International Municipal Lawyers Association
2017 Code Enforcement Program
Niagara Falls, Ontario, Canada

De-Coding the Visual Landscape: Municipal Sign Ordinances, Murals, and the First Amendment.

Shannon T. O'Connor, Esq.
Goldberg Segalla, LLP
5786 Widewaters Parkway
Syracuse, New York

©2017 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2017 Code Enforcement Program, held October 14-15, 2017 in Niagara Falls, Ontario, Canada. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

© 2017 Goldberg Segalla LLP

Local Government Regulation of Artwork

- Scant case law on topic
- Common areas of regulation:
  - Zoning codes
  - Sign regulations
  - Nuisance Abatement Controls
    - Graffiti abatement
  - Procurement Process for improvements to public spaces, i.e., artwork in parks or public buildings

© 2017 Goldberg Segalla LLP

Sign Ordinances or Regulations

- What to these ordinances cover?
  - Physical characteristics:
    - Size, height, shape, color
  - Location:
    - Placement, on premises v. off premises, public or private property, attached to a building, detached from building
  - Communication:
    - Content or message

© 2017 Goldberg Segalla LLP

First Amendment

- "Congress shall make no law …abridging the freedom of speech."
- Seems simple & straightforward…yet Free Speech law is complex
  - Competing interests:
    - Free Speech requires a balancing of the constitutional interest in the freedom of expression against the government's need to regulate in the public interest
  - Courts continue to use different analytical approaches, scrutiny levels of review, which in turn results in a lack of clarity & predictability with few bright line rules

© 2017 Goldberg Segalla LLP

Herculean Task….

- “It is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of the law relating to sign regulations.”
- Now put “Artwork” into the mix…
- Note:
  - First Amendment protections have generally expanded over time, as such, constitutional challenges to regulations on murals will likely increase over time

© 2017 Goldberg Segalla LLP

Constitutional Standard of Review

- Standard of judicial review or constitutional scrutiny level is likely outcome determinative
- Analytical Framework:
  - How does free speech law limit the discretion legislative bodies can exercise when enacting sign ordinances?
    - (major issue that decides whether ordinances or certain provisions are constitutional)
  - The standard of review the courts use when reviewing a constitutional challenge of a sign ordinance decides how this legislative discretion is limited
    - Importance of the standard of review courts use cannot be stressed enough

© 2017 Goldberg Segalla LLP

3 “Main” Scrutiny Levels

- Rational Basis Review = Likely to Win
- Intermediate Scrutiny = We have a good Chance
- Strict Scrutiny = We likely Lose

© 2017 Goldberg Segalla LLP

Rational Basis Review

- Infrequent that courts invalidate laws under this standard
  - Deferential to government and government action
  - Ends or objective of government only needs to be for a legitimate purpose
  - Means adopted to achieve those ends only needs to be reasonable
- Uphold regulation if there is a rational relationship between the law and the legislative purpose it serves
- Person challenging the law (not the government) must prove either:
  - The government has no legitimate interest in the law or policy; or
  - There is no reasonable, rational link between that interest and the challenged law

© 2017 Goldberg Segalla LLP

Intermediate Scrutiny Level

- Standard imposes some restrictions or limits on legislative discretion in adopting legislation, but not impossible to meet
- Burden of proof on government
- Language used by Courts applying this test is not consistent
  - Generally, a government must establish that the law serves an important government objective, and it is substantially related to achieving that objective
  - Some free speech cases – include an intermediate plus + standard

© 2017 Goldberg Segalla LLP

Intermediate Scrutiny

- Applicable in Analysis of Free Speech cases involving:
  - Commercial speech
  - Speech in public forums
  - Content neutral speech laws
  - Time, manner, place restrictions

© 2017 Goldberg Segalla LLP

Strict Scrutiny Level

- Strict Scrutiny usually fatal
- Strict scrutiny requires that the government prove that there is compelling government interest behind the law, and that law is narrowly tailored to achieve its result
  - Sometimes includes regulation is the least restrictive means for achieving that interest - standard as the law must "be narrowly tailored to serve a significant governmental interest, and leave open ample alternative avenues for communication"
- Courts rarely find a compelling government interest to justify content-based legislation, or laws that treat noncommercial speech less favorably than commercial speech

© 2017 Goldberg Segalla LLP

Purpose or Justification for Sign Ordinances

- Valid exercise of municipal police power
- Supreme Court upheld traffic safety and community aesthetics as significant governmental interests sufficient to satisfy intermediate scrutiny in its analysis of a sign ordinance
  - *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (stating "[n]or can there be substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city are substantial government goals.")

© 2017 Goldberg Segalla LLP

Metromedia, Inc. v. City of San Diego

- San Diego sign ordinance challenged
- Justice Rehnquist described this case as a "virtual Tower of Babel, from which no definitive principles can be clearly drawn."
- Plurality opinion with five separate opinions
- Referred to as the leading case on commercial and noncommercial speech
- Difficult to extrapolate controlling principles or positions from the decision

© 2017 Goldberg Segalla LLP

Metromedia, Inc. v. City of San Diego

- Plurality upheld ordinance restriction on commercial speech under 4-part test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*
- 4-part test:
  1. Concern a lawful activity and not be misleading;
  2. The asserted governmental interest must be substantial (if yes to both 1 & 2),
  3. The regulation must directly advance the governmental interest asserted; &
  4. The regulation cannot be more extensive than is necessary to serve that interest

© 2017 Goldberg Segalla LLP

Murals & Sign Ordinances

- Murals or other works of art on outdoor walls can be classified as a sign, artwork, or both depending on the content and the municipality in which the work is done
- Common for municipal sign ordinance to classify murals as “signs” when they contain commercial speech
- Murals containing noncommercial speech considered artwork and exempt

© 2017 Goldberg Segalla LLP

Complete Angler, LLC v. The City of Clearwater, Florida, - Mural Non-Commercial Speech

- Facts:
  - Bait shop owners had a marine themed mural on an outside wall of various fish local to area, no text in the painting
  - Artist stated painting was to draw attention to natural habitat, surrounding waterways, and alert viewers to threatened species of fish
  - Owner cited for violating sign ordinance, size restrictions and failure to obtain a permit, ordered removal of mural
- Plaintiff Challenges to Ordinance
  - Definition of artwork is unconstitutional because it is vague, overbroad, and permits city employees unbridled discretion
  - Restriction on expressive activities

© 2017 Goldberg Segalla LLP

Complete Angler, LLC v. The City of Clearwater, Florida,

- Court Analysis:
  - Applied Strict Scrutiny
  - Court reasoned that the mural "did more than propose a commercial transaction," and qualified as artwork
  - City improperly determined or classified mural as commercial speech
  - Mural was protected noncommercial speech

© 2017 Goldberg Segalla LLP

Wag More Dogs, LLC v. Cozart, Mural – Commercial Speech

- Facts:
  - Owner of a dog daycare, grooming, and boarding facility commissioned a mural with dogs, including a cartoon dog from the business logo
  - Business located near dog park in Arlington, VA
  - Ordinance – required a sign permit for business sign that was defined as a sign "identifying the products or services available on premises or advertising a use conducted thereon."
  - Zoning cited owner for violation of sign ordinance
- Plaintiff Challenges to Ordinance:
  - Impermissible content-based restriction on speech
  - vague

© 2017 Goldberg Segalla LLP

Wag More Dogs, LLC v. Cozart,

- Court Analysis
  - Applied intermediate scrutiny
  - Content was neutral on its face
  - Restriction, as applied, permissible regulation of commercial speech
  - Mural had commercial and economic purpose of attracting customers from dog park, included images from business logo

© 2017 Goldberg Segalla LLP

Tipp City v. Dakin – Mural was Commercial

- Facts:
  - Warrior Racing was a shop that sold nitrous oxide for racing cars in Ohio
  - Commission a “mad scientist” mural on an outside wall with beakers, chemical molecules
  - City cited business for violating sign ordinance and failure to obtain permit

- Plaintiffs Challenges to Ordinance:
  - Mural was protected non-commercial speech
  - Overly broad
  - Content-based restrictions
  - Strict scrutiny should apply

© 2017 Goldberg Segalla LLP

Tipp City v. Dakin – Mural was Commercial

- Court Analysis:
  - Applied intermediate scrutiny
  - Central Hudson Test
  - The court concluded that the mural constituted commercial speech since "[t]he sign plainly is intended to attract attention to Warrior Racing" because "the chemicals and molecules depicted on the sign propose a commercial transaction to racing aficionados and others."

© 2017 Goldberg Segalla LLP

Content Neutrality

- At least Six Supreme Court decisions should be analyzed to determine content neutrality
    1. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)(plurality decision that produced 5 separate opinions)
    2. Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)
    3. Ward v. Rock Against Racism, 491 U.S. 781 (1989)
    4. City of Ladue v. Gilleo, 512 U.S. 43 (1994)
    5. Hill v. Colorado, 530 U.S. 703 (2000)
    6. Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

© 2017 Goldberg Segalla LLP

Neighborhood Enterprises, Inc. v. City of St. Louis – Content Based

- Facts:
  - an individual, who "describe[d] himself as a critic of the City's use of eminent domain for private development, painted a mural on a side of building that, stated "End Eminent Domain Abuse" in a red circle with a slash through it
  - City cited plaintiff that mural was an illegal sign and did obtain permit
- Plaintiffs Challenges
  - Ordinance violate state & federal constitutions free speech protections
  - Denied equal protection
- Court Analysis:
  - Applied Strict Scrutiny
  - Sign definition in ordinance was impermissibly content-based because the message conveyed determines whether the speech is subject to the restriction

© 2017 Goldberg Segalla LLP

Mahaney v. City of Englewood – Prior Restraints Doctrine & Mural

- Facts:
  - Owner of a smoking accessory shop hired artists to paint murals on the north and south exterior walls to prevent graffiti
  - Cited by city for violations of sign ordinance, size & number restrictions, and failure to obtain permit
- Plaintiff Challenges to Ordinance:
  - Challenged the provision of ordinance requiring a special review procedure for murals
- Court Analysis:
  - Applied strict scrutiny
  - The court concluded that the special review procedure for murals constituted an impermissible prior restraint on free speech in violation of the constitution

© 2017 Goldberg Segalla LLP

Burke v. City of Charleston – Historic Preservation Ordinance & Mural

- Facts:
  - Mural painted on the side of a restaurant located in an area zoned as a historic preservation district
  - Mural was a “pop art” style painting in bright colors
  - City cited plaintiff and ordered mural removed
- Plaintiff Challenge:
  - Challenge to historic preservation ordinance on First Amendment grounds
- Court Analysis:
  - court concluded that the mural constituted noncommercial speech for its First Amendment analysis
  - held that the ordinance was content-neutral because the government’s purpose was not to regulate the murals content. the purpose of regulating the size, color, and format was the preservation of the historic district, and the restrictions went no further than necessary to achieve those goals

© 2017 Goldberg Segalla LLP

Open Questions related to Murals

- First Amendment challenges based on:
  - to local design requirements
  - Artists arguing that restrictions to size, color, structure, or materials regulate the communicative message of mural

© 2017 Goldberg Segalla LLP

Municipal Mural Programs

- City of Philadelphia
- City of Los Angeles
- City of Pasadena
- City of Portland
- Savannah, Georgia
  - Metropolitan Planning Commission Case Study
- Multiple Cities in Wisconsin

© 2017 Goldberg Segalla LLP