

Zoning Ordinances and “Free Speech”

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Over the past two decades, there has been a marked expansion in legal challenges to local land use regulations claiming violations of the free speech clause of the First Amendment to the United States Constitution. First Amendment claims can arise whenever government enacts or enforces zoning or other regulations that deal with uses such as billboards or adult entertainment businesses. This article discusses why this litigation is taking place, provides an overview of First Amendment law, and offers local officials some guidelines to help avoid potential legal challenges.

WHY ARE THERE SO MANY FIRST AMENDMENT CHALLENGES TO ZONING?

While no one can provide a definitive answer to the question of why the past two decades have seen a significant increase in First Amendment challenges to local zoning, part of the answer can be found in several recent changes in both our society and legal system. First, a number of societal changes have coalesced to create a greater potential for conflict when government regulates the use of land. We have become an increasingly diverse society and, unfortunately, this has too often resulted in our also becoming divided and divisive. At the same time, we have become a more litigious society. We are much more likely today to turn to the courts in search of a resolution for our differences.

Second, two lines of Supreme Court decisions, beginning in the late 1970's, have combined to encourage potential litigants to bring their “First Amendment & Zoning” claims into federal court. In one line of decisions, beginning with *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), the Court interpreted an 1871 federal “civil rights” statute as

allowing individual plaintiffs to sue local governments for damages and attorneys’ fees if the plaintiff can show that a local regulation violated *any* of his individual rights guaranteed under the federal constitution. In the other line of decisions,

COURTS HAVE BECOME INCREASINGLY PROTECTIVE OF “FREE SPEECH” RIGHTS — INCLUDING “SPEECH” THAT IS PURELY COMMERCIAL IN NATURE

the Court, in 1974, ruled on its first zoning case in 46 years and subsequently decided a succession of zoning cases, many of them dealing with First Amendment claims. These Supreme Court decisions, in turn, led to a greater willingness on the part of the lower federal courts to decide zoning cases involving First Amendment claims.

OVERVIEW OF THE “FREE SPEECH” CLAUSE OF THE FIRST AMENDMENT

The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the *freedom of speech*, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.” (Emphases added). This article focuses on the “free speech” clause of the First Amendment.

Although the First Amendment speaks in absolute terms — “Congress shall make *no law* ... abridging the freedom of speech ...” (emphasis added) — the Supreme Court has rejected a literal reading of the text. While government may not normally impose direct restric-

tions on the communicative aspects of speech — e.g., limit the message to be displayed on a sign — the Court has adopted the view that, under very limited circumstances, speech may be subject to narrowly proscribed regulations. There is no single test that the Supreme Court employs to determine how much government regulation of speech may be tolerated; rather, the Court chooses its analysis based on the manner in which government is attempting to impose regulations on speech. Recent Court decisions have shown, however, that attempts to regulate the *content* of speech in any context will trigger the highest level of scrutiny. Thus, the question of whether a regulation of speech is *content-neutral* has become the paramount concern of courts.

A *content-neutral* regulation will apply to a particular form of expression (e.g., signs or parades) regardless of the content of the message displayed or conveyed. The most common form of content-neutral regulation is so-called “*time, place or manner*” regulation, which, as the name suggests, does no more than place limits on when, where, and how a message may be displayed or conveyed; for example, a sign code that regulates the size, location and number of signs, regardless of the message they contain.

Normally, any time government makes regulatory distinctions based on the *content* of the regulated speech, courts will apply a very demanding analysis, known as *strict scrutiny*. By contrast, if the regulatory distinctions are *content-neutral*, a somewhat less demanding analysis, known as *intermediate scrutiny*, applies.  “*Strict versus Intermediate Scrutiny.*”

Courts will apply strict scrutiny even to content-neutral regulations, however, when the regulation imposes a total ban on a category of speech protected by the

First Amendment. For example, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), a unanimous Supreme Court ruled that an ordinance banning all residential signs, with certain exemptions, violated the First Amendment rights of homeowners because it totally foreclosed their opportunity to display political, religious, or personal messages on their own property. While the Court accepted the city's contention that the ordinance was a content-neutral "time, place, and manner" regulation, it still struck down the ordinance because the city had foreclosed an important and distinct medium of expression – lawn signs – to political, personal, or religious messages and had failed to provide adequate substitutes for such an important medium.

Courts are also very concerned about any land use regulation that imposes a "prior restraint" on speech. "Prior restraint" is the legal term for any attempt to condition the right to freedom of expression on receiving the prior approval of a governmental official.

In the context of land-use regulation, a prior restraint may take the form of requiring an applicant to obtain a permit, license, or conditional use approval as a condition to displaying or conveying a message. Such attempts are seen as posing a particularly serious threat to the values embodied by the First Amendment and will receive the strictest judicial scrutiny. As with other forms of strict scrutiny, when a court finds a prior restraint, it will reverse the traditional presumption of validity afforded to the actions of government and presume that the prior restraint is unconstitutional.

In order to overcome the presumption that a prior restraint is unconstitutional, government must show that the licensing or permitting scheme: (1) is subject to clearly defined standards that strictly limit the discretion of the officials administering the scheme, and (2) meets stringent procedural safeguards to guarantee that a decision to grant or deny the license is rendered within a determined and short period of time, with provision for an automatic and

swift judicial review of any denial.

Finally, even where a government regulation of speech is otherwise valid, it may be struck down if a court finds the language so vague that it is unclear what type of expression is actually regulated or it is so broadly worded that it has the effect of restricting speech to an extent that is greater than required to achieve the goals of the regulation.

 "Vagueness & Overbreadth."

LEARNING TO AVOID FIRST AMENDMENT "MISTAKES" IN LAND USE REGULATIONS

The legal doctrines and decisions associated with the First Amendment are quite complex and local government officials are well-advised to consult legal counsel with substantial knowledge and experience in this area before enacting land-use regulations that affect freedom of speech or religion. At the same time, however, there are a number of fairly straightforward principles and policies, which, if rigorously followed, should enable local officials to avoid the most common mistakes that can arise when enacting or enforcing land-use regulations that could give rise to First Amendment challenges.

Among the regulatory areas most likely to create potential problems are: (1) adult entertainment zoning & licensing regulations; and (2) billboard and sign zoning regulation.

ADULT ENTERTAINMENT ZONING & LICENSING

The Supreme Court has ruled that local governments may single-out adult entertainment businesses for special regulatory treatment in the form of locational restrictions if government can show a substantial public interest in regulating such businesses unrelated to the suppression of speech *and* if the regulations allow for a reasonable number of alternative locations.

Local governments may bar such businesses from residential areas and subject them to "distancing" requirements from churches, schools, playgrounds, and each other. However, such businesses must be allowed to open and

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Strict versus Intermediate Scrutiny

The strict scrutiny test requires that a content-based regulation of speech must be justified by a *compelling* governmental interest and be *narrowly tailored* to achieve that interest. Moreover, a content-based regulation of speech is presumed to be unconstitutional (i.e., the normal presumption that a local government regulation is constitutional is reversed), so that government, rather than the party challenging the ordinance, bears the *burden of proof* and must affirmatively justify the regulation to the court's satisfaction.

The strict scrutiny test is not normally applied to content-neutral regulations of speech, which, as previously discussed, usually take the form of *time, place or manner* restrictions. Instead, the courts apply a less demanding test known as *intermediate scrutiny*. Intermediate scrutiny has also been applied to regulations that are directed at the non-communicative aspects of speech but, in addition, have an indirect effect on the message being communicated. This test requires that a content-neutral regulation of speech must be justified by a *substantial* – not a *compelling* – governmental interest and must be *narrowly tailored* to achieve that interest. Finally, the regulation must leave open "ample alternative avenues of communication."

Vagueness & Overbreadth

Two important legal principles – termed "*void for vagueness*" and "*overbreadth*" – seek to ensure that government regulation of expression is sufficiently precise so that individuals will know exactly what forms of expression are restricted and that laws which legitimately regulate certain forms of expression do not also include within their scope other types of expression that may not permissibly be regulated. These two principles are quite closely related, and courts often find that an ordinance violates both.

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operate at locations that are “available” for such a use; i.e., locations that are zoned to permit such uses and that are serviced by roads and utilities.

Adult entertainment zoning ordinances must also be drafted with meticulous attention to the definitions used to determine what constitutes an adult entertainment business and the legislative record must reflect that the ordinance was enacted to address the negative “secondary effects” (most typically, increased crime and lowered property values) associated with such businesses, rather than to censor or prohibit the entertainment itself.

The Supreme Court has also ruled that local government may license adult entertainment businesses and thereby regulate various operational aspects of these businesses. However, because licensing ordinances are viewed as a form or “prior restraint,” courts will closely examine them and will not hesitate to strike one down if it *either* fails to contain criteria for city officials to follow in granting or denying a license *or* lacks effective time limitations for the issuance of a decision on a license application.

Finally, since requiring an adult business to obtain a conditional use permit raises concerns about a prior restraint similar to those raised by a licensing ordinance, courts have struck down such requirements where they vested over-broad discretion in city officials or did not provide for specific time limits for deciding on the application.

ZONING REGULATION OF SIGNS AND BILLBOARDS

Courts have become increasingly protective of “free speech” rights – including “speech” that is purely commercial in nature (e.g., a billboard advertising a car, or a sign on a restaurant). In the past, local governments had to exercise the greatest caution only when regulating “non-commercial” signs such as political (“Vote for Joe”) or personal (“No Solicitors”) signs. Today, however, such caution should probably be extended



to any sign regulations that go beyond “time, place or manner” restrictions on the height, area, number, and location of signs.

This does not mean that localities cannot take steps to regulate commercial signs such as billboards. However, to do so, local government officials must be able to demonstrate that a substantial government interest (e.g., aesthetic or traffic safety) would be served by regulation and that there is a “reasonable fit” between the regulation and the interest to be served by the regulation.

1. Political Signs. A sign ordinance prohibiting political or election signs is clearly unconstitutional and courts have struck down prohibitions on political signs that applied in both residential and other districts. Courts have also struck down sign ordinances that discriminated among different political messages (e.g., an ordinance restricting the content of political signs to the candidates and issues being considered at an upcoming election).

Ordinances that place unreasonable limits on the number of political signs that may be displayed, or that impose restrictive time limits only on political signs, have also been struck down. Although some cases have suggested that

time limits on political signs might be permissible if they are part of a “comprehensive” program to address aesthetic issues, these cases provided little guidance on how comprehensive the government program must be to justify the restrictions on political signs.

2. Regulation of On-Premise versus Off-Premise Signs. Local sign regulations often distinguish between on-premise and off-premise signs in an effort to restrict the location and number of off-premise signs (i.e., billboards). Courts accept as rational a local determination that on-premise signs are an inseparable part of the business use of a piece of property, while off-premise advertising is a separate use unto itself that may be treated differently from on-premise signage.

There is little question that local government may lawfully regulate off-premise commercial signs more strictly than on-premise commercial signs. Regulations have also been upheld that limit the height, size, and/or number of off-premise signs, or that restrict their location.

Some off-premise sign regulations have been struck down, however. The U.S. Supreme Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)

found San Diego's ban on off-premise signs to be invalid because exceptions to the ban were made for some, but not all, noncommercial messages. Courts have followed *Metromedia* by striking down off-premise sign regulations that make distinctions among forms of noncommercial speech as well as those that allow exceptions for certain commercial messages but not a general exception for noncommercial messages. In contrast, regulations that exempt all noncommercial speech from a general ban on off-premise signs have been upheld as have those where the definition of off-premise signs has been found not to include noncommercial messages.

Courts have also invalidated off-premise sign regulations where the local government failed to demonstrate what interests it was seeking to promote through the regulations. While most courts merely require that the interests be mentioned in the ordinance, and then defer to the governing body's determination that the regulations substantially promote those interests, other courts have required a higher level of substantiation of the interests involved and the regulations' relationship to them.

SUMMING UP:

When regulating speech – whether commercial or noncommercial – local governments need to act with care. As with other areas of land use law (e.g., property rights) local regulations are most likely to be upheld when they are carefully drafted to comport with judicial decisions and are supported by sound reasoning. Planners and lawyers can work together to develop ordinances that meet community objectives in a manner consistent with judicial case law. ♦

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