FIRST AMENDMENT PITFALLS IN THE REGULATION OF SIGNS

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Summary of GK Ltd Travel v. City of Lake Oswego

In *GK Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1077 (9th Cir. 2006), the Ninth Circuit Court of Appeals sustained Lake Oswego's sign regulations against a variety of federal constitutional claims. The case provides guidance in framing and defending the regulation of signs by local governments. The plaintiffs in the case were a sign owner (Ramsey Signs), its lessee (GK Travel) and GK's two shareholders. The city and its code enforcement officer were the defendants. Plaintiffs' pole sign was used to advertise and identify GK Travel, a travel agency. The city reformed its sign code in 1985 and again in 1994 to eliminate classifications of signs based on content. As part of the 1994 changes, the city phased out allowance of pole signs over a five-year amortization period, which was later extended to ten years. The case arose out of enforcement efforts against plaintiffs' nonconforming pole sign.

The plaintiffs asserted 17 claims for relief. Two of the four damage claims sought compensation under 42 U.S.C. § 1983 because of the enforcement of the pole sign limitation. The remaining two damage claims (race discrimination and just compensation for removal of sign) were without factual support or were premature. The claims for injunctive and declaratory relief alleged that the ordinance was unconstitutional because it triggered compliance upon change of copy on a sign, prohibited pole signs which were a "protected medium" of speech, impermissibly classified based on the content of signs, the viewpoint of the sign owner, and commercial/non-commercial sign distinctions, failed to provide sufficient procedural safeguards in obtaining a sign permit, granted "unbridled discretion" to the issuer of sign permits, and was vague and overbroad.

The city obtained summary judgment in the district court in all but a few particulars. The court found, and the city conceded, that the regulations of "danger," "official notices," "no solicitation," and "for charitable fundraising events" signs were based on content of messages and were not justified. The remainder of the sign code was found to be constitutional and the judgment of the district court was affirmed on appeal. The circuit court upheld the pole sign limitations and the remainder of the sign code against all of the constitutional claims.

The opinion is significant in several respects. First, the court found that the sign code was content-neutral. Importantly, the court held that classifying on the basis of speaker is not a content-based regulation, and upheld the city's speaker-based exemptions to the permitting process. (These exemptions spared hospitals, railroads and public bodies from obtaining a

permit and paying a fee.) The court also found that event-triggered allowances for temporary signs were not content-based restrictions, and upheld these allowances for signs around the time of elections and the sale or lease of real estate. Finally, the court declared it is not a content-based regulation merely because a city officer has to read a sign in order to determine if the change of copy regulation applies.

Second, the court granted deference to the city's stated purposes in the sign code. While the plaintiffs argued that the city had to prove the existence of traffic safety problems or aesthetic decline and show how the sign code would remedy them, the court accepted the evidence offered by the city and announced a general deference to the city's determination that the sign code served its legitimate interests.

Third, the court upheld permitting regulatory classifications based on sign structure types. In upholding the near complete ban on pole signs, the court held that pole signs were not a "venerable means of communication" and that the city's limitation was justified by its aesthetic interests. The court also found that the sign code left open ample alternatives to pole signs, including other non-sign-based forms of communication, as well as other types of signage.

Fourth, the court upheld the city's design review process. Because the code contained sufficiently specific criteria to determine whether the sign in question was "compatible" with the surrounding environment and required written reasons for a denial, it did not grant unbridled discretion to city officials. The court also rejected the plaintiffs' vagueness challenge, and held that the "somewhat elastic" criteria in the design review process did not invalidate the code.

Finally, the court determined that the procedural protections in the Lake Oswego sign code were sufficient to meet constitutional standards. The court determined the sign code was content-neutral, and therefore did not require all the procedural requirements of content-based prior restraints. The court was satisfied that the sign code requires quick processing of sign permit applications and a written decision with findings; it did not require more.

Plaintiffs' petition for a writ of certiorari is pending with the United States Supreme Court.

Other Issues in Sign Code Litigation

While the *GK LTD Travel* case addresses many pertinent topics in sign code litigation, there are several other current issues municipalities should consider in drafting and defending their sign codes. The following section addresses some of the most important questions.

1) Can a municipality provide generic exemptions to the permitting requirements under its sign code?

Courts draw distinctions between exemptions from the application of municipal sign codes to certain types of signs and exemptions from permitting and fee requirements. *GK Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1077 (9th Cir. 2006). Cases arise where exemptions from code requirements allow certain messages to appear in forms unavailable to other messages, such as banning noncommercial billboards but allowing signs placed by

government bodies or memorial plaques placed by historical agencies. *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988). While such categorical exemptions from sign code requirements are consistently found unconstitutional, *id.*, the law is not entirely clear as to when exemptions from permitting and fee requirements are permissible.

Depending on how they are drafted, generic exemptions from municipal permitting and fee requirements can constitute impermissible content-based restrictions as well. Even though permitting exceptions narrow the reach of the sign ordinance, they will be struck down if the exceptions favor particular sign messages. For example, in *Solantic LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), the Eleventh Circuit invalidated a city ordinance that exempted 17 different categories of signs from both the form and permitting schemes imposed in the sign code, including several seemingly "generic" exemptions.[1] The court emphasized that even if the enumerated exemptions applied only to the permit requirements, the character of the exceptions would still render them unconstitutional because they were based on the content of the messages. 410 F.3d at 1256 n.6. The court relied on its previous decision in *Dimmit v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993) to support a finding that the permitting exemptions were content-based. In *Dimmit*, the court invalidated a city ordinance that exempted from permitting requirements flags representing a governmental unit or body but not flags of another organization or group. *Id*. at 1262.

However, not all exemptions from permitting requirements have been struck down as content-based restrictions. In *Solantic*, the Eleventh Circuit distinguished its previous decision in *Messer v. City of Douglasville*, 975 F.2d 1505 (1992) in which it held that an ordinance exempting certain signs from a city permit requirement was not content-based on the grounds that the *Messer* exemptions were "much more limited"[2] and "contained no specific exemptions for political, historical, religious, or special event signs." 410 F.3d at 1263 n.12.

As noted above, in *GK LTD. Travel v. City of Lake Oswego*, the Ninth Circuit upheld exemptions from the city's permit and fee requirements for "public signs, signs for hospitals or emergency services, and railroad signs." 436 F.3d at 1076.[3] The court found that these exemptions are "purely speaker based" and "say nothing of the City's preference for the content of these speakers' messages." *Id.* at 1077. The court also held that event-based exemptions for temporary signs in residential zones were not content-based. *Id.* However, the Ninth Circuit did not disturb the district court's holding that exemptions for "legal notices" or "danger signs" were constitutionally impermissible (as based on the message of the sign rather than the identity of the

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[1] The following kinds of signs are among the exemptions enumerated by the Neptune City Sign Code. "Signs erected by, on behalf of, or pursuant to the authorization of a government body, including… legal notices, identification signs and informational, regulatory or directional signs; … Official signs of a noncommercial nature erected by public utilities…; Holiday lights and decorations; …Public warning signs to indicate the dangers of trespassing, swimming, animals or similar hazards; …. and Religious displays." 410 F.3d at 1257.

[2] "The ordinance in *Messer* exempted from permitting requirements and/or permit fees the following signs: (1) one wall sign per building, attached to the side of the building, announcing the business; (2) one real estate "for sale" sign per property; (3) one bulletin board located on religious, public, charitable, or educational premises; (4) one construction identification sign; (5) directional traffic signs containing no advertisements." 410 F.3d at 1263 n. 12 (quoting *Messer v. City of Douglasville*, 975 F.2d 1505, 1511 (11th Cir. 1992)).

[3] The Lake Oswego Code defined "public sign" as "a sign erected and maintained by a public agency within the right-of-way of a street or alley."

sign owner). The district court reasoned that there are no obvious owners for either type of sign, and therefore the distinction based on speaker was inapplicable. *Id.* at 1076.

The Ninth and Eleventh Circuits take different positions on whether speaker-based exemptions from permit requirements are content-based or content-neutral. In *Solantic*, the Eleventh Circuit expressly rejects the idea that exemptions favoring certain speakers are not content-based. 410 F.3d at 1265 ("The sign code exemptions that pick and choose the speakers entitled to preferential treatment are no less content-based than those that select among subjects or messages."). The Ninth Circuit takes a contrary view in *GK LTD. Travel*, holding that municipalities may exempt certain speakers from permitting and fee requirements without the burden of justifying a content-based regulation. The court notes that these institutional speakers are otherwise required to follow the substantive requirements of the sign code and concludes that just because the law affects one class of speakers more than others does not make the law content-based. 436 F.3d at 1077.

The key differences between the valid and invalid ordinances providing exemptions to permitting requirements seem to be the breadth of the exemptions and the presence of an articulated requirement of content-neutrality. The *Messer* exemptions are extremely narrow and very limited in scope. The *GK Travel* exemptions are entirely content-neutral and justified solely on the basis of the party speaking or a triggering event. There, the Ninth Circuit expressly notes the sign code's demand for content-neutrality.[4] 436 F.3d at 1077. Speakers exempt from permit and fee requirements should not be exempt from the general sign regulation scheme, as exemptions from form requirements are routinely held unconstitutional. *See Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988) (striking down content-based exemptions to general ban on billboard signs).

2) What kind of procedural protections must a municipality provide to permit seekers?

Municipalities seeking to impose sign permitting requirements must comply with the procedural protections established by prior restraint jurisprudence. In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court articulates the requirements imposed by the First Amendment for valid licensing processes. These requirements have been summarized as: "(1) any restraint prior to judicial review can be imposed only for a specified brief period, during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Solantic*, 410 F.3d at 1270 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990)).

Whether or not the *Freedman* protections apply depends upon whether the permitting scheme in effect is content-based or content-neutral. In *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), the Court evaluated a content-neutral licensing scheme for public park use and found that "*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."

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[4] The provisions allowing temporary signs without a permit expressly state that "signage shall not be restricted by content" but is "usually and customarily used to advertise real estate sales, political or ideological positions, garage sales, home construction or remodeling" and other temporary events.

Id. at 322. Following *Thomas*, multiple courts have concluded that the *Freedman* requirements apply only to content-based permitting schemes. *See Solantic*, 410 F.3d at 1271(citing *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1281 (11th Cir. 2003)); *GK LTD. Travel*, 436 F.3d at 1082.

Therefore, so long as the city's sign code is content-neutral, courts will not require all the *Freedman* procedural protections to be in place. However, municipalities still must avoid granting "unbridled discretion" to their city officials in making determinations under the code and provide avenues for "effective judicial review." *Thomas*, 534 U.S. at 323.

3) What must a local government prove to justify its sign code?

The sign code must meet the *Ward* test for time, place and manner restrictions

When a municipal sign ordinance is challenged as violating the First Amendment, courts will use the test laid out in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) to determine the constitutionality of the restrictions on speech. Municipalities defending their ordinances will have the burden of showing that the regulations are reasonable time, place, and manner restrictions. Under *Ward*, time, place and manner restrictions must be content-neutral, narrowly tailored to serve significant government interests, and provide for ample alternative channels of communication. An analogous test is used to justify the regulation of commercial speech under *Central Hudson Gas and Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

To satisfy the first prong of the test, the regulations must be content-neutral, which means that the regulations must be justified without reference to the content of the regulated speech. *Id.* at 791. Many sign codes fail under this prong, as it is difficult to draft exemptions to sign codes that do not classify permissible speech according to content. *See Nat'l Adver. Co. v. City of Orange, supra*. In *City of Orange*, the sign code granted exemptions to the ban on noncommercial billboards for a variety of speakers and topics, including signs placed by governments and public utilities, memorial tablets or plaques, flags of national or state bodies, and changeable reader boards. *Id.* at 248. The court found that the exemptions were based on content and ultimately struck down the sign code. *Id.* at 249. Content-based regulations must meet a higher standard and are much more difficult for governments to justify.

If the regulations in a sign code are found to be content-neutral, the government must also show that they serve significant government interests and are narrowly tailored to advance those interests. *Ward*, 491 U.S. at 796. The most common government interests advanced in sign code litigation are traffic safety and aesthetics. The Supreme Court has held that both of these interests are "significant" for the purposes of the *Ward* test. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981). While courts will defer to the legislative body's judgment in determining whether the government's ends are advanced by a particular regulation, they will also examine the city's statement of purpose and any studies or findings advanced by the litigants to justify the regulations. *GK Travel LTD*, 436 F.3d at 1073. Municipalities should clearly articulate their interests in passing sign regulations in a statement of purpose included in the sign code ordinance.

Once a city demonstrates its ordinance serves significant government interests, it must also show that the regulations on speech are narrowly tailored to advance those interests. *Id.* The more exceptions to form and permitting requirements included in a code, the less likely it is that a court will find the code to be necessary to advance the stated regulatory purposes. In *Solantic v. City of Neptune Beach*, the 11th Circuit found that the City never explained how its purported interests in traffic and aesthetics were served by the numerous exemptions in the code. The court faulted the city for failing to explain how a sign depicting a religious figure with flashing lights and moving parts (which was permissible under the exemption for religious displays) would be any less distracting to motorists than a moving or illuminated sign featuring another figure which was categorically barred by the code's general prohibition on moving parts or flashing lights. *Solantic*, 410 F.3d at 1267. While the city's interests may have been legitimate, the code had too many loopholes to appear to seriously advance them. The ultimate question before most courts is whether the code in question could have been written more narrowly (*i.e.*, with less exceptions) and still advance the stated interest.

By contrast, the Ninth Circuit upheld the City of Lake Oswego's ban on all pole signs, finding it was narrowly tailored to serve the city's interests in traffic safety and aesthetics. The court found that because of their height, pole signs could reasonably be perceived by the city to be aesthetically harmful and distracting to travelers and that severely limiting their presence in Lake Oswego "directly serves the City's purposes." *Id.* By banning all pole signs, and not excepting certain signs, Lake Oswego's code was upheld as narrowly addressing a specific problem.

The final prong of the *Ward* test requires that even narrowly tailored content-neutral regulations on speech leave open ample alternative opportunities for a speaker to convey his or her message. *GK LTD Travel*, 436 F.3d at 1074. A city defending its sign code must show that speakers have other reasonable opportunities to communicate. In *GK Travel*, the Ninth Circuit found that even though the city had banned pole signs, the sign code left unrestricted many other non-sign based forms of communication, such as handbills, radio, television, newspaper or telemarketing. *Id.* With respect to signage, the code still authorized several other types of signs, including wall, monument and canopy signs. *Id.* Municipalities should consider what other avenues are left open to speakers when they restrict certain media.

The local government has the burden of proof to show its code meets the *Ward* factors

When a sign code is challenged, the burden is on the municipality to show that its code meets the *Ward* requirements. Different courts have required varying amounts of evidence from government entities in meeting this burden, but at the very least, the government must come forward with some justification for its restrictions on speech. The amount and kind of required evidence will depend somewhat on whether the sign code is subject to a "facial" or "as applied" challenge. A "facial" challenge alleges that any enforcement of the ordinance creates an unacceptable risk of the suppression of ideas. *Kuba v. 1-A Agricultural Assoc.*, 387 F.3d 850, 856 (9th Cir. 2003) (citing *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)). An "as applied" challenge alleges that the restriction on speech is unconstitutional as applied to the litigant's particular speech activity or to a particular permitting decision, even though the law may be capable of valid application to others. *Id.* The kind of evidence needed to meet the

government's burden in overcoming these challenges varies somewhat depending on which type of challenge is brought and under which of the *Ward* factors the sign code is attacked.

When a challenger alleges that an ordinance is content-based, the city must show that its code provisions are content-neutral. In a "facial" challenge, the city can present the text of the code itself to show that its provisions or exemptions do not discriminate on the basis of content. A statement of purpose espousing content-neutrality can also be helpful in supporting the city's position. *See GK LTD Travel*, 436 F.3d at 1077. In an "as applied" challenge, whether or not a facially content-neutral ordinance was applied to censor or limit particular sign messages may create jury claims for damages, depending upon factual issues about consistency in the application of the ordinance. *Seattle Affiliate of the October 22nd Coalition v. City of Seattle*, 403 F.Supp.2d 1185, 1194 (W.D. Wash. 2006). Courts will consider evidence of past discriminatory enforcement (or lack thereof) in assessing a city's claims of content-neutral application.

The city also has the burden of demonstrating that its stated interests are significant and that the regulation in question is narrowly tailored to advance those interests. Though courts often combine this two-prong test into a single inquiry, municipalities defending sign ordinances should be prepared to provide *both* evidence of sign-related problems (to justify the significance of the interest) *and* evidence that demonstrates that the proposed regulations will address the identified problems (to show narrow tailoring). In an as applied challenge, the city's actual motivation in enforcing its ordinance may sometimes create a question for the jury which speaks to both the legitimacy of the interest and narrow tailoring. *See, e.g., October 22nd Coalition*, 403 F.Supp.2d at 1194. However, whether a jury will ultimately make this determination is dependant on the particular facts of each case. Similarly, a jury may also consider whether the city's ordinance has left open ample alternative channels for the speaker to communicate his message, but this question, once again, is very fact dependant. *Id*. (finding, as a matter of law, that placing marchers on sidewalk instead of street along permitted parade route provided an ample alternative).

The required justification may vary.

The amount of evidence a city must provide varies somewhat by court and by the particular type of speech limitation. In cases dealing with regulations that limit the physical characteristics of signs (size, height and structure limitations), courts defer to a municipality's means-end determinations. As noted in *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994), "[i]t is common ground that governments may regulate the physical characteristics of signs . . . ."

In contrast, regulations that preclude signage may require more substantial justification. A court will question and require stricter justification for any "broad prophylactic rule[]" that is of the kind that is "inherently suspect in the area of free expression." *Edenfield v. Fane*, 507 U.S. 761 (1993). In *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002), the court struck down the city's prohibition on peddling near a sports stadium because the city had "provided no objective evidence" that its stated interests in traffic flow and safety were jeopardized by the plaintiff's peddling. *Id.* at 1039. The court noted that the city offered "no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed" to support either its interest in pedestrian safety or the proposition that its ordinance advanced that interest. *Id.*

Other courts have not required as significant a showing from the city defending an ordinance burdening speech. In the commercial speech context, courts have permitted litigants to justify speech restrictions "solely on history, consensus, and simple common sense." *Falanga v. State Bar of Georgia*, 150 F.3d 1333, 1341 (11th Cir. 1998)(citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)). However, municipalities should be wary of this seemingly permissive language. Even in cases where this lower standard has been applied, the city has been required to offer more than "conclusory affidavits" from interested parties. *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1555 n.15 (7th Cir. 1986). Similarly, in *GK Ltd Travel*, the 9th Circuit noted favorably the existence of testimony and hearings in the city's record about the problems of "visual pollution" associated with pole signs and the dialogue between the city and business leaders regarding the proposed sign code. 436 F.3d at 1073. The court also considered evidence that the city had relied "on the experience of other cities" and found that "this evidence provided the City with legitimate and relevant bases for advancing its Sign Code and restricting the availability of pole signs." *Id.*[5]

At a minimum, municipalities defending their sign ordinances should offer some empirical data justifying their sign codes. While cities are not necessarily required to conduct their own independent studies and can rely on research or reports conducted in other communities, they should be prepared to offer justification for why the experience of another city necessitates similar action in their own communities. That justification may be present in the legislative history of the sign regulation.

4) Can a local government apply design review to signs without creating "unbridled discretion" in decision makers?

Municipalities can apply design review provisions to their sign codes if they employ "narrowly drawn, reasonable, and definite standards." *Advantage Media, LLC v. City of Eden Prairie*, 2006 WL 2129304 (8th Cir. Aug 1, 2006) (citing *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 133 (1992)). Plaintiffs challenging design review provisions often allege that the design review process grants "unbridled discretion" to local authorities enabling them to improperly reject permit requests for unconstitutional reasons. Local governments can defeat these challenges if their sign codes contain a limited and specific set of criteria for review, including characteristics such as form, proportion, scale, color, materials, and style of lettering. *GK Ltd Travel*, 436 F.3d at 1083. Cities should also provide written reasons for the denial of any permit and an established deadline within which officials must make permitting decisions.

Most design review provisions that have been invalidated by the courts have contained overly broad design criteria or have failed to articulate standards for officials to follow. In *Desert Outdoor Adver., Inc. v. City of Moreno*, 103 F.3d 814 (9th Cir. 1996), the court struck down the city's sign code because permits could be denied on the basis of such ambiguous reasons as "harming the community's health, welfare or aesthetic quality." *Id.* at 819. Moreover, city officials could deny a permit without providing any evidence or reasons as to why a proposed sign is detrimental to the community. *Id.* Conversely, the court upheld the City

[5] Finally, many of the cases requiring "hard" evidence are outside the context of sign regulations and occur generally in cases dealing with leafleting and picketing. *See, e.g., Weinberg, supra.*

of Lake Oswego's permitting process because the standards for "compatibility review" were explicitly defined in the city's sign code. *GK Ltd. Travel*, 436 F.3d at 1083.[6] Courts will also look to the history of the sign code to determine whether or not a pattern of past abuse exists. *Id.* at 1084. Lacking evidence of past discriminatory application, courts are less likely to find that a design review process is unconstitutional.

5) Can sign companies challenge regulations that do not apply to them?

The "overbreadth doctrine" creates an exception to some traditional standing requirements in First Amendment cases. This doctrine allows litigants to challenge a statute not because their own rights of free expression are violated, but because of an assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech. *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1270 (11th Cir. 2006) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Under the doctrine, a party may bring a First Amendment case asserting the rights of third parties if a statute is constitutionally applied to the litigant but might be unconstitutionally applied to third parties not before the court. *Id.* The challenge on behalf of the absent third parties must be a "facial" challenge.

Sign companies challenging municipal sign codes often use the overbreadth doctrine to attempt to invalidate an entire sign code, even when the code has been constitutionally applied to their particular case. In order to bring an overbreadth challenge, the sign company must still first establish what is known as "constitutional standing" before they can sue on behalf of anyone else. Constitutional standing requires a showing that the company has suffered an injury, that there is a causal connection between the injury and the city's conduct, and that there is a likelihood that the injury can be redressed by a favorable decision in the case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Recent circuit court decisions have interpreted this requirement to mean that a sign company can only challenge the provisions of the sign code that in some way apply to them. In *Advantage Media LLC v. City of Eden Prairie*, *supra*, the sign company sought to invalidate the entire sign code on a facial overbreadth challenge. The Eighth Circuit held that because the code's provisions were severable, the sign company could not challenge other provisions of the code which were not factors in the denial of its permit applications. *Id.* at *5. Similarly, in *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006), the Eleventh Circuit concluded that the plaintiff could only challenge provisions of the contested festival ordinance that affected its activities.

However, municipalities should be aware that sign companies can indeed bring overbreadth challenges if they can show that they are subject to the provisions of the sign code. In *CAMP v. City of Atlanta*, though the court found that the plaintiff organization could not challenge the entire festival ordinance as a whole, it did have standing to challenge provisions of the code that allegedly granted unbridled discretion to licensing officials, a permitting exception

[6] The Lake Oswego sign code required signs to be "designed to be compatible with other nearby signs, other elements of street and site furniture and with adjacent structures. Compatibility shall be determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering."

for government-sponsored events, and three application requirements that allegedly functioned as unconstitutional prior restraints. *Id.* at 1275-76. Because CAMP was impacted by each of those provisions, the court found it had standing to sue. Thus, if a particular sign code (or any of its provisions) could possibly apply to a sign company, the company will be able to establish standing to challenge the code (or particular provisions).

6) How can municipalities regulate political signs?

Municipalities drafting sign codes must be particularly sensitive to regulations on political signs. Because political speech is at the core of the First Amendment, it is the most protected and any regulations impacting political speech will be closely scrutinized by a court. There are two primary ways in which political speech can be impermissibly burdened: when a sign code favors commercial speech over noncommercial speech and when the sign code makes content-based distinctions between types of noncommercial speech.

A sign code is invalid if it imposes greater restrictions on noncommercial speech than on commercial speech. *GK Ltd Travel*, 436 F.3d at 1081. Sign codes which make it easier, cheaper and faster to communicate a commercial message than a political message will likely be held unconstitutional. In *Beaulieu v. City of Alabaster*, 2006 WL 1791401 (11th Cir. June 30, 2006), the court struck down a sign code which required a permit to post a campaign sign but not to post a real estate sign.

As discussed throughout this paper, exemptions to permitting and form requirements are difficult to draft without making impermissible content-based distinctions. In *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), the court struck down the city's sign code because some types of signs were extensively regulated and others were exempt from regulation based on the nature of their messages. *Id.* at 1266. In the case of political signs, homeowners could post signs "related to elections, political campaigns, or referendums" without a permit, but could not post a different political message unrelated to an upcoming election. *Id.* at 1264-65. The court held that these content-based distinctions between types of noncommercial speech are unconstitutional.

Conversely, the City of Lake Oswego was able to successfully regulate political signs by avoiding content-based distinctions. In *GK Ltd Travel*, the sign code provided for an exemption for all signs placed in residential zones regardless of content. 436 F.3d at 1077. The only restrictions were temporal and size limits. Under the code, residents could erect a temporary sign without a permit so long as that sign goes up not more than 90 days prior to an election, stays up not more than five days following the election, and is no larger than six square feet. *Id.* The sign code explicitly prohibited content-based regulation and allowed for residents to display any message of their choosing as long as the size and time requirements were honored. The court found that the code was neutral with respect to noncommercial messages and upheld the regulations.

Practical tips for municipal lawyers drafting sign codes

1. Include a statement of purpose in the sign code that clearly identifies the city's interests in sign regulation. Cite to evidence of the problems necessitating the

sign code as well as evidence that the proposed solution will address the problems. Reliable sources of evidence include empirical studies, anecdotal evidence from citizens (compiled complaints about distractions or dissatisfaction with current sign scheme), transcripts from hearings on the issue, studies of the impact of sign codes conducted in other cities that can be reasonably related to the problems faced in your city, or other data showing a correlation between the signs to be regulated and the problems you want the code to solve.

2. Include minimal exemptions and define them without reference to content. Speaker-based exemptions have been upheld in the Ninth Circuit, but not in the Eleventh Circuit. Short lists of clear, narrow, exemptions are more often upheld than longer lists. Event-based exemptions are also upheld, so long as the exemption is not content-based. For example, instead of allowing temporary signs for the conveyance of messages about candidates or election issues, merely permit additional temporary signs of any content during the period of 90 days before an election. Instead of allowing signs about subdivision sales, consider allowing additional signage of any content on subdivision property that is the subject of sales.

3. Provide opportunities to comment and participate in the creation of sign regulations to affected persons and industry groups. The factual foundation for the regulation will be more firm if the comments are recognized by modifications or discussion.

4. Explicitly disavow regulatory distinctions based on the message of a sign in the text of the ordinance. A provision in the sign code for the City of Hillsboro, Oregon provides that,

   "The Hillsboro Sign Code is not intended to, and does not restrict speech on the basis of its content, viewpoint or message. Any classification of signs in this chapter that permits speech by reason of the type of sign, identity of the sign user or otherwise, shall permit any type of speech on the sign. No part of this chapter shall be construed to favor commercial speech over non-commercial speech. To the extent any provision of this chapter is ambiguous, the term shall be interpreted to not regulate on the basis of speech content, and the interpretation resulting in the least restriction on the content of the sign message shall prevail."

5. Publicly-owned signs should not be completed exempted from sign regulation. They can be exempted from the requirements to obtain a permit and pay a permit fee.

6. If possible, place the decision-making authority under a sign code in either a single individual, or a select committee, to increase the likelihood that code decisions will be consistent. The more people with authority to make permitting decisions increases the risk that the code may be applied inconsistently.

7. Provide written reasons for permit denials and include a time limit for permit decisions in the text of the sign code.

8. Provide some type of formal administrative review of all adverse permitting decisions.

9. Use a separate severability clause than the standard one in your code. In particular, be sure to state that the physical limitations on signage (size, height, location, illumination and number restrictions) are severable.

10. Consider including a variance provision to allow a court to find that the sign code is more narrowly tailored. Subjective variance criteria, however, risk a determination of "unbridled discretion."

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