

# *Unmasking the Myths about Signs:*

Learning to Use Signage as a Planning Tool  
for Intelligent Community Development

## *Chapter 3*

### **Myth #2: Censorship of Commercial Speech is Legal**

Planners are often tempted to write signage regulations that favor signs they like and limit or eliminate signs they do not like. The regulations they write may require reading what is on a sign before you can tell what the rules for that sign will be. For example, they may allow temporary signs that guide people to a neighborhood garage sale, but attempt to outlaw temporary real estate signs pointing to a home that is for sale. Such restrictions have the effect of allowing one type of speech, but censoring another.

Signs are a complex subdivision of what we call speech. They include outdoor advertising in its many placed-based forms, and on-premise signs ranging from traditional ground- and building-mounted signs to sign centric site design and signature buildings, such as commonly used by franchisers in the fast food or service stations trades. Too often that complexity is overlooked in discussions of signage.

Although the on-premise business sign is the most regulated form of commercial expression now in existence, the sign industry does not object to regulation *per se* – neither does today’s business community. Both sign makers and sign users accept the need for regulation; the objection is to regulations based on personal preferences amounting to censorship and a misunderstanding of the First Amendment “free-speech” protections afforded signage.

Sign regulations based on nuisance theory are usually supported by either subjective interpretations of what makes for a “beautiful” and/or “safe” sign, or demonstrate a failure to recognize the important role signage plays in creating a vibrant, vital business district. This is not only potentially lethal to long-term, sustainable retail revenues, but is also toxic in terms of the fiscal health of the average pluralistic town or city.

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It is now well established that sign codes regulating private signs must be time, place, and manner regulations that are content neutral. In this chapter we will examine the Constitutional protections and case law that apply to regulations of signage.

### Constitutional Protections

Commercial signs generally fall into three classifications with differing property interests, often leading to differing treatment by the controlling law:

- **Outdoor advertising.** The permanent ground or building-mounted outdoor advertising (or off-premise) structure, if located on private property, is considered a primary land use, possessing a primary real estate interest.
- **On-premise.** The permanent ground or building-mounted on-premise sign is considered an accessory land use, possessing a partial real estate interest. A sub-category of on-premise signage is comprised of incidental signs (such as credit card signs, restroom signs, and ADA signs), which may be either

permanently or temporarily affixed to the premises, and may or may not possess a partial real estate interest, depending upon the controlling law.

- **Temporary.** Temporary signs, such as political, real estate, or special event or activity signs, are short-term, impermanent communication devices that do not possess a real property interest; they are personal property.

**It is now well established that sign codes regulating private signs must be time, place, and manner regulations that are content neutral.**

Legal issues arising from signage regulation generally focus on the First, Fifth or Fourteenth Amendments to the U.S. Constitution; sometimes more than one Amendment is involved. The following Table summarizes these issues as they relate to the three Amendments.

TABLE 3	
First, Fifth, and Fourteenth Amendments First, Fifth, and Fourteenth Amendments	
CONSTITUTIONAL AMENDMENT	RELATED SIGNAGE ISSUES
First Amendment	Restraints on commercial and noncommercial communication. Content control. Censorship.
Fifth Amendment	Just Compensation. Amortization. Abatement. Contributory value of sign to overall business. Valuation of signage. Value of the communication component of a site. Regulatory takings. Takings. Eminent domain.
Fourteenth Amendment	Discrimination. Code administration. Variances. Application of the code. Code interpretations. Conditional uses. Amortization. Censorship.



*When terrorists attacked New York, many business owners used their variable message boards to express their patriotism.*



## The First Amendment

**The government cannot place limits on time-place-manner based upon what the message “says” or who is saying it.**

In ten words, the First Amendment prohibits Congress from establishing any law that curtails the right to speak – “Congress shall make no law abridging the freedom of speech ...”

Although this command appears to be straightforward enough, the founding fathers neglected to clarify how to go about preventing abuses of the right to “free speech,” or for that matter, whether there were different kinds of speech which might be deserving of different levels of protection. Consequently, the U.S. Supreme Court, over the years, has produced a shopping list of balancing tests and speech categories. However, written or pictorial advertising – on signs – was not foremost in either mind or law until 1942, when the “commercial speech doctrine” made its appearance. To understand what occurred then, and where it has lead today, some background is in order.

### Background

Prior to 1942, it did not occur to litigants to characterize their advertisements as “commercial speech” because advertising was thought of as an occupation, not a form of expression. Then, in 1940, a New York City entrepreneur, Mr. Chrestensen, distributed a leaflet, which on one side advertised the exhibit of a scrapped navy submarine he owned, and on the other, protested the city’s denial of wharfage facilities. He “subdivided” his leaflet in order to avoid the city’s “sanitary” code which prohibited distribution of advertising handbills in the streets, but did permit distribution of “political” messages. The police put a stop to his promotional efforts, and he sued the city, charging that its sanitary regulation violated the Due Process Clause (not the First Amendment). The U.S. Supreme Court found that Chrestensen’s printed protest amounted to an attempt to dodge the sanitary code, and held that the owner’s usage of the streets for advertising purposes was unlawful.<sup>1</sup> In its opinion, the Court did not address commercial speech or the First Amendment, but only the issue of whether commercial conduct could be regulated by legislatures. However, its holding that commercial advertising receives no Constitutional protection originated the distinction between commercial and noncommercial speech. This holding held sway until 1976, when the Court decided *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>2</sup>

In *Virginia Board*, a state regulation prohibited pharmacists from advertising the prices of drugs. Consumers of prescription drugs brought suit against the state, charging that the advertising ban violated the First Amendment and denied them the benefit of learning the prices of drugs from advertisements. The core question was whether an advertisement, unaccompanied by any political expression, receives protection under the First Amendment. The Court responded that it did. Justice Blackman, writing for the majority, explained why.

Justice Blackman noted that:

1. the profit motivation of a speaker did not remove speech from the protection of the First Amendment;
2. the public needed commercial information as much as, if not more than, it needed political information;

3. the success of a democracy and a free economy required that commercial information be freely disseminated and readily available; and
4. the First Amendment prohibited the government from preventing the flow of commercial information in order to affect the public's decision.<sup>3</sup>

**Justice Blackman posited that the success of a democracy and a free economy required that commercial information be freely disseminated and readily available.**

The opinion further observed that “time, place and manner” restrictions on commercial speech are permissible if they:

1. are justified without reference to the content of the speech;
2. if the restrictions serve a significant government interest; and
3. leave open ample alternative channels for communication of the information.<sup>4</sup>

In the context of the above three-pronged test for constitutionality, time refers to “when” a message may be displayed; place refers to “where” the message may be displayed, and manner to “how” the message may be displayed. The phrase “without reference to the content of the speech” means that the government cannot place limits on time-place-manner based upon what the message “says,” the number of words used to convey the message, or who is saying it, unless the message contains false or misleading information, or otherwise poses, or proposes an imminent threat to public health, safety or welfare. The Supreme Court has ruled that these latter forms of expression do not receive First Amendment protections.

While the case granted commercial speech First Amendment protection, the protection was weakened because the Court observed in a footnote that “common sense differences” between commercial and noncommercial speech made commercial speech more regulable.<sup>5</sup> As a result of this judicial “aside,” in several cases following *Virginia State Board*, the Court drew on “common sense differences” to afford commercial speech something less than full First Amendment protection.<sup>6</sup>

Then, in 1980, a four-pronged balancing test was devised to determine whether a state regulation banning advertising violated the First Amendment. The case, *Central Hudson Gas & Electric Corp v. Public Service Commission*, 447 U.S. 557 (1980), arose



*Consumers must have ready access to information on the cost of goods; such knowledge is essential to a free economy.*



<sup>1</sup> *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>2</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>3</sup> “Our pharmacist does not wish to editorialize on any subject...philosophical or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations, even about commercial matters. The idea he wishes to communicate is simply this: ‘I will sell you X prescription drug at Y price.’” Justice Blackman, *Virginia State Board*, at p. 771.

<sup>4</sup> *Virginia State Board*, at p. 771.

<sup>5</sup> *Virginia State Board*, at p. 771-772 n. 24.

<sup>6</sup> See *Ohralik v. Ohio State Bar Assn*, 436 U.S. 447 (1978). The Court opined that if commercial speech were granted full First Amendment protection, the protection granted to other forms of speech would be diluted and the First Amendment ... “devalitized.” *Ibid*, p. 449.

from a challenge of a New York state law that prohibited public utility advertising. The State asserted that such advertising would increase consumer demand, thereby leading to increased energy consumption in direct contravention of the state's interest in energy conservation.

The balancing test used to decide the issue is as follows:

1. The court must first ask if the commercial speech at issue concerns "lawful activity" and is not "misleading." If the answer here is negative, then no protection is afforded, and the inquiry is ended.
2. The court must then ask if the government interest served by the regulation is substantial. If the answer here is negative, then the First Amendment will apply because speech should not be limited for insubstantial reasons.

If the answer to both of the first two questions is affirmative, then the court must determine answers to the following:

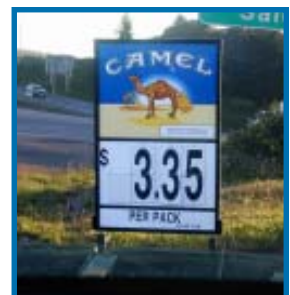
3. Does the regulation directly advance the government's interest?
4. Is the regulation no more extensive than necessary to serve that interest?

In applying the test to the facts of the case, the Court found that the ban failed the fourth requirement because the state could achieve its goal by requiring that the utility include in its advertisements information regarding energy conservation. And while still paying deference to the "common sense differences" between commercial and non-commercial speech, the Court clearly articulated more scrutiny of restrictions on commercial speech than the deferential standards of "reasonable" or "rational" or "not arbitrary and capricious," normally applied to test the validity of governmental regulations of purely economic interests.

## First Application of *Central Hudson*; Distinguishing Between On-Premise and Off-Premise Signs

At its first opportunity to apply the *Central Hudson* test and analysis, the Supreme Court experienced some difficulty. The case was *Metromedia Inc v. City of San Diego*,

*Signs may be regulated based on time, place, and manner restrictions, but all regulations must be content-neutral. A city may, for example, ban all temporary signs, or limit their number, location or duration of posting; but it may not regulate based on what the sign says or who is saying it, unless the message is misleading, fraudulent or otherwise illegal.*



453 U.S. 490 (1981). The issues were many, and the resolution produced five separate opinions.

The crux of the matter was the constitutionality of the city’s sign ordinance that permitted on-premise signs while banning off-premise signs – or outdoor advertising. The primary reasons advanced by the city for its ban on outdoor advertising structures were (1) they significantly degraded the attractiveness of the community, and (2) they compromised traffic safety. The ban included both commercial and non-commercial speech.

While none of the five opinions garnered a majority of the Court’s members, the justices could agree on some points. First, the Court was unanimous in finding that a community could ban off-premise commercial signs, but still permit on-premise commercial signs as a legitimate exercise of police powers to reduce sign clutter (or improve “aesthetics”) and promote traffic safety.<sup>1</sup> While the opinion states that promotion of traffic safety is a legitimate exercise of police powers, the city had conducted research and was unable to prove this point, therefore both litigants agreed there was no evidence that the off-premise signs had caused traffic accidents.

Next, seven justices agreed that, based on the *Central Hudson* four-prong test, the city’s interest in promoting traffic safety and avoiding visual clutter was substantial enough to justify a complete prohibition of off-premise commercial signs.

Finally, although the Court ruled 6-3 that the city’s sign ordinance was unconstitutional, the six judges couldn’t agree why. Two justices simply found that the ordinance failed the *Central Hudson* test because the city had not conclusively shown that the city’s interest in aesthetics and traffic safety was substantial enough to justify a prohibition of signs in commercial and industrial areas. The other four justices joined in a plurality opinion that found two flaws: (1) the ordinance favored commercial over noncommercial speech because commercial speech could be displayed on on-premise signs while noncommercial speech could not; and (2), the ordinance discriminated among various noncommercial messages by creating exceptions for some, but not all such messages.

Justice White summed up his opinion by stating, “It is apparent . . . that the ordinance distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content. Whether or not these distinctions are themselves constitutional, they take the regulation out of the domain of [content neutral] time, place and manner restrictions.”<sup>2</sup>

**“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”**

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<sup>1</sup> While the opinion states that promotion of traffic safety is a legitimate exercise of police powers, it was not a controlling factor in *Metromedia*, because all the litigants agreed there was no evidence that the off-premise signs complained of by the city caused traffic accidents. However, Justice White did address the issue by finding that the record was inadequate to show any connection between “billboards” and traffic safety, and therefore, the ban did not directly advance the city’s interests in traffic safety. *Metromedia*, at p. 510.

<sup>2</sup> *Metromedia*, at pp. 516-517.

## Further Guidance from the Court

Two cases following *Metromedia* provided additional guidance on parts three and four of the *Central Hudson* test. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the Court specified a more precise standard required by the third part of the test: regulation of commercial speech must be “no more extensive than necessary to achieve the substantial governmental interest.” While the Court did not go so far as to require the least restrictive means of regulation, it did say that more than mere reasonableness was required – “a means narrowly tailored to achieve the desired objective.”<sup>1</sup>

In *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), the Supreme Court rejected a claim that the city’s ban on commercial news racks was justified by the city’s legitimate interests in the safety and attractive appearance of its streets and sidewalks, particularly since the ban would remove only 62 commercial news-racks while leaving 1,500-2,000 noncommercial news racks (those dispensing only “newspapers”) in place. The Court found that the benefits to be derived from the ban were “minute” and “paltry,” given the city’s supposed goal of achieving a reduction in the total number of news racks.

The Court also rejected the city’s claim that its ban was justified because of the “low value” of commercial speech, holding:

*In the absence of some basis for distinguishing between “newspapers” and “commercial handbills” that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati’s bare assertions that the “low value” of commercial speech is sufficient justification for its selective and categorical ban on news racks dispensing “commercial handbills.”*<sup>2</sup>

*A business’s trademark or logo is protected under the 1958 Lanham Act. No sign regulation can require a company to alter a trademark as a condition of obtaining a sign permit.*



The Court discussed the “reasonable fit” test, noting that:

*[the] regulation need not be absolutely the least severe that will achieve the desired end, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the “fit” between ends and means is reasonable.*<sup>3</sup>

Finally, the Court determined that the ban could not be considered a valid content-neutral regulation of “time, place and manner,” because the very basis for the regulation was the difference in content between commercial and noncommercial news-racks.

## Where the Law Stands Today: *Central Hudson* Altered; *Virginia Board* Strengthened

In 1996, the Supreme Court delivered its most significant pronouncement on the status of commercial speech since its *Virginia Board* decision 20 years earlier, establishing that the First Amendment protected commercial speech.

In *44 Liquormart Inc v. Rhode Island*, 116 S.Ct.1495 (1996), the Court unanimously struck down a state law that prohibited the advertising of retail liquor prices except at the place of sale. The state argued that the ban was a necessary extension of its interest in reducing alcohol consumption among all drinkers.

The justices found it difficult to agree on the reason to strike down the law – the decision consists of an eight-part plurality opinion. In taking the views together, however, the result is an expression of a significant change in how the Court views the First Amendment status of commercial speech, together with a willingness either to apply a more stringent test than *Central Hudson* or to apply *Central Hudson* with “special care.”<sup>4</sup> Justice John Paul Stevens wrote:

*In recent years this Court has not approved a blanket ban on commercial speech unless the expression itself is flawed in some way....[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.*<sup>5</sup>

Justice Clarence Thomas argued that when a government regulation works to keep information from the public in order to control the public’s choices or conduct, the *Central Hudson* test is inapplicable. Adhering to the principles of *Virginia Board*, Justice Thomas stated that (1) a democracy and free enterprise economy require well-informed citizens free to make independent decisions, (2) the First Amendment protects the

**The government may no longer manipulate the marketplace by suppressing truthful speech about a legal product when less-restrictive, or speech-neutral, alternatives are available to further the government’s goal.**

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<sup>1</sup> *Board of Trustees*, at p. 480.

<sup>2</sup> *Discovery Network*, 113 S.Ct. 1505, p. 1516.

<sup>3</sup> *Ibid.*, p. 1510 n. 13.

<sup>4</sup> “We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy.” *Central Hudson*, 447 U.S. at 557, 566.

<sup>5</sup> *44 Liquormart*, Justice Stevens; p.p. 1507-1508.

circulation of commercial speech, and (3) regulations which suppress information are not permissible, even if they pass a balancing test.

Additionally, Justice Thomas predicted that given the fourth prong of the *Central Hudson* test, there would almost always be a speech-neutral alternative available to advance a state's interest and, for that reason alone, restrictions on commercial speech would rarely, if ever, pass constitutional scrutiny.<sup>3</sup>

Before *44 Liquormart*, the *Central Hudson* balancing test arguably sanctioned the suppression of truthful commercial speech. After *44 Liquormart*, it seems clear that the government may no longer manipulate the marketplace by suppressing truthful speech about a legal product when less-restrictive, or speech-neutral, alternatives are available to further the government's goal. This point is illustrated in a recent Supreme Court decision on commercial speech regulation, *Lorillard Tobacco Co., et al. v. Reilly*, 121 S.Ct. 2404 (2001).

In *Lorillard*, the Court struck down a Massachusetts law that imposed severe location restrictions on signs advertising tobacco products in an effort to discourage tobacco use by minors. Applying the *Central Hudson* test, the Court acknowledged that Massachusetts had a substantial, and even compelling interest in preventing children from using tobacco. Notwithstanding this interest, however, the Court found that the regulations failed to meet *Central Hudson*'s "reasonable fit" requirement because the state's effort to discourage underage tobacco use unduly impinged on advertisers' "ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." (*Id.* at 2427.) The Court further noted that "[I]n some geographical areas, these regulations would constitute nearly a total ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers." (@ 2425.)

Although the Court's rulings in *44 Liquormart* and *Lorillard* are not specifically attributed to the application of strict scrutiny, they come very close. Thus, for the present, it appears reasonably safe to assume that when judging the validity of content-based bans on commercial speech, the Court will apply *Central Hudson* with sufficient "special care" as to be the practical equivalent of strict scrutiny, thereby effectively equating the First Amendment status of commercial speech with that of noncommercial speech in such instances.

*As a condition to placing its sign, a city cannot demand, for any reason, that McDonald's change its "golden arch" to a purple one, or Shell, its "shell" to a star; or require Hollywood Video to straighten the baseline of its letters.*



## Federal Trademark Law (The 1958 Lanham Act): A Corollary to the First Amendment

The federal Lanham Trademark Act (15 U.S.C., section 1051, *et seq.*) protects federally registered names, marks, emblems, slogans, and colors, if included in the registration. The first clause of Section 1121 (b) of the Lanham Act reads as follows:

*No state or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.*

**The Court recognized that the function of a trademark is to convey recognition of a product or service by utilizing a uniform appearance.**

While a governing entity may regulate signs, so long as no Constitutional protection is abridged, the plain language of the Lanham Act prohibits federal, state and local governments from requiring alteration of a registered trademark or copyrighted slogan, as registered, as a condition of obtaining a sign permit.

An oft-cited case addressing the question is *Sambo's of Ohio v. City Council of Toledo*. 466 F.Supp 177 (N.D. Ohio 1979). Here the plaintiff enterprise initially sought and received a minor zone change to operate a newly constructed restaurant; it then requested a sign permit for that restaurant. The city would not issue a permit unless the applicant agreed to change its registered trade name and logo because the city determined that the name and logo were racist. The Court ruled that the city's effort to require alteration of a federally registered trade name as a condition of permit on alleged racial grounds was unwarranted, over broad, and in violation of both the First Amendment and the Lanham Act.

In finding against the city, the Court noted that if the registered name had to be changed on the sign, it would also prevent the plaintiff from advertising or using the name in other media advertising, or even inside the restaurant. The Court further declared that one cannot have freedom of speech if only innocuous utterances are permitted. (*Id.* at 180.)<sup>2</sup>

A more recent case involving Section 1121 of the Lanham Act is *Blockbuster Videos Inc. & Video Update v. City of Tempe (AZ)*, 141 F3d 1295 (9th Cir. 1998). In *Blockbuster*, the city required that mall signage conform to certain color schemes as set out in a comprehensive sign plan approved by the city in concert with shopping center owners. Video Update's trademark colors did not comport with the city's color scheme, and the city refused to approve a sign permit unless Video Update agreed to change its red letters to white. Blockbuster Videos received permission to display its torn-ticket logo as registered, but it did not receive approval to install its other registered mark—a blue awning.

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<sup>3</sup> 44 *Liquormart*, pp. 1515-1520.

<sup>2</sup> See also, *Texas v. Johnson*, 491 U.S. 397, 414 (1989)—"[o]ne bedrock principle underlying the First Amendment is that government cannot prohibit expression of an idea simply because society finds [it] offensive or disagreeable."

In a majority opinion the Court held that a municipality may not enforce zoning regulations if those regulations require the alteration of a registered mark. In reaching this decision, the Court reasoned that if the law recognizes that the function of a trademark is to convey, *via* a symbol, recognition of a commodity by potential customers, then it must have a uniform appearance, not only in design, but also in color.

The Court did not extend Lanham Act protection to Blockbuster’s awning request, however, finding that while an ordinance can not require alteration of a mark, it can entirely preclude display of a mark.

Although the Ninth Circuit in *Blockbuster* deferred to what it believed was the “plain meaning” of the Lanham Act, a correct interpretation of the Act is not yet settled, as evidenced by a case arising in the Western District of New York—*Lisa’s Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2d Cir. 1999).

**Often the economic harm flowing from a “regulatory taking” is substantial, yet many times this harm is not willingly recognized by governmental authorities.**

In this case, the Second Circuit relied extensively on legislative history, and determined that Congress never intended that section 1121(b) should interfere with uniform aesthetic zoning requirements, so long as the subject ordinance did not require actual alteration of the trademark. Therefore, the Court held that an ordinance limiting sign color typefaces and decorative elements for aesthetic reasons was not in violation of the Lanham Act. In so ruling, the Court found that the subject regulations “simply limit color typefaces and decorative elements to certain prescribed styles [and thus]...have no effect on businesses’ trademark....limit[ing] only the choice of an exterior sign at a particular location. As such, though entirely disallowing the use of a registered trademark in carefully delimited instances, these regulations do not require ‘alteration’ at all.” (@ 15.)

While the two cases above differ on interpretation of the Lanham Act, they do agree on two points: (1) regulations that condition a sign permit on an actual alteration of a trademark are in violation of the Lanham Act, but (2) regulations that totally ban the display of registered trademarks or logos do not violate the Lanham Act. This is not to say, however, that such a prohibition could withstand judicial scrutiny under First Amendment content-neutrality requirements, particularly if the only articulated reason for the prohibition is based on aesthetics. Unfortunately, neither *Blockbuster* nor *Lisa’s Party City* raised or discussed First Amendment issues.

## The Fifth Amendment

The Fifth Amendment contains two separate guarantees for property rights: the due process clause and the “takings” clause.

The due process clause – “No person shall ... be deprived of life, liberty, or property, without due process of law” – protects citizens from government action that arbitrarily deprives them of a fundamental right, and applies to both the act itself and the procedures incidental to the act. The “takings” clause – “... nor shall private property be taken for public use, without just compensation” – is designed to prevent the government from forcing individuals to bear public burdens which more fairly should be borne by the citizenry at large.

These provisions apply not only to the federal government; for over 100 years the Supreme Court has interpreted the “due process clause” of the Fifth Amendment to be applicable to the actions of state and local governments as well.

The Supreme Court has long held it permissible for local governments to divide a jurisdiction into zones, segregating one use from another, even if the zoning resulted in adverse economic consequences for impacted land owners.<sup>1</sup> However, the regulation of land use through zoning may at times diminish value to the point that a “takings” has occurred. Compensation is most likely to be required for zoning, or other land use regulations, either when the government action results in total or near total destruction of land value, or when the governmental regulation serves no valid public purpose.<sup>2</sup>

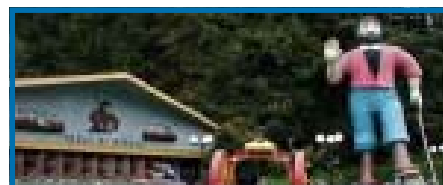
When signage is affected by a “takings,” it is generally the result of condemnation of the host site or a change in law or regulation that makes a previously legal and conforming sign suddenly illegal. Often the economic harm flowing from a “regulatory taking” is substantial, yet many times this harm is not willingly recognized by governmental authorities. On-premise signage has suffered more from this lack of recognition than off-premise signage, largely due to federal legislation mandating just compensation for those property owners and interests most directly affected by the “Highway Acts” of the 1950s, 1960s and 1970s.

## Condemnation of On-Premise Signage

Compensation for loss of on-premises signage as a result of traditional condemnation action against its host site, under eminent domain theory, is relatively new concept. However, as the contributory value of a sign to its site gains in recognition and appreciation, it is increasingly likely that the signage will be considered separately for purposes of assigning a value and paying compensation. One example is outlined below.



*In some cases, the sign is so important to a business that without the sign the business ceases to exist. Consequently, the value of a sign to a business may be much greater than the actual cost of building the sign.*



<sup>1</sup> The seminal case is *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), which upheld a zoning code that excluded multiple-dwelling houses from areas of one-family residences as a legitimate exercise of police powers to promote community health, safety, more, and general welfare, even though the value of the land so zoned is significantly diminished.

<sup>2</sup> See, *City of Monterey v. Del Monte Dunes*, 95 F. 23<sup>rd</sup> 1422 (1999), holding that if it is determined either that the aggrieved party has been denied all economically viable use of his property or the government’s action does not substantially advance a legitimate public purpose, the government will be held liable for compensation. See also, *Lake Nacimiento Ranch Co. v. San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987), holding that the court may review the owner’s investment expectations when determining if a regulation denies an owner economically viable use to the extent that a takings has occurred; *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which held that a compensable takings occurs if there exists no rough-proportionality or nexus between the regulation as it impacts the landowner and the government’s asserted interest.

## *Caddy's v. Hamilton County, Ohio* (a lower court case, no West Law cite)

This case was decided by jury trial in a lower court in Hamilton County, Ohio—a state that recognizes the “visibility component” of a commercial site as a partial real estate interest. In *Caddy's*, the business’ building was to be “taken” under exercise of eminent domain to make way for a municipal stadium. The county tax assessor placed a value of \$1.3 million on the land and building and no value on the business’ signage, which had been “grandfathered in” and was highly visible to adjacent streets and highways. Because *Caddy's* very distinctive, 3,000 square foot wall murals and a roof sign were non-conforming under present codes, they could not be duplicated on the replacement buildings used by the county as comparable relocation sites; neither did the comparables have equal or similar exposures to the freeway. Therefore, if income levels were to be maintained after relocation, alternate forms of commercial communication, such as outdoor advertising or television and radio commercials, would have to substitute for the lost on-premise visibility to potential customers.

**The on-premise sign (referred to by Justice Brennan as a “business” sign) is “part of [the business]” or in other words, an accessory use.**

During trial on the issue of just compensation for lost visibility, expert testimony established that the cost of visibility replacement in the form of outdoor advertising was \$180,000 per year. This number was based on how much the subject signs would have rented for, had they been “outdoor advertising” instead of on-premise signage.

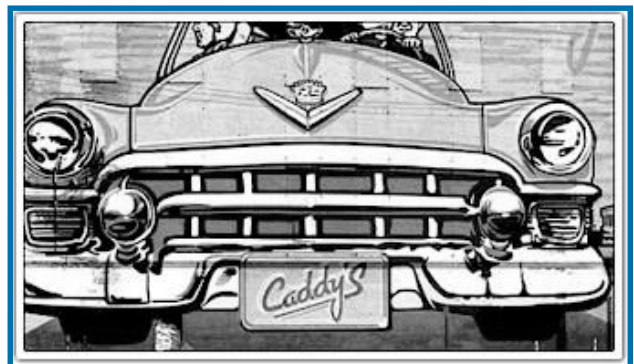
Using a capitalization rate of 10%, the jury awarded \$1.8 million for the value of the lost on-premise signage—an amount which, if invested at 10% interest per annum, would permit the owner, annually, to afford the cost of off-premise (or “outdoor advertising structure”) exposures for a new location lacking on-site signage visibility.

The jury also awarded \$1.3 million for the real property and building. Thus the combined award gave the owner sufficient money with which not only to replace land and building, but also to protect the former income stream with funds, which, if prudently invested, would annually cover replacement-exposure expenses without adversely affecting sales volume.

### **The Accessory Use Doctrine: A Corollary to the Fifth Amendment**

Off-premise signs are frequently deemed to be nothing more than advertising, and are often widely viewed as significantly degrading to the attractiveness of communities, particularly in the case of large outdoor structures. Thus, communities often seek to ban off-premise signs altogether, and generally succeed without running afoul of the First Amendment.<sup>1</sup>

*Caddy's distinctive murals and signs provided extremely valuable on-site advertising for the restaurant. When the restaurant was forced to relocate, the court recognized this value, awarding Caddy's a sizable sum of money to replace the lost exposure.*



By contrast, on-premise signs, although regulated, are never completely banned, because it is evident to most they are a practical and commercial necessity for the business or business site to which they are attached.

In all incorporated U.S. towns and cities, businesses and their signs are located in commercial zones or districts, with clearly defined primary or principal uses (retailing), together with lesser supporting or accessory uses, of which sign use is one.

The separation of use into “principal” and “accessory” is a legal principle (the “accessory use doctrine”) premised upon recognition that it is not possible to plan for every use that may occur on a given site. Therefore, in practice, the local government will first establish a general primary use zone, and secondarily, and in general terms, address incidental or “accessory” uses which commonly accompany the primary use, and perhaps significantly contribute to the full success and enjoyment of the primary use.

**Prior restraint occurs when the right to communicate is subject to the prior approval of a government official.**

The landmark case establishing the application of the accessory use doctrine to on-premise signage is *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952). The opinion was written by Justice William P. Brennan before his appointment to the U.S. Supreme Court.

Justice Brennan’s opinion established an important point: The on-premise sign (referred to by Justice Brennan as a “business” sign) is “part of [the business]” or, in other words, an accessory use. Brennan writes:

*The business sign is in actuality a part of the business itself, just as the structure housing the business is part of it, and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard....<sup>2</sup>*

In arguments over whether a permanent on-premise sign possesses a real property interest or whether compensation should be paid separately for the condemnation of a sign as part of the condemnation of its site, the “Accessory Use Doctrine” may be invoked as a legal tool to assist in defining the sign’s property status, and establishing the right to monetary damages for its demise.

## Regulatory Takings of On-Premise Signs

Compensation for regulatory downsizing, removal or ban of a previously legal sign (or a regulatory takings) is vigorously resisted by many local governments. However, as it becomes more and more apparent that on-premise business signs contribute significantly to business success, it may also become more and more apparent, at least to the courts, that new codes, which retroactively render a sign nonconforming, may owe

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<sup>1</sup> Although regulations based on the distinction between on-premise signs and off-premise signs are content-based, 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; therefore, efforts to ban off-premise signs are generally acceptable under First Amendment content analyses, as a valid exercise of police powers in the protection of community “aesthetics.”

<sup>2</sup> *Id.* at 365.

compensation to the owner for provable consequential loss of business revenues and diminution of real property value.

Under a retroactively applied sign code, in order to avoid paying compensation for the removal of a previously conforming sign, many communities have resorted to “amortization” – theorizing that if an “offending” sign is permitted to remain for a reasonable amount of time after the new code is in place, the owner will recoup his investment in the sign, thereby negating the need to pay him anything extra for its ultimate removal. Amortization is discussed more fully in the following chapter: MYTH #3 – SIGNS IN AND OF THEMSELVES HAVE LITTLE VALUE.

**Increasingly, the concept of permanent on-premise business signs as possessing a compensable real property interest is recognized by our legal system.**

Increasingly, the concept of permanent on-premise business signs as possessing a compensable real property interest is recognized by our legal system. Thirty-five states now have some type of statute recognizing and protecting the real property value of on-premise business signs. In many instances, for a commercial land use to be economically effective, the use must be permitted a sign with adequate size, placement, height, and lighting to guarantee readability and conspicuity. As studies continue to expand our understanding of the significance of signs in the economic survival of a business, and as attempts are made to retroactively downsize signs below the visual acuity level of the average consumer, the federal government should extend its present prohibition against non-compensatory takings for outdoor advertising displays to permanent on-premise business signage. Additionally, these actions are likely to be considered censorship subject to the First Amendment protection.

## The Fourteenth Amendment

In on-premise signage regulation issues, the Fourteenth Amendment commonly enters the picture at the permit counter. In order to pass constitutional muster the permitting or licensing, or conditional use or variance request, must be structured to assure easy understanding of objectively-based requirements, reasonable application fees, speedy decision on the application by the permitting authority, and recourse to automatic and swift appeal of any denial. Because a sign is essential to communicating one’s presence and effectively competing in the marketplace, a failure in any of these minimum due-process requirements can give rise to a “prior restraint” issue.

Prior restraint occurs when the right to communicate is subject to the prior approval of a government official. Therefore, it is always present in the sign permitting process, making it incumbent upon the official to act pursuant to clearly defined standards that strictly limit the official’s discretion and guarantee resolution within a short period of time. Prior restraint problems might even arise in the construction materials and electrical code provisions if these provisions unduly delay the permit process.

Although the Supreme Court has not yet applied the prior restraint doctrine to a municipal sign code permitting issue, it has made it clear since 1965 in *Freedman v. Maryland*, 380 U.S. 51; 59 (1965) that (1) the decision whether to issue a permit must be made within a specific brief period; (2) the scheme must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license; and (3) a censorship scheme must place the burden of instituting judicial proceedings and proving that the expression is unprotected on the censor.

And while the U.S. Supreme Court has not decided a prior restraint issue outside the context of zoning, several lower courts have. For example, in *Desert Advertising, Inc v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), the Court struck down an ordinance where the only standards for granting a sign permit were that: [the sign] “will not have a harmful effect upon the health or welfare of the general public” and “will not be detrimental to the aesthetic quality of the community.”

In *North Olmsted Chamber of Commerce, et al v. City of North Olmsted*, U.S. Dist. Ct., Northern Dist. of Ohio, Eastern Division, Case No. 1:98 CV 0810, the Court determined that the city’s ordinance lacked sufficiently narrow, objective, and definitive standards which, therefore, gave government decision makers unfettered discretion in issuing a permit and further did not provide any of the procedural safeguards set out in *Freedman*. In sum, the *North Olmsted* Court found that “a system of prior restraint that fails to provide procedural safeguards does not comport with the Constitution” (*Id.* at 37). For this, and for violations of content-neutrality and equal protection requirements, the Court found the ordinance unconstitutional in its entirety.

## Temporary Signs: A Class by Themselves

A common definition for a temporary sign is “a sign announcing special events or sales, the sale or rental of property, political positions or other matters, and intended for use for a limited period of time.” Temporary signs may be portable, as a “sandwich board,” or attached, as a window sign.

Local governments often enact special restrictions and prohibitions regarding temporary signs, generally based on the argument that the haphazard use of these signs is detrimental to several legitimate governmental interests, including aesthetics, traffic safety, and hazard to pedestrians, if placed on the sidewalk or other public right-of-way. Although regulations may be struck down if a court finds they are irrational or overly restrictive, the present judicial trend is to permit restrictions if (1) they are reasonable on the grounds of safety and aesthetic objectives, and (2) they do not overly censor the free flow of marketplace information or, even more importantly, the expression of political choice or opinion.



*For a commercial land use to be economically effective, the use must be permitted a sign of adequate size, placement, height, and lighting to guarantee readability and conspicuity.*



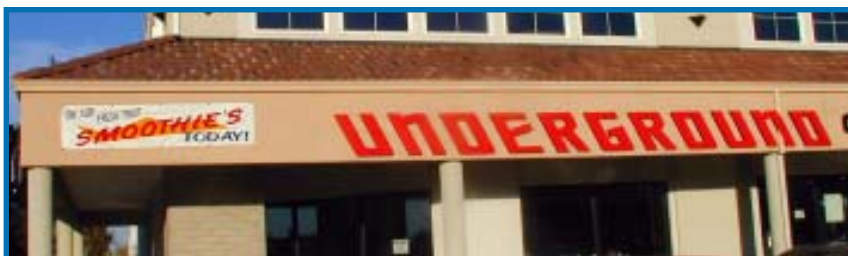
Notable Cases on Point:

1. **Regulation of real estate signs.** In *Linmark Assoc's, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Supreme Court held that a local government may not prohibit the use of temporary real estate signs in residential areas because such a prohibition unduly restricts the flow of information. This is not to say, however, that a local government may not place reasonable restrictions on the size, number and location of real estate signs in furtherance of a legitimate interest (e.g., aesthetics), but again, the government must convince the court that its regulations are necessary to achieve a legitimate governmental interest or were not aimed at curtailing information. For example, in *Citizens United for Free Speech v. Long Beach . Bd. Of Comm'rs*, 802 F. Supp. 1223 (D.N.J. 1992), the federal trial court held that an ordinance permitting “for sale” signs, but prohibiting “for rent” signs during certain periods was invalid because the government presented no convincing evidence that the differing (or discriminatory) regulatory treatment achieved its claimed interest in aesthetics.

A similar aesthetic argument was raised by the City of Euclid, Ohio to justify a city ordinance restricting real estate signs to window display only. The federal Sixth Circuit Court of Appeals struck down the ordinance based on its findings that the ordinance was neither narrowly tailored to achieve the city’s claimed interest (in aesthetics), nor did it provide an adequate alternative channel of communication. The Court observed that Euclid’s decision to restrict lawn signs was not motivated by a desire to improve the physical appearance of residential neighborhoods, but instead, was principally intended to stem the proliferation of real estate signs in some neighborhoods—a proliferation the city deemed as conveying “negative” messages about the general community. (See *Cleveland Area Bd. Of Realtors v. City of Euclid*, 88 F.3d 382 (6<sup>th</sup> Cir. 1996).)

While a local government may not prohibit temporary real estate signs on private property, it may totally prohibit the posting of real estate signs on public property—either in the public right-of-way or attached to public property. However, the prohibition must extend to all privately-owned temporary signs, or the ordinance will run afoul of content-neutrality requirements and be subject to strict scrutiny.

*Temporary signs fill a need that permanent signage cannot. They are used extensively by chains, mom-and-pop retailers, and even individual entrepreneurs to reach potential customers with timely information.*



2. **Regulation of political signs.** Regulations that distinguish signs based on their subject matter or viewpoints raise First Amendment concerns, and are subject to strict scrutiny. In the area of politically-based noncommercial speech, the Supreme Court is very firm on the point. In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Plaintiff was prohibited from displaying an antiwar sign on her lawn by the city’s ordinance that banned all residential signs except those within 10 exempted categories; the Plaintiff’s sign did not fit into one of these categories. The Court ruled that the ordinance violated the First Amendment rights of homeowners because (1) it totally foreclosed their opportunity to display political, religious, or personal messages on their own property *via* an important and distinct medium of expression—lawn signs, and (2) the city had failed to provide adequate substitutes for such an important medium.

**With regard generally to political or election signs, an ordinance prohibiting such signs is clearly unconstitutional.**

Although the Court accepted the city’s contention that the ordinance was a content-neutral time, place and manner regulation and was only intended to prevent “visual clutter,” the Court held that a prohibition on noncommercial speech at one’s own home could not be sustained under even a minimal level of scrutiny, and expressed the opinion that the city should find “more temperate measures” to satisfy its regulatory goals.

With regard generally to political or election signs, an ordinance prohibiting such 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. For example, in *City of Lakewood v. Colfax Unlimited Ass’n*, 634 P.2d 52 (Colo. 1981), the Colorado Supreme Court invalidated an ordinance that restricted the content of political signs to the candidates and issues being considered in an upcoming election, finding that the ordinance violated the principle that “[g]overnment may not set the agenda for public debate.” *Id.* at 62.

There is some disagreement among courts regarding the placing of limits either on numbers of political signs that may be displayed or the time period they can be displayed. However, there seems to be consensus that reasonable time and number limits may be imposed as part of a “comprehensive” program to seriously address aesthetic issues. (See *Collier v. City of Tacoma*, 854 P.2d 1046 (Wash. 1993); *Tauber v. Town of Longmeadow*, 695 F.Supp 1358 (D. Mass. 1988).)

*When cities fail to enforce existing sign codes, the proliferation of temporary signs that results often provides the impetus for tightening regulations for all signage. Often, simply enforcing existing regulations will solve apparent “sign clutter” issues without causing harm to local businesses and the local economy.*

