content-based restriction on speech” because the ordinance allowed certain types of signs, prohibiting others based on their content.

3. City’s Permit System as an Unlawful Prior Restraint

Nugent found the city’s procedures for issuing sign permits an unconstitutional exercise of prior restraint on speech because the permit system was not content-neutral.





Some cities have attempted to ban temporary signs such as the one on the right, but make exceptions for political campaign signs such as the one on the left. Content-based prohibitions, however, are unconstitutional. Signs with similar structures must be regulated in the same way, regardless of what they say.

Issuance of permits was left to the discretion of the city’s building officials, creating a highly discretionary process, lacking constitutionally required procedural safeguards.

Equal Protection Challenge

Applying strict scrutiny, Nugent also declared portions of the sign ordinance, providing different regulations for “bulletin boards,” “informational signs,” and “organizational signs,” as unconstitutional because permits were issued depending on whether the display identified a commercial or noncommercial entity.

Other Issues

1. Severability of the Unconstitutional Portions of the Ordinance

It is not uncommon for a court to “sever” those portions of an ordinance it finds unconstitutional from the remainder of the ordinance – which is not constitutionally flawed – and allow for enforcement of the remainder. In this case, however, Nugent found that because the ordinance was so thoroughly riddled with content-based distinctions and an impermissible system of prior restraint, “severance of the unconstitutional portions would fundamentally disrupt the statutory scheme as a whole, [and thus] the illegal provisions are not severable and the ordinance is struck down in its entirety.”

2. Vagueness, Overbreadth, and Due-Process Violations and State-Law Prohibition on Retroactive Zoning

Nugent declined to rule on these claims because he already found the ordinance unconstitutional on other grounds.

3. Takings Claim

Nugent ruled the plaintiffs’ takings claim, based on the code’s requirement that all non-exempt pole signs be removed after an amortization period, was not “ripe” for adjudication because the prohibition had not yet been enforced.

4. Retaliatory Enforcement Claim

The plaintiffs claimed the city engaged in retaliatory enforcement of its sign ordinance after several of the affected parties made their objections known and there was a likelihood of a legal challenge. Nugent ruled neither party was adequately or fully briefed on this issue and set a trial date of April 10, 2000, on this aspect of the case. The trial date was subsequently postponed twice, and was rescheduled for June 20, 2000.

Issue

Does requiring an applicant to obtain a sign permit before a commercial on-premise sign can be displayed impose an unconstitutional prior restraint on speech when the ordinance grants substantial discretion to a city official in deciding whether to grant or deny the permit?

The North Olmsted sign code required a permit for any sign over six square feet and gave the administrator broad discretion to either grant or deny a permit. The code allowed the administrator to “consider” any “facts and circumstances related to” the city’s standards, criteria, purpose and intent of the sign code. A sign could be prohibited based upon its “visual impact and influence.”

Nugent struck down the permitting requirement because it imposed an impermissible system of prior restraint on both non-commercial and commercial signs. Critically, however, the opinion suggests, rather than explicitly states, this

permitting scheme would be found to be a prior restraint if the challenge had been confined solely to commercial signs.

Analysis

The relatively few prior cases that addressed this question split on the issue. There are cases that have struck down discretionary permit schemes when they've been applied to commercial signs – see, e.g., *Desert Outdoor Advertising Inc. v. City of Moreno Valley*, 103 F.3rd 814 (9th Circuit, 1996) – but there are also cases that have upheld them. For example, in *Purnell v. State*, 921 S.W.2nd 432 (Texas Appellate, 1996), a state Appellate Court upheld an ordinance that prohibited the use of a sign without a prior permit against a challenge brought by a local business. The court in the Purnell case held that the permit requirement did not constitute an unlawful prior restraint because “the Constitution accords lesser protection to commercial speech.”

Although Nugent struck down the permitting process, he did not clearly state that the scheme would have been found unconstitutional if the challenge had been based solely on its application to commercial signs. That said, in another portion of the opinion, dealing with whether the plaintiffs have legal “standing” to bring this lawsuit, Nugent authored a lengthy footnote suggesting that, had such a ruling been necessary to resolve the prior restraint claim, he would have found the permitting system unlawful as applied to commercial signs.

The plaintiffs' victory on the prior restraint issue in this case, combined with the suggestion in the aforementioned footnote, has significant potential to influence other courts when they address similar discretionary permitting schemes for commercial on-premise signs. This does not mean that sign permits would no longer be required, but rather that the standards granting or denying a permit would have to be based on clearly objective grounds, and provide for an adequate and timely appeals process when a permit is denied.

These changes would have several positive effects. First, the change from more subjective to more objective standards in a sign ordinance appropriately limits the opportunity for sign regulators to act in an arbitrary and/or discriminatory manner. Objective criteria are far more difficult to manipulate than more subjective standards. Secondly, the sign code should provide more predictability in permitting decisions because the applicant would normally be expected to receive a permit if it met the objective criteria. Third, and perhaps most significantly, the change from more subjective to more objective criteria would provide an opportunity for the sign industry, sign users, and local government to discuss the values and goals that should be reflected in the drafting of the new objective standards. Finally, requiring a full range of procedural safeguards in a system of prior restraint in the sign-permitting process will, in and of itself, strongly

discourage local governments from denying permits without an objective and demonstrable basis for the denial.

Issue

Does the First Amendment permit a city to impose different regulations on various signs by differentiating among them on such content-based distinctions as: identification sign; bulletin board; informational signs; organizational signs; etc.?

Facts

The city's sign ordinance classified signs both by their structure (wall, pole, etc.) – which is clearly not a content-based classification – and by their use (identification sign; bulletin board; etc.), which the plaintiffs argued were content-based classifications because of the way these uses were defined.

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professor, Cleveland-Marshall College of Law

Ruling

Nugent found that the sign ordinance was unlawfully content-based with regard to both non-commercial and commercial signs. He then ruled that the content-based regulation of non-commercial signs could not pass strict scrutiny and that the content-based regulation of commercial signs could not pass intermediate scrutiny.

Analysis

Sign codes treating signs based on their physical characteristics – for example, size, height, location, number, etc. – are regulating the displays in a constitutionally permissible “content-neutral” manner because the regulation is not dependent on the content of the message carried by the sign. Many sign codes do look to a sign's content, however, to treat signs differently depending on whether their message falls into a particular category, such as those noted above: identification sign, bulletin board, etc.

While such content-based regulations are arguably subject to heightened scrutiny by courts, in practice, few courts have seriously considered the issue. The result has been a proliferation of sign codes that tend to impose harsher regulations on commercial on-premise signs than on signs carrying other messages.

The fact that the industry was successful in this case in convincing the judge that all content-based regulation of signs is subject to heightened scrutiny,⁵ and that the content-based regulation of commercial signs was unconstitutional, has significant potential for influencing other courts to adopt a similar analysis. The imposition of heightened scrutiny by courts reviewing sign codes that impose greater restrictions on commercial on-premise signs than on other content-based categories of signs would require the local government to: (1) articulate the governmental interest that is being served by such restrictions; (2) demonstrate how these restrictions advance that interest; and (3) demonstrate why that interest could not be served by a less restrictive regulation. As a general matter, local governments have been unable to meet this standard when it has been imposed by courts.

If courts routinely imposed strict scrutiny on sign codes that place greater restrictions on commercial on-premise signs than on other content-based categories of signs, we would expect that many of these sign codes would be struck down. As was the case with the previous issue, this would provide the industry, sign users, and local government with an opportunity to collaborate in the drafting of the new content-

neutral standards that would not impose greater restrictions on commercial on-premise signs merely because they were commercial signs.

Issue

May a sign code lawfully ban all existing and future pole signs other than those that fall within specified content-based exceptions?

Facts

The North Olmsted sign ordinance prohibited erecting new freestanding signs (pole signs) and required the removal of all existing freestanding signs following an amortization period. However, the ordinance granted a blanket exemption for all official public notices, and the flag, emblem, or insignia of all governmental bodies, and exempted temporary displays or signs in conjunction with a charity drive or political campaign signs.

Ruling

Nugent found the selective prohibition on pole signs in the ordinance made content-based distinctions, and was, therefore, impermissible and unconstitutional.

A city may not change the rules depending on the speaker. For example, it could not prohibit businesses from displaying a banner, but allow museums and other nonprofit entities to do so.



Analysis

This provision raised both state law and federal constitutional law issues. Nugent ruled that since the ordinance violated federal rules, consideration of the state laws became a moot point.⁶ On the federal question, Nugent viewed the selective prohibition on pole signs as a content-based regulation of speech and ruled that this provision could not pass strict scrutiny because the city could not cite any compelling government interest implicated by the prohibition on pole signs.

The success of the plaintiffs' arguments on this issue casts significant doubt on local governments' ability to enact a selective prohibition on commercial pole signs. Moreover, a total prohibition on all pole signs raises its own set of constitutional questions.

Conclusion

Judge Nugent's opinion in this case provides strong support in favor of the on-premise sign industry's claims that many local sign ordinances are unlawfully discriminatory against commercial signs. That said, it is important to understand the degree to which this decision constitutes a binding legal precedent on other courts.

Nugent's decision is binding precedent only within the Northern District of Ohio boundaries; so, the substantive legal

elements of his opinion in this case must be followed only in the federal trial courts in the northern half of Ohio. Although the city has chosen not to appeal this decision to the 6th Circuit Court of Appeals, had there been a decision from that court it would have only been binding precedent on the federal courts within the boundaries of the 6th Circuit, comprising the states of Ohio, Kentucky, Michigan, and Tennessee. In short, the only court decisions that are binding on all federal courts – and on all state courts insofar as issues of federal constitutional law are concerned – are those rendered by the U.S. Supreme Court.

While a given federal court decision is binding only within the district/circuit in which it is decided, decisions from one district/circuit are routinely cited by attorneys litigating cases in other districts/circuits when they believe the decision supports the position they are advocating. In this way, a significant constitutional decision at the trial court level, such as in this case, can have significant potential effects throughout the country.

(Endnotes)

¹ The terms of that settlement offer were the following: (1) the city agrees to amend the sign code in a mutually agreeable fashion to resolve the litigation; (2) the city agrees to grandfather all existing pole signs indefinitely, including the right to change the sign face, with termination of the sign occurring only upon termination (not sale or transfer) of

North Olmsted was unable to cite any compelling government interest implicated by its prohibition on pole signs. This casts significant doubt on local governments' ability to enact a selective prohibition on commercial pole signs, while a total ban on pole signs raises its own set of constitutional questions.





Grandfathering of sign structures can lead to poor sign design like the example to the right. The city in which this sign is located would not allow a new sign with a more appropriately shaped face, even though the square footage would have been the same, because its new sign code prohibited signs of this size (for safety and aesthetic reasons). This meant the new owner was forced to rework the existing structure left by the previous owner (above) rather than being allowed a professional-looking sign that was more readable from the freeway and more aesthetically pleasing.



business use of the premises; and (3) the city agrees to pay all fees and costs. Note: fees/costs were \$126,674.30 as of May 31, 1999.

² Not unsurprisingly, the city did not respond favorably to this offer. On June 9, 1999, the city's law director wrote to the plaintiffs' attorneys indicating he viewed their June 8 offer as requiring the city "completely capitulate in this action," and thus anticipated a rejection of this offer if presented to city council. He requested the plaintiffs' attorneys discuss the following: (1) What specific portions of the sign code "must be amended or repealed, and, with respect to each such provision, what amended or substituted language should be used?"; and (2) "What reduced amount of attorneys' fees would your client pay?" He indicated he would present any amended settlement offer to the city council at its June 15 meeting and suggested the parties and legal counsel meet at his office following that meeting.

³ The plaintiffs' attorneys responded to the law director's rejection of the proposed settlement June 11 by: (1) declining to submit an amended proposal until the city responded with a formal counterproposal; (2) noting "if the city is willing to grandfather existing pole signs and pay plaintiffs' reasonable legal fees, we are willing to work with you to resolve the remaining issues"; and (3) offering to meet at the law director's office June 16. The law director responded to this June 11 letter on June 15, reiterating his view that the plaintiffs' attorneys were demanding a capitulation, rather than offering a settlement proposal, but agreeing to the meeting June 16. On June 17, the plaintiffs' attorneys wrote to the law director to confirm their understanding of the settlement discussions held at the law director's office the previous afternoon. That letter summarized the settlement discussions in this way: (1) as regards the content-based and viewpoint-based provisions in the code, both sides agreed "it

might be possible to resolve these issues through mutually agreeable revisions to the existing sign code"; (2) both sides agreed the pole-sign issue could not be resolved at this time; (3) the city's offer to pay \$25,000 in legal fees was rejected as "nowhere close to an acceptable number."

⁴ The magistrate found the city's sign ordinance contained the following constitutional violations: the ordinance was an impermissible system of prior restraint; the ordinance impermissibly discriminated as to commercial speech according to content; the ordinance unconstitutionally restricted non-commercial speech; the ordinance's selective prohibition on pole signs makes impermissible content-based distinctions; and the ordinance facially violates the equal protection clause in allowing speech to some speakers that is not allowed to others.

⁵ Judge Nugent ruled that the content-based regulation of commercial signs could not pass muster under the intermediate scrutiny standard of *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

⁶ The state law issue involved the question of whether a city must prove that pole signs constitute a "nuisance" before requiring their removal. Under Ohio law, non-conforming uses may normally not be amortized; however, there is an exception for non-conforming uses that constitute a nuisance as that term is legally defined. In a 1987 case, however, the Ohio Supreme Court ruled 4-3 that a city could require the amortization of certain on-premise commercial signs because these were an "aesthetic nuisance." This 1987 case has subsequently been relied on by any Ohio city that wants to get rid of certain signs. Because the 1987 case presented an unusual set of facts, we believe that the situation in this case

can be distinguished, and it is possible to obtain a different outcome on the sign amortization issue. Success on this issue would be of great worth to members of the industry in Ohio and would also be potentially significant in other states that also permit amortization of non-conforming uses only where such uses are found to be a nuisance in legal terms.

A city that wishes to allow the patriotic display of government flags and banners must also allow the display of private entity and decorative flags and banners. To prohibit one and allow the other is content-based and, therefore, impermissible. Furthermore, if the display of flags and banners is unsafe and unattractive, then this would be the case whether the flags and banners are public or private.



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