

SIGN REGULATION

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Is Anything Constitutional?



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WHAT DOES THE CONSTITUTION HAVE TO DO WITH SIGNS, ANYWAY?

- I. THE FIRST AMENDMENT PROTECTS SPEECH.
 - A. Signs are not only structures.
 - B. Signs convey messages (i.e., they are protected speech).
- II. WAYS THAT CITIES **CANNOT** CONSTITUTIONALLY REGULATE SIGNS.
 - A. A sign ordinance cannot regulate the content of signs.
 - B. Content regulation comes in many different forms:
 - 1. The on-site, off-site dilemma;
 - 2. Problems with sign permit and appeal provisions;
 - 3. Problems with special interest exceptions (i.e., real estate agents, political candidates, and car dealers, etc.)
- III. WAYS THAT CITIES **MAY** CONSTITUTIONALLY REGULATE SIGNS.
 - A. City must decide that aesthetic integrity is a priority in the community that is worth fighting for (literally).
 - B. City must regulate signs by limiting height, size, and number rather than content based descriptions.
 - C. City's ordinances must be drafted in such a way that each provision is readily severable by a Court.
 - D. City's ordinance must reflect the City's interest in aesthetics, and operate toward reaching the City's aesthetic goals.
 - E. City must always coordinate with attorney knowledgeable on First Amendment issues before enacting or amending a sign ordinance.

BRENTWOOD AND SIGNS – ONE CITY’S EXPERIENCE

Signs in Brentwood (Before the Lawsuit):

First zoning ordinance in 1972 included size limitations on signs (first appearance of 6 ft. height limit)

Comprehensive revisions were adopted in 1988, 1991 and 1999, but the 6 ft. height limit remained constant. Off-premises signs were prohibited.

A few billboards are located in Brentwood, in locations that had billboards before City regulated signs. State law grandfathers them in.

The Lawsuit (Part 1):

October 9, 2002 – Two men from Arab, Alabama appear at Brentwood Planning & Zoning Department, requesting permits for five billboards along I-65 in north Brentwood. Prime Media had obtained five leases from property owners (*not Brentwood residents!*) who had agreed to allow billboards. Sign ordinance prohibited off-premises signs, as well as signs over 6 feet tall. Permits were denied.

October 29, 2002 – Prime Media, Inc. files suit against Brentwood in federal district court, challenging the constitutionality of the sign ordinance.

*Who the *&#@% is Prime Media, Inc.?????* Two guys from Arab, Alabama. The company was incorporated in summer of 2002, and had not yet put up a single billboard.

Prime Media’s lawyer is E. Adam Webb of Atlanta. Webb had represented billboard companies in Georgia, Florida, Connecticut and California.

Lawsuit didn’t just attack height limits and off-premises sign prohibition. It attacked City’s permitting process, including lack of time limits and clear appeals process. But beyond that, it attacked provisions for political signs, real estate signs, historical markers, and much, MUCH MORE that had nothing to do with billboards.

On the one hand, lawsuit looked boilerplate. On the other hand, someone had spent a lot of time combing through City’s ordinance and finding everything that might be content-based or otherwise vulnerable. In some areas, they had us – but mostly in areas not dealing with billboards.

Why Brentwood?

Brentwood wasn't the only city in Tennessee with a sign ordinance. Commercial areas were a relatively small portion of City. So why pick on us?

BUT I-65 runs through Brentwood, with Nashville to the north, Cool Springs/Franklin to the south. Plaintiffs testified they explored the area and found it to "underserved."

The Lawsuit (Part 2):

January 31, 2003 – Prime Media sued Franklin, too.

After Brentwood amended its sign ordinance, court ruled that Prime Media's request for injunctive relief was moot, but allowed amended complaint based on new ordinance.

November 4, 2003 – Judge enjoined enforcement of Brentwood's six foot height limit and 120 square foot sign face limit. Judge found that there was no evidence that City's height/size limits are "narrowly tailored" to further its governmental interests. This ruling was the subject of the City's appeal to the 6th Circuit Court of Appeals.

February 24, 2005 – 6th Circuit Court of Appeals ruled for Brentwood. District court's injunction is overturned. Court upheld Brentwood's size and height limits and found sufficient narrow tailoring. A few issues were remanded to district court.

To ask the City to justify a size restriction of 120 square feet over, say, 200 square feet or 300 square feet would impose great costs on local governments and at any rate would do little to improve our ability to review the law—because any further explanation assuredly would contain the kind of aesthetic and subjective judgment that judges are not well-equipped to second guess. Prime Media, Inc. v. City of Brentwood, 398 F. 3d 814 (6th Cir., 2005)

July 29, 2005 – District Court dismissed lawsuit, ruling that Prime Media lacks standing to challenge remaining sign ordinance provisions which have no direct effect on it. Prime Media appeals this ruling.

June 9, 2006 – Case went back to 6th Circuit Court of Appeals for determination of standing of Prime Media to challenge provisions of the sign ordinance which are not applicable to it.

May 8, 2007—Sixth Circuit Court of Appeals affirmed dismissal of remaining claims for lack of standing.

The United States Court of Appeals for the Eleventh Circuit holds that a plaintiff who has established constitutional injury under a provision of a statute as applied to his set of facts may also bring a facial challenge, under the overbreadth doctrine, to vindicate the rights of others not before the court under that provision. Hence, the overbreadth doctrine allows plaintiffs to bring a facial challenge to the provisions under which the plaintiff suffered an "injury in fact." The United States Supreme Court has reaffirmed the "independent obligation" of federal courts to ensure a case or controversy exists as to each challenged provision even in a case where the plaintiffs established harm under one provision of the statute. Thus, a plaintiff is required to establish injury in fact as to each provision challenged, even under the overbreadth doctrine. A plaintiff may bring an overbreadth claim to challenge only those provisions of a law that "affect its activities" where those provisions actually caused it injury.

Prime Media, Inc. v. City of Brentwood, 485 F.3d 343 (6th Cir. Tenn. 2007)

Related matters:

Like Brentwood, Franklin amended its ordinance while its lawsuit with Prime Media was pending. The amended ordinance was upheld by the 6th Circuit Court of Appeals.

The lesson: Even when a lawsuit has been filed, you can still amend your sign to change portions that may be thrown out by the courts. By doing so, much of the lawsuit may become moot. Still, the best practice is to have good, defensible, content-neutral sign regulations in place before you get sued.

Clarksville was sued by another plaintiff represented by the same lawyer who represented Prime Media. That lawsuit was settled.

Caveat: Settling a sign lawsuit by allowing the plaintiff to put up signs may set a precedent for other potential plaintiffs.

Several Middle Tennessee cities have revised sign ordinances. I have attempted to assist these cities to use the same format as the Brentwood and Franklin ordinances which have been held to be constitutional. This is met with resistance from special interests, but ultimately we have improved these ordinances as well.

Sign law continues to develop in the U. S. District Courts and Courts of Appeals. Continue to closely observe new decisions to determine their impact on local sign regulations. Does anyone smell a rat? See: State vs. Deangelo, 2009 N.J. LEXIS 10

LED Signs open up a new kettle of fish.

SIGN REGULATION DOs AND DON'Ts

DON'T:

Pick and choose what you'll allow in the public ROW

If you allow one form of expression in the ROW, does that open the door for other things that might be more objectionable? Avoid making exceptions for signs such as:

Political signs



Yard sale signs



Real estate signs



Church directional signs



Roadside memorials



DO:

- Clearly state your purpose.
- Apply size, number, location provisions in furtherance of your purpose.
- Be content-neutral.
- Avoid exceptions.
- If you have any content-based regulations, make sure they are dispensable.

DON'T:

Allow unbridled discretion to grant or deny permits.

DO:

- Establish clear guidelines if you're going to require permits.
- Have a clear appeals process for permit denials.
- Provide permitting official with specific, objective criteria to grant or deny permits (e.g., height, size.)
- Include any permitting requirements in a separate section from time-place-manner restrictions.
- Consider abolishing permit requirements.

A content-neutral time, place, and manner regulation can be applied in such a manner as to stifle free expression. It thus must contain adequate standards to guide an official's decision and render that decision subject to effective judicial review. Thomas v. Chicago Park Dist., 380 U.S. 51 (2002)

DO:

Use caution in distinguishing between on-premises and off-premises signs.
(If you prohibit off-premises signs, are you regulating content?)

Metromedia Inc. et al. v. City of San Diego, et al., 453 U.S. 490 (1981): In pursuing goals of aesthetics and traffic safety, city could reasonably distinguish between onsite and offsite advertising on same property, in view of fact that city could believe that offsite advertising presented more acute problem and that commercial enterprise as well as interested public had stronger interest in identifying place of business and advertising products or services available there than in using or leasing available space to advertise commercial enterprises located elsewhere.

DON'T:

- Limit content of billboards (if they are allowed) to commercial or noncommercial messages.
- Choose between appropriate subjects of noncommercial speech for public discourse.

DO:

- Allow First Amendment rights of residents.
- Avoid content distinctions for yard signs (except to prohibit commercial signs at residences?)

DON'T:

Back off from imposing reasonable time-place-manner restrictions for yard signs.

Residential yard signs: *Displaying a sign from one's own residence carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means, for it provides information about the speaker's identity, an important component of many attempts to persuade. Residential signs are also an unusually cheap and convenient form of communication. Furthermore, the audience intended to be reached by a residential sign-- neighbors--could not be reached nearly as well by other means.* City of Ladue v. Gilleo, 512 U.S. 43 (1994)

Real estate signs in yards: *Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated-- primarily newspaper advertising and listing with real estate agents--involve more cost and less autonomy than "For Sale" signs ...; are less likely to reach persons not deliberately seeking sales information ...; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold.... The alternatives, then, are far from satisfactory.* Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382 (6th Cir., 1996) (Also see Linmark Associates, Inc. v. Willingboro Township, 431 U.S. 85 (1977.)

DON'T:

Stand in the way of subdivision covenants that go further than your sign restrictions.

QUESTION

Does it violate state or federal law for a private residential subdivision to prohibit a resident of that subdivision from placing a political yard sign in the resident's own yard?

OPINION

Such a restriction does not violate any state statute. The prohibition would be subject to analysis under the First Amendment to the United States Constitution only if it constitutes state action. Tenn. Op. Atty. Gen. No. 04-041 (2004)

DO:

- Be comprehensive in defining “sign.” (Is a flag a sign? What about pennants? Balloons? Inflatable beer cans?)
- Make sure your definitions and regulations are:
 - Clear
 - Understandable
 - Enforceable

DO:

- Consult TCA § 13-7-208 whenever there is a question about nonconforming signs.
- Allow lawful nonconforming signs to stay put (but you may not have to let on-premises signs be replaced with a similar or larger sign.)
- Require on-premises signs to conform with sign regulations if business ceases to operate for 30 months.
- Allow lawful nonconforming off-premises signs to be increased in size, one standard size up from the existing size.

DON'T:

- Amortize lawful nonconforming signs (unless business is closed 30 months.)

National Auto/Truck Stops, Inc. v. Williamson County, 2001 WL 434860 (Tenn. App., 2001) [In regard to on-site signs at truck stop] *These signs are an integral part of the business establishment, much the same as the building in which the service station is housed, and it is not disputed that their replacement is necessary to the continued conduct of the business at that location. We agree with the appellant that the Tennessee Non Conforming Property Act protects not only principal uses, but the accessory uses of a business establishment as well. Within the purview of the statute, one cannot be separated from the other.*

DON'T:

- Allow lawful nonconforming on-premises signs to be replaced with similar or larger signs, *unless* it's shown they are “necessary to the conduct of [the] industry or business.” (See TCA § 13-7-208(d).)

Alexander Ford-Mercury, Inc. v. City of Franklin, 2005 WL 549163 (Tenn. App., 2005) *[T]he grandfather provision allows the plaintiff . . . to replace the sign and construct a new one if the reconstruction is necessary to the conduct of his dealership.* (Also see *B.F. Nashville, Inc. v. City of Franklin*, 2005 WL 127082)

DON'T:

- Use the “let’s give everybody something” approach.
- Assume you’re safe because the hometown folks are happy.

DO:

- Rely on outside expertise for technical assistance and Constitutional issues.
- Look at what other cities have successfully done.
- Seek input from area businesses.

DO:

- Rely on your own experience and history with signs.
- Insert findings, purpose in your sign ordinance.
- Include a severability clause.

DO:

- Use content-neutral aesthetic guidelines in establishing sign regulations.