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Memo

To: Chuck Thompson
Executive Director and General Counsel, IMLA

From: Susan L. Trevarthen

Date: September 30, 2015

Re: Comments on IMLA's Third Rough Draft of IMLA Model Sign Ordinance

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Distinguishing on site/offsite signs based on who owns the sign is a problematic approach. All land-use and zoning law is premised on the use or activity of the property, not on the ownership status of the occupant. As long as you follow the teachings of Metromedia and cases (like *Southlake* in the 11th Circuit) which have legally concluded that non-commercial speech can only ever be on site speech because it is deemed to be the speech of the property owner, the ownership status of real estate signs and campaign signs should not be a concern. Note: if the city chose to go this way, however, those involved in real estate transactions and political campaigns could simply alter the way in which they interact with property owners to respect this requirement. The question is whether they would be willing to.

The draft's distinctions between digital signs, highway signs, flashing signs and changeable copy signs are poorly delineated and need additional definitions and regulations. It is important that a national model sign code not create a default that offsite billboards and digital billboards are allowed, as this one currently does. The very cities which are most likely to implement the model without alteration are those that may not realize that they have the legal ability to ban or more substantially limit these sign types. At a minimum, in these sections of the model sign code, there should also be an alternative approach so users can pick option A or option B.

Fundamentally, this reads like a county sign code, not a city sign code. County sign codes are usually obligated to consider the broader range of sign types because they must provide for a wider variety of land uses and zoning districts. For example, many cities will not have an urban growth boundary while many counties will. In contrast, many cities are not full service cities, and have a more limited range of sign needs because of the more limited range of land uses in their community, and thus have a different approach to sign regulation. Nationwide, these smaller cities are far more numerous, and far less likely to have access to expert legal assistance. Thus, a model sign code would do well to envision this kind of city as the average user. Larger, more complex cities and counties are more likely to have access to the expertise needed to deal with the more extensive sign regulations.

The concept of providing an entire model sign code, which an individual city might be tempted to slap a title on and adopt, is also problematic. Even it with commentary and warnings, the model is less likely to be abused if presented in modules with options on key points, thereby clearly indicating to the user that such customization is essential. Have you compare this to the model recommended in Street graphics and the law, currently being updated by Dan Mandelker and John Baker?

The model sign code misses the opportunity to address some low hanging fruit, such as a set of permitting criteria and timelines that satisfy prior restraint. This area of sign law is now quite stable, and yet many sign codes continue to violate those requirements. Similarly common it is quite cute clear under the cases that have addressed the issue that cities may ban animated digital signs or may tightly regulate them. As such, a regulatory module providing such standards would be of great use to cities.

Ease of enforcement is a real concern with permitting for temporary signs in this new world, and most cities are probably going to prefer not to have a permitting requirement for temporary signs. However, Brian Connolly has come up with an interesting idea where, in lieu of permitting, the law would require registration by uploading a picture of the sign, as installed and with identifying location information, to the city's website. City enforcement personnel could then create protocols for monitoring the website based on available resources and the relative priority of temporary sign enforcement. It may be the case that the very cities that lack the resources to enforce properly also will lack the technological capability to provide such an option. However, it is legal and is a clever approach.

The idea of allowing signs to be posted based on the occurrence of an event or activity rather than permanently, without addressing the speech contained on those signs, is a fundamental question following *Reed*. On the surface, this approach seems to neatly accommodate *Reed*. However, when read in concert with prior case law addressing sign types for elections and events, it is hard to believe that a court might not have the same objections to this kind of sign regulation.

For example, durational limits of election signs have been challenged many times, and no case would uphold a 30 day durational restriction for the simple reason that it fails to even cover the entire election season of a particular election let alone the seasons of more than one election per year. If you have primaries and runoffs, this is highly restrictive. If you define "election" to include all elections leading to the final election, this partially addresses the concern. Better minimums would be either 90 days, the time at which a campaign account may be opened, or the time of candidate qualification for inclusion on the ballot in the upcoming election.

The other concern, which is not new, is the potentially large disparity between the length of time that a real estate sign may be relevant, as compared to the length of time available for a campaign sign. For this reason, I have preferred to use the time of candidate qualification or opening of the campaign account, as more similar to the trigger of placing the property on the market or advertising it for sale.

A separate definition of sign area should be created with the content that is currently nested within the definition of "sign". In general, I believe the standards miss the opportunity to create a maximum area per sign within the overall budget of sign area allotted to a particular property.

Your approach to the definition of sign is to include nearly everything in that definition, and then to make broad provision for certain signs throughout the community. This makes some sense. However, in certain states the common law provides that, when a zoning code is silent as to whether municipal property is subject to the zoning code, the municipality is exempt from its own zoning regulations. If the city took this recommended approach, rather than removing the topic of government signs from the sign code entirely, it could inadvertently convert the city to one controlled by the zoning code.

I like the idea of providing for art as long as it's not for hire, but enforcement is going to be tricky with regard to many unique murals. This kind of rule will catch the large-scale advertising by national brands but not the mural commissioned by the local business such as was at issue in the Clearwater litigation. Also, while these sign limits are effective and limiting the damage of an inappropriate sign, they are likely insufficient for many buildings and will be rejected by many of our clients interested in place making and economic development driven by art. As such, it would be best to have a proportional limit that addresses what can be very large blank façades that do not contribute to the urban environment, and are far more effective in contributing to the public realm when painted with a mural.

The exclusion of signs which are not exposed to view from the street needs further detail. For enforcement purposes, what is a street? Does this encompass private rights-of-way and street? These terms, which are defined differently in different zoning codes, will determine the meaning of the statement. As such, a note should be added warning users to make sure that the terms used are defined appropriately or to substitute the similar terms that may exist already within their zoning code. Also, a definition of "advertise" needs to be added, which clearly covers only commercial speech.

I agree that governments may continue to regulate signs after *Reed*, and that they may continue to regulate commercial speech under the *Central Hudson* doctrine, and I am pleased to see that the model now recognizes this. The comment says that the code does not distinguish between commercial and noncommercial speech, yet it prohibits commercial speech at certain locations. This is inconsistent. Regardless, as long as the code clearly avoids prohibiting noncommercial speech broadly, the model code should continue to recognize the viability of bans and strict limitations on commercial and off-site speech, as compared to regulations of noncommercial speech which are governed by *Reed*.

I think there is merit in the compelled speech concept, but the reference to “cat’s paw” is simply distracting in the area of land use and zoning. I recognize it's applicable in labor, but it is not a term that make sense to those who will be working with the sign code. The warning in the comment about compelled speech should instead be placed so that it applies to the entire model sign code.

What is the source of the various size limits in the draft? They are fairly limited, which I applaud is the appropriate approach for a model. This is actually an area in which the national organizations could be quite helpful: in aiding individual cities to identify what are the tightest appropriate sizes that are justified by the research and can be defended. The sign industry has done a good job of providing guidelines for those cities which want to provide for greater signage then it's absolutely necessary; what our various city planning and scenic organizations can do is provide the alternative set of standards for a city that seeks to be as tight as supported by the science.

The definitions of marquee and projecting signs overlap, and need clarification. Also, the definition of temporary is phrased to address intent, such that it may be considered content based. And highway needs to be defined or a note needs to be added so that this term is properly interpreted in the wide range of circumstances across the country.

There are two sections with prohibited signs 1.2 and 1.4.7. These should be merged. The statement in 1.2.1 is not complete; it should require a sign permit as well.

With the universally provided sign types, pavement marking should be defined as part of traffic control devices. In my opinion, Section 1.3.1.2 should be expanded to include the name of the property as well. This could be residential, such as the name of a subdivision or condominium, or commercial/industrial/institutional. A maximum number of characters or other size limitation could be included to avoid the abuse we sometimes see with businesses defining their name to include sales messages.

The flag regulation in 1.3.1.4 violates decades-old sign law on viewpoint and content neutrality, and has no place in the model. The reference to this provision should also be removed from 1.3.1.5.

The temporary sign regulations need to provide for signage rights for those properties with less than .25 acres. Just as zoning codes have variances to avoid taking property, sign regulations should never work to completely deprive a property owner of the right to post at least noncommercial signs.

1.3.1.5 needs to say "essential" not "important". The model missed the opportunity to provide an extensive set of legislative findings, which could be very useful to city attorneys.

1.3.2.1a) conflicts with 1.3.2.7; the first provides for only one sign, while the second provides for two signs. The drafting is also not clear that the requirements of 1.3.2.1 also apply to the other sections of 1.3.2., which I believe is the intent.

The general provisions for the time to remove a temporary sign at section 1.4.5.1E provides for 14 days while the provision in 1.3.2.3C regarding real estate signs provides for 15 days, thus favoring commercial speech over noncommercial speech in violation of *Metromedia*. It would be better to leave this in 1.4.5.1E and be uniform for all temporary signs. Also, the

provision in subsection B about advertising in the local newspaper needs to be broadened to account for the fact that many properties are exclusively advertised online today.

The time limit in 1.3.2.2 should be extended to 90 days as noted above or, even better, to the date that a campaign account is opened or that candidate qualification is due. I am not comfortable with a 30 day duration, based on the many durational limit cases.

In 1.3.2.4., why must the days of display be consecutive? This is perhaps not realistic. This is an appropriate place to provide an option that grants the ability to display multiple times per year.

In my opinion, 1.3.2.5 and 1.3.2.6 violate viewpoint neutrality. I do not see how a court would uphold these exceptions and find that a code can fail to have similar exceptions for all of the other cultural and religious holidays that are scattered throughout the year. It is a tough issue, but is best handled through the general allotment of temporary signage, or as an exclusion from signage.

As noted above, using time as a proxy for a content-based event or political sign is an open question. It deserves the kind of warning placed on the compelled speech approach on page 3.

The provision of 1.3.4 could be applied to permanent signage as well, for those cities seeking to ban billboards. This should be included as an option in the model. Alternatively, the prohibition of the practice of advertising for hire could be placed in the zoning districts, outside of the sign code.

In 1.3.5, the reference to non-transient residential uses is awkward. Better to create an alternative that references hotels or hospitality uses. In Florida, many cities would not want to allow a sign for a home occupation or for a vacation rental of a home (like Air B&B) and, based on solid zoning principles supported by *Reed*, they don't need to.

In general, the model fails to address mixed uses. The issue is probably too complex to handle in a model, but a comment should be added reflecting that this model sign code is premised on a traditional Euclidean zoning scheme.

Another general issue with the provision of signage rights based on the acreage of multitenant uses is that it fails to account for the number of access points. Such a property might have only one or two access points, and other properties might have 10 or 12. This factor needs to be accounted for in some fashion. Also, what is the source for the various charts regarding maximum sign area and standards regarding placement on the lot? These charts and locations should be reviewed by somebody like Jerry Wachtel for how they relate to the research on legibility. Same comment regarding illumination standards and dwell time of 10 seconds. What municipal attorneys need from the model is an understanding of how strictly they can go without undermining either the effectiveness or the defensibility of the sign code. The sign industry will give them ample guidance for amplifying the amount of signage provided.

A note should be added to 1.4.1.3 (and similar provisions of the model) that the effectiveness of locational and height restrictions depends on the topography. If there are areas of high relief or if the landscaping involves the use of berms or other changes in elevation, the heights and locations may leave the signs invisible to the right-of-way.

The general allocations of signage are silent as to the type of sign being posted. In some cases, this may make sense while, in others, it appears that a particular sign type should be called out. For example, in the regulations for commercial centers at F on page 9, the first three categories clearly apply to ground mounted or freestanding signs while the fourth category applies to a flat wall, projecting or integral sign. Commercial centers need to be defined.

In general, the sign regulations need to use the defined terms for sign types. These are not content based, and there's no reason not to use them liberally for clarity. And each sign type needs regulations.

As noted above, the default should be to a ban on highway signs or digital signs, with an alternative that provides for them. The interplay between the various definitions and the regulations needs additional work. Also, the various state highway acts implicate whether the standards and regulations are possible. Three states ban billboards, and there's no reason to think that they must provide for them after *Reed*. Moreover, many states (including Florida) have statutes that require local governments to pay excessively high amounts of compensation in order to retire an off premise sign by amortization. Therefore, the model should not simply provide for such amortization without warning users to check state law.

1.4.2.5 should not be entitled “content” for obvious reasons. Also, changeable copy sign is not defined and its relationship with digital and flashing signs is not clear. The primary identification sign provision in 1.4.2.5 B should be left in 1.3.1.2., and should include the name, if any.

1.4.4.5 regulates by number. Many sign cases disfavor regulation by number, as a proxy for limiting the number of messages that are allowed on the property. They are wrong, but better not to go there. The regulations in the remainder of the model sign code use sign area, and that would be better to use here also.

The provision for bench signs again is not required, and should be omitted from the base model. It could be included as an alternative, but most of these signs are regulated by contract with the bench provider and may not even need regulations in the sign code. Given the outcome of *Metro Lights* and the New York case on this type of signage, it may be best to leave control of such signage in the city's proprietary capacity.

The regulations of integral signs in 1.4.5.3 should be compared to 1.4.2.3. Should these be the same as for flat wall signs?

1.4.5.4 should not be separate from the concept of governmental signs, and pavement markings should be defined as part of governmental signs.

In 1.4.5.5 the "no placement on a dwelling" may be insufficient. Is this allowed in the residential district? What about on a clubhouse or a parking garage? How about on a buffer wall surrounding a residential development? It's very difficult to enforce the ban on compensation for the display of art, although it is certainly a safer way to regulate.