

# **Billboard and Sign Regulation: Recent Cases and Trends**

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*“Billboards are a long established medium of communication, used to convey a broad range of different kinds of messages. But whatever its communicative function, the billboard remains a large, immobile, and permanent structure which like other structures is subject to regulation.”*

Justice John Paul Stevens  
*Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981)

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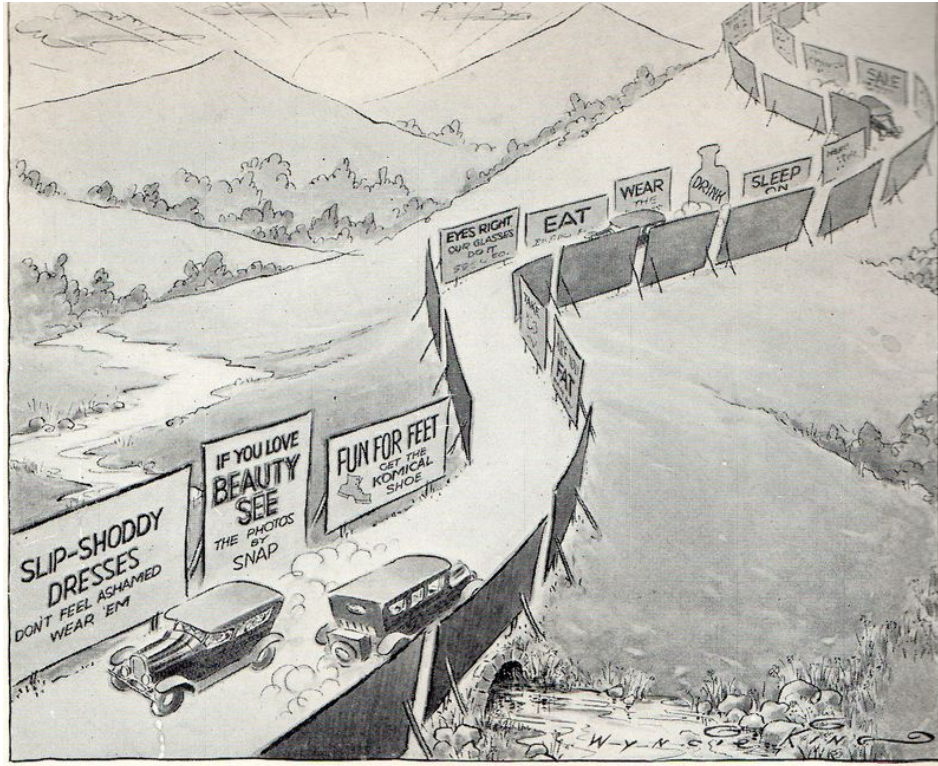
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## BILLBOARD AND SIGN REGULATION: RECENT CASES AND TRENDS



Source: Billboards and Aesthetic Legislation, New Applications of Police Power, 1931 (published by Saint Louis Public Library).

One of the most central values to First Amendment law is that laws regulating expression or expressive conduct cannot discriminate between messages based on their content. Municipalities face the constant and ever present challenge of ensuring that their attempts to regulate signage and billboards in their community properly comply with the spirit of the constitution that grants every citizen the freedom of speech and expression. Suffice it to say that in almost every lawsuit filed that challenges a city's attempt to regulate signage and/or billboards, the challenge is always grounded in some constitutional violation originating from the regulation itself (facial challenges) or in the way the regulation is applied (as-applied

challenges). Secondary to these challenges is the customary attack that the sign/billboard owner or leasor has some vested right to erect or otherwise maintain the sign and/or billboard at issue.

The purpose of this paper, and of the presentation you will later hear, is not to discuss every nuance of First Amendment law as it relates to sign or billboard regulation. In fact, to do so would be impossible as we all remember that constitutional law course completely dedicated to nothing but First Amendment issues. However, any review of the First Amendment case law related to sign and/or billboard regulation, be those cases new or old, requires at least the mention of two U.S. Supreme Court cases that are the cornerstone of every First Amendment challenge to sign or billboard regulation...*Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*<sup>1</sup> and *Metromedia v. City of San Diego*.<sup>2</sup>

***Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York.*** The issue in *Central Hudson* focused on the passing of a regulation banning all promotional advertising by electric utility companies operating in the state of New York. After the state Superior Court initially ruled that the regulation did not violate the First and Fourteenth Amendments of the Constitution, the utility appealed to the U.S. Supreme Court. On appeal, the Supreme Court reversed the lower court and applied the four-prong analysis that is now relevant to almost all commercial speech cases. The Court: (1) noted that the Commission did not claim that the expression at issue either was inaccurate or related to unlawful activity; (2) ruled that the utility's promotional advertising was not unprotected commercial speech merely because the utility held a monopoly over electricity in its service area; (3) ruled that, while the Commission's interests in energy conservation and ensuring fair and efficient energy rates were substantial, the link

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<sup>1</sup> 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

<sup>2</sup> 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981).

between the advertising ban and utility's rate structure was, at most, tenuous, and; (4) ruled that, because the regulation reached all promotional advertising, it was more extensive than necessary to further the Commission's interest in energy conservation. As such, the regulation impermissibly infringed appellant's First Amendment.

***Metromedia v. City of San Diego.*** In *Metromedia*, seven of the nine justices on the U.S. Supreme Court agreed that a city may ban billboards, and that the restriction on free speech is justified by community interests in safety and community appearance. The plurality of four justices explained:

In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. Second, the city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising. . . . Third, San Diego has obviously chosen to value one kind of commercial speech – onsite advertising – more than another kind of commercial speech – offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance – onsite commercial advertising – its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise – as well as the interested public – has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. . . . It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. ***Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted.***<sup>3</sup>

With that, we begin our review of some of the most recent cases in Texas and across the country dealing with sign and billboard regulation.

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<sup>3</sup> See summary entitled “Billboards are Different”, Randall Morrison, <http://www.signlaw.com/billboards.html>.

**I. TEXAS CASES (STATE & FEDERAL):**

***Lamar Corp. v. City of Longview*, 270 S.W.3d 609 (2008).**

Shortly after Lamar Corp. built three outdoor billboards within 1,500 feet of a park, the City of Longview passed an ordinance barring billboards within 1,500 feet of a public park. Because the signs were grandfathered in, they were allowed to remain. However, the signs fell under “nonconforming sign” status and thus, under the city’s ordinance had to be kept in good repair and required a permit for any non-maintenance or structural changes. Thereafter, Lamar, without a permit, repaired or replaced all of the sign face frames and supporting structures connecting the posts and removed the catwalks on the three signs. The City sent Lamar a notice of violation for failing to obtain permits and Lamar applied for sign permits under “structure repair.” The City then denied the permits and informed Lamar that the signs had lost their “nonconforming sign” status due to repair beyond maintenance, and furthermore required the signs to be taken down. After filing for a variance, and that too being denied, Lamar filed suit for declaratory judgment to keep the signs’ nonconforming status and be allowed to remain in place. Lamar also requested the court declare the ordinance unconstitutional as an improper taking. After both parties filed for summary judgment, the trial court denied Lamar’s and granted the City’s affirming the City’s decision that the three billboards lost their nonconforming status, and ordered them to be removed.

Citing *College Station v. Turtle Rock Corp.*, 680 S.W. 2d 802 (Tex. 1984), the court stated that a City “may enact reasonable regulations to promote the health, safety, and general welfare of its people” and furthermore, “if reasonable minds may differ as to whether a particular zoning ordinance has a substantial relationship to the public health, safety, morals, or general welfare, *the ordinance must stand as a valid exercise of the city’s police power.*” On this

theory, the court said that the ordinance's purpose, to "1) keep unmaintained signs from injuring motorists and pedestrians; 2) attract business to the City; and 3) preserve the beautification of the city's residential areas, parks, forests, and playgrounds by preventing proliferation of signs in those areas," was substantially related to the health, safety, and welfare of the City's citizens. Thus, requiring Lamar's nonconforming signs to be removed accomplished the goals of the sign ordinance. The court found that because the City reasonably exercised its police power it was not required to compensate Lamar for its losses, and thus there was no unconstitutional taking.

***Houston Balloons & Promotions v. Houston TX*, 589 F.Supp.2d 834 589 F. Supp. 2d 834 (S.D. Tex. 2008) [MSJ]; 2009 U.S. Dist. LEXIS 53693 (S.D. Tex. June 24, 2009) [Trial].**

Houston Balloons, a company that leased balloons for the purpose of advertising, brought this claim against the City of Houston alleging that the sign code restricted the company and its customers' freedom of expression, due process, and equal protection under the First, Fifth and Fourteenth Amendments. The sign code classified the advertising balloons as Attention Getting Devices (AGDs) that were required to be registered with the city. Though the entity that displays the AGD is responsible for registering the balloon, Houston Balloons occasionally registered customers' AGDs. Shortly after, the city banned all *non-generic* AGDs causing Houston Balloons to lose business, but allowed *generic* messages or no messages on identical AGDs. Because the City's regulation of AGDs did not involve a fundamental right or interest or burdened an inherently suspect classification, it was subject to rational-basis scrutiny from the Court. While the City stated its goals in regulating AGDs were traffic safety and visual aesthetics, the City provided no evidence at trial demonstrating that its classification between AGDs with *non-generic* messages and AGDs with *generic* messages promoted safety or aesthetics. As a result, the City's regulation of AGDs violated Houston Balloons' Constitutional

right of equal protection to erect and maintain inflatables with *non generic* messages. Because of the City's inconsistent enforcement, the Court also found violations of Houston Balloons' Constitutional right to due process.

During the commencement of this action the City of Houston went on further to ban *all* AGD's whether it has any type of message or not.

***RTM Media, LLC. v. City of Houston, 584 F.3d 220 (5th Cir. Tex. 2009).***

RTM Media sued the City of Houston alleging that a sign ordinance restricting off-premise commercial signs violated the First Amendment. Relying on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the court noted that a billboard ordinance may permit on-premise commercial signs and ban off-premise commercial signs; however an ordinance may not differentiate between noncommercial and commercial messages being allowed. On the issue of banning commercial versus noncommercial speech, the court looked to *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), and found that because Houston demonstrated a "carefully calculated" approach to improve their billboard problem and commercial billboards posed a greater nuisance than noncommercial signs, the ordinance advances a significant government interest. Thus, the ordinance could differentiate between commercial and noncommercial messages and was found to be constitutional under the First Amendment.

***State v. Central Expressway Sign Associates, 302 S.W.3d 866 (2009).***

The State condemned an easement that was leased to an advertising company for the purpose of erecting a billboard and selling advertising space. The land was to be used to improve a highway interchange in Dallas. In that case, the state's expert testified that a billboard

had a value of \$360,000 but a jury held the same billboard was worth \$1,850,000 because the judge allowed the jury to include projected business income as part of the billboard value. The trial court entered a judgment for \$1.85 million and the appellate court affirmed. *Central Expressway* illustrates that a billboard carried on the tax rolls at less than \$10,000 in value could be purchased by the state for \$360,000 in condemnation value. However, under the new business income value approved in this case, that same billboard is now worth over \$1.8 million dollars.

***Morales v. City of South Padre Island, 2010 WL 2292042 (S.D. Tex. 2010).***

The City of South Padre Island had an ordinance regulating the display of signage in the City. Fernando Morales, the owner of Tino's Seafood, alleged that the City's ordinance banned the restaurant from passing out free food samples in front of the restaurant, changing the color of the building the restaurant was located in, and "placing artist-drawn representations of the food served at its restaurant" in the window of the establishment in order to draw in customers. The owner further alleged that members of the City's board of adjustment negligently and fraudulently misrepresented that the restaurant would be allowed to paint the building, and failed to disclose the City's prohibition of signage use. The owner also alleged that the ordinance violated his First Amendment right to free speech. On these claims, the owner sought a temporary restraining order to prevent the City from enforcing the ordinance. The court found that although the City failed to regulate all potential sources of visual clutter, this was not sufficient to show the ordinance was not furthering the City's government interest to improve aesthetics of the City.

***Primary Media, LTD v. City of Rockwall*, 2011 WL 908353 (Tex. App. – Dallas, March 17, 2011).**

Primary Media installed a billboard in the City of Rockwall's jurisdiction in 2007, and the City notified Primary Media that the sign was in violation of a City ordinance. Primary Media refused to remove the sign and the City sued for an injunction to (1) require removal of the sign, and (2) prohibit any leasing of the sign until it was removed. Primary Media counterclaimed arguing that the ordinance was void because it was an invalid amendment of a repealed statute and that another ordinance was actually governing. However, the particular ordinance in question only had a handwritten reference to the repealed statute, and the City argued it was a scrivener's error. The trial court granted the City's motion for summary judgment and ordered Primary Media to cease leasing the billboard and remove it within 90 days. The appellate court held that although the ordinance cited a repealed statute, it was still a current and valid ordinance. On the issue of the scrivener's error, the court held that there was not enough evidence to properly determine the issue and thus sustained the summary judgment on this issue. Primary Media finally argued that the ordinance was not properly extended to the City's ETJ because it only extended to parts of the jurisdiction rather than all of it. The court found that state law (TEX. GOV'T CODE ANN. § 216.902) permits municipalities to "extend regulatory ordinance and enforce the ordinance within its area of extraterritorial jurisdiction," but found no authority that supported the all or nothing theory Primary Media alleged. Thus, the court upheld the summary judgment in favor of the City.

## **II. CASES FROM OTHER JURISDICTIONS (STATE & FEDERAL):**

***H.D.V.-Greektown, L.L.C.; 415 East Congress, LLC; and K and P Incorporated, fdba Déjà vu, dba Zoo Bar v. City of Detroit, No. 08-1329, 08-1361 (6th Circuit 2009).***

In 2009, in the Sixth Circuit noted that in order to decide which precedent to apply, the court must determine whether the City's sign ordinances are content based or content-neutral. The Sixth Circuit stated that an ordinance is not a content-based regulation of speech if (1) the regulation controls only the places where the speech may occur, (2) the regulation was not adopted because of disagreement with the message that the speech conveys, or (3) the government's interests in the regulation are unrelated to the content of the affected speech. 568 F.3d at 621-22 (citing *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 432 (4th Cir. 2007) (paraphrasing *Hill v. Colorado*, 530 U.S. 703, 719-20 (2000))). The *Hill* decision was the controlling precedent.

***Midwest Media Property, LLC v. City of Erlanger, Ky., 343 Fed. Appx. 133 (6th Cir. Ky. 2009).***

Midwest Media Property filed suit against the City of Erlanger, Kentucky alleging that the denial of sign applications violated the company's First Amendment rights. The court affirmed the lower court and held that, despite the city's failure to state a purpose for the size and height restrictions and motivation for enacting the ordinance, the ordinance still advanced a significant government interest in city aesthetics and traffic safety and did not violate the First Amendment.

***Reed v. Town of Gilbert, 587 F.3d 966 (9th Cir. Ariz. 2009)***

A local church, wishing to place direction signs around the town advertising their services, sued the city claiming the town's sign ordinance violated the First Amendment and Equal Protection Clause. The ordinance only permitted these types of signs for certain "qualifying events" which were only allowed within a certain amount of time before and after the event. The court stated that in determining whether or not the ordinance was content based it would focus on "whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance." In using this standard the court found that the ordinance's definition of "Qualifying Event" did not constitute a content based ban because it only pointed to a determination of "who" and for "what event" the sign advertised. Thus, the regulation was content neutral. In regards to time, manner, and place restrictions, the court held that the ordinance was narrowly tailored and served the government interest of aesthetics while still leaving other alternative channels for communication. On the issue of the ordinance's treatment of commercial speech versus noncommercial speech, the court found that the ordinance did not favor one form of speech over the other. Hence the court affirmed the decision of the lower court by finding that no First Amendment or Equal Protection Clause rights were violated.

***Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2<sup>nd</sup> Cir. N.Y. 2010).***

Clear Channel brought this suit against the City for an ordinance banning offsite advertising signs within 200 feet of, and within sight of, arterial highways in manufacturing and commercial districts. The advertising company argues that the city's sporadic enforcement of

the ordinance undermines a legitimate government interest. Citing *Central Hudson v. Public Service Commission*, 447 U.S. 557 (1980), the court found that the ordinance directly advanced the states interest involved and was not more extensive than necessary to serve that interest. The measures that the city did use to enforce the ordinance, while not always consistent, were reasonable. The court stated that the means of enforcement need not be the most restrictive in order to advance the interest; and just because sign owners could convert a non-conforming sign to a conforming sign did not mean that the interest was not served. Hence the court concluded that the ordinance did not unconstitutionally restrict Clear Channel.

***Coastal Outdoor Advertising Group, LLC v. Township of East Hanover, New Jersey*, 397 Fed. Appx. 794 (3d Cir. N.J. 2010).**

The appellate court held that the district court correctly determined that, although the billboard company had suffered an injury that was traceable to the township's application of its ordinance, the injury would not be redressable because the billboard company could not demonstrate a substantial likelihood that the requested relief will remedy the alleged injury in fact. Even if the township's superseded prohibition on billboards were unconstitutional, the billboard company would not be "substantially likely" to erect the billboard because unchallenged setback, use, and height restrictions would still prevent it from erecting its billboards. Thus, it did not meet the redressability requirement for Article III standing. Moreover, it was by no means certain that the billboard company was even eligible for nominal damages because it was aware that its billboard violated several provisions of the township's land use and zoning code when it filed its application.

***Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380 (3d Cir. Pa. 2010).**

Melrose brought this action after the city of Pittsburgh rejected its applications to change the identification signs on five of its buildings. The proposed names, including “wehirenurses.com building” and “palegalhelp.com,” were found to be advertising signs and thus prohibited in the zoning districts where they were located. Melrose filed suit alleging violations of the First Amendment and the Fourteenth Amendment equal protection rights. The district court rejected Melrose’s claims and granted the City’s motion for summary judgment. Rather than applying *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) to determine whether the restrictions on commercial speech were valid, the court looked to a prior decision in the district; *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994). Under *Rappa*, the court said that the test for content-neutrality depended on a “context-sensitive” analysis where the significance of the sign was a key factor. The court further cited *Rappa* stating that “determining whether a sign is related to the location where it is placed inevitably demands a consideration of the sign’s content.” Under this theory, the court affirmed the decision of the district court finding that the purpose of an identification sign necessarily allowed the City to restrict advertising content placed on it.

***Briner v. City of Ontario*, 370 Fed. Appx. 682 (6th Cir. Ohio 2010).**

The Briners, owners of a local towing company, had their name removed from a municipal towing list after making several public complaints against the local police for their failed attempts to solve an alleged burglary and theft of the Briner’s property. In response, the Briners began a yard sign campaign to start a local police review board. The signs specifically criticized the chief of police. The Briners filed suit against the City of Ontario and city officials

for First Amendment retaliation. In order to succeed in a retaliation claim, plaintiffs must show “(i) that they were engaged in constitutionally protected conduct; (ii) that defendant’s adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that conduct; and (iii) that the adverse action was motivated at least in part as a response to the exercise of their constitutional right.” *Lucas v. Monroe County*, 203 F.3d 964, 973 (6th Cir. 2000). In regard to the first prong, the court found that though the Briners claim they were engaging in constitutionally protected speech, this portion needed to be remanded to the lower court to determine if they did in fact meet the requirements for protected speech. On the second and third prong, the court found there was evidence to support the Briner’s claim, but that an issue of fact existed and thus would not support a summary judgment in favor of the Briners. In response to the First Amendment claim regarding the yard signs, the Briners claimed that their rights were violated when they were threatened and harassed by city officials who contacted them to remove the signs. City officials allegedly made phone calls and sent letters threatening legal action if the Briners did not remove the sign. The Briners also claimed that police officers would park in the areas where the signs were placed as a show of intimidation. The court found that the Briners were not actually prevented from speaking by these actions, and thus no speech was restricted.

***Clear Channel Outdoor v. City of St. Paul*, 618 F.3d 851 (8th Cir. Minn. 2010).**

Clear Channel is an outdoor advertising company that mainly builds, leases and maintains billboards. For years, Clear Channel used temporary billboard extensions, “part of a graphic or word that protrudes beyond the normal rectangular billboard,” to give their customers more creative freedom. In November of 2000, the City of St. Paul adopted a code ordinance

which regulated the size of the extensions and the amount of time they were permitted. Clear Channel continued to use extensions according to city code. In March 2005, the zoning committee began to discuss limiting billboard extensions, and at a public meeting, a representative of “Scenic St. Paul” suggested that billboard extensions be prohibited altogether. The zoning committee and city council continued to discuss the extensions throughout 2005 and finally agreed to allow extensions with an additional permit fee. However, in March 2006, the City adopted an ordinance to ban billboard extensions reading “No sign shall be enlarged or altered in a way which increases its nonconformity . . . billboard extensions are not permitted.” After the ordinance went into effect in May, the City ordered Clear Channel to remove its existing billboard extensions. Thereafter, Clear Channel filed a complaint against the City stating that the ordinance was an unconstitutional and unreasonable use of police power, and that it also violated the company’s constitutional right to due process. The trial court held that the ordinance was arbitrary and capricious, and unenforceable as a matter of law because the City failed to articulate reasons for the enactment of the ordinance in the city council record. The court here affirmed the decision stating that the City’s failure to properly articulate the justifications for the ordinance in the record made the ordinance unenforceable.

***Get Outdoors II, L.L.C. v. City of El Cajon, California, 403 Fed. Appx. 284 (9th Cir. 2010).***

Get Outdoors requested twelve permit applications for the installation of outdoor signs in the City of El Cajon. The City denied the permits on the grounds that all the signs would violate the City’s sign area and height restrictions. Hence, Get Outdoors filed suit claiming the ordinance was unconstitutional under the First Amendment. The court held that Get Outdoors lacked standing to bring the First Amendment claim, because it could not show the court could

overturn the denial of the permits in order to redress those injuries because the ordinance was constitutionally valid. Citing *Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111, 1114-1115 (9th Cir. 2003), the court stated that “size and height restrictions on billboards are evaluated as content-neutral time, place and manner regulations.” Therefore, the City’s 35 foot height restriction and 300 square foot area restriction were found to be narrowly tailored and constitutional. The court affirmed summary judgment for the City.

***World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676 (9th Cir. Cal. 2010).**

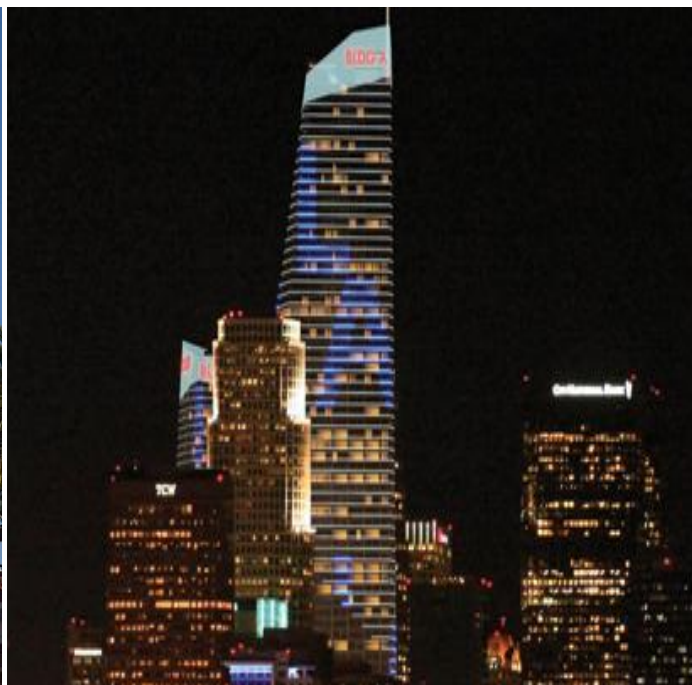
World Wide Rush, an advertising company that leases outdoor advertising space for billboards, brought a preliminary injunction against the City of Los Angeles in order to prevent it from ordering the company to remove several signs that did not comply with the City’s sign ordinance. The district court agreed with World Wide Rush and granted the injunction and the City appealed. The issues on appeal were whether the district court erroneously concluded that (1) the City’s freeway facing sign ban is an unconstitutionally underinclusive restriction on commercial speech, and (2) the City’s supergraphic and off-site bans are unconstitutional prior restraints on speech. Freeway-facing-sign-ban bars billboards within 2,000 feet of and “viewed primarily from” a freeway ramp. Despite the ordinance, the City adopted another ordinance allowing billboards near the Staples Center and in the Santa Monica Boulevard area. The other ban focuses on supergraphic and off-site signs. A supergraphic sign is a sign projected onto or hung from building walls. An off-site sign is a sign that directs “attention to a business or product not located on the same premises as the sign itself.” The supergraphic and off-site sign bans make an exception for signs “specifically permitted pursuant to a legally adopted specific plan adopted by the city, supplemental use district or an approved development agreement.”

Addressing the first issue, the court stated that “a regulation may have exceptions that undermine and counteract the interest the government claims it adopted the law to further; such a regulation cannot directly and materially advance its aim and is therefore unconstitutionally underinclusive.” However, the court found that the City’s exceptions to the freeway-facing-sign-ban did not undermine the City’s interest in aesthetics and safety because they were allowed in the Staples Center area to improve conditions there. On the second issue, the court held the ban did not create a prior restraint because the city council’s discretion to make exceptions to the supergraphic and off-site sign bans was not unbridled. Instead, the discretion was legislative and thus did not create an unconstitutional prior restraints on free speech.

### **III. THE NEW FACE OF BILLBOARDS: ELECTRONIC AND DIGITAL MEDIA**

The word "billboard" as used in a Baltimore City ordinance did not include a sign painted on the outside wall of a building.

*Grebow v. City of Baltimore*, 217 Md. 333, 142 A.2d 554 (1958).



## **A. Digital Billboard Issues and Protections for City Attorneys, City Staff and Public Officials.<sup>4</sup>**

### **1. Issue #1 – Safety First.**

The only studies that conclude digital billboards are safe were funded by the billboard industry. The scenic community urges that city staff become familiar with the government-funded review and critique of these two studies completed by Jerry Wachtel for the Maryland State Highway Administration.<sup>5</sup> In addition, the Federal Highway Administration has completed a study that should be released during 2011. Based on the results of the Wachtel review and the anticipated results of others, the prudent course action would suggest that cities adopt a complete prohibition on digital billboards (EBBs) until they can properly consider to what extent digital billboards divert a driver's attention from the road.<sup>6</sup>

### **2. Issue #2 – Community Aesthetic should be a Public Choice.**

Scenic America representatives have never seen a more passionate outcry from citizens than when a single digital billboard penetrates their community. That is why thousands of cities across America and hundreds in Texas have prohibited new digital billboards or billboards converted from non-digital to digital. City officials are wise to seriously consider the residents' concerns about how they want their community to look and the danger of losing ground in the protection of the city's natural, historical and architectural views. Once a digital billboard is erected, it will likely remain standing for many generations unless the city is extremely careful in drafting its sign ordinance. The scenic community believes that citizen input is a must in every

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<sup>4</sup> Excerpts prepared and submitted by Scenic Texas, Inc.

<sup>5</sup> These studies may be found at: <http://www.scenic.org/pdfs/review.pdf>.

<sup>6</sup> For more information and resource materials on digital billboards, go to the digital billboard page of the Scenic America web site: <http://scenic.org/billboards/digital>

single decision – not only whether these signs are allowed in the first instance, but, if allowed, the exact numbers, locations, size, spacing, brightness, number of faces, timing of messages, exchange rate (how many come down for one conversion), and whether the digital billboard permit should expire (a sunset provision). A few statistics from selected Texas cities as of May 2011 are below:

**Hundreds of Texas cities including Houston, Fort Worth and Austin prohibit all digital billboards.** Some additional examples of other Texas programs include the following:

- San Antonio, the corporate home of Clear Channel, allowed an initial 12 digital billboards in a pilot program that now has ended. No digital billboards have been allowed since.
- When El Paso considered allowing digital billboards, the exchange rate proposed by city staff and a council committee was 14-for-1 contrasted with the industry’s suggestion of a 3-for-1 exchange rate. No exchange ordinance was adopted; El Paso currently has a moratorium on all new digital billboards and is in litigation with Clear Channel over existing digital billboards that the city alleges were erected without proper city permits.
- Dallas is currently considering allowing a three-year pilot program with a maximum of 25 digital billboard conversions (no new locations) at an exchange rate of *6 sq. ft. converting to 1 sq. ft.*<sup>7</sup>

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<sup>7</sup> While the most traditional method of billboard reduction is to exchange traditional “faces” for digital “faces”, billboard exchanges based on square footage ultimately result in greater billboard reduction.

Scenic Texas believes that, notwithstanding industry pressure to allow digital billboards, there are only approximately fifty (50) digital billboards in all Texas cities at this time.

### **3. Implementing “Protections” based on safety and aesthetics.**

For city officials who conclude that the city can accept the safety and aesthetic implications associated with the digital billboard “boom” that is upon us, the scenic community recommends the implementation of four “protections” into any proposed ordinance regulating digital billboards, that is in addition to the spacing, size, and height restrictions that otherwise customarily exist.

**Protection #1:** Protecting scenic and other important areas should be a priority. If a city were to decide to allow digital billboards, the city should be aggressive in protecting “scenic areas” – like gateways to downtown, approaches to/from airports, residential areas, parks, schools, and vistas of other historic, scenic or locally significant areas by prohibiting digital billboards in those areas. In fact, the best ordinances dictate exactly where a digital billboard *will be* permitted to locate rather than where it *will not be* permitted to locate.

**Protection #2:** Digital billboards should be approached as a business deal, meaning that the city should get a good deal for its citizens. If there are to be “trades,” they should be (1) structured with City beautification as the ultimate goal and (2) should be fair for the citizens rather than automatically responding to a billboard company’s request without further consideration. Clearly, electronic billboards possess far greater commercial value to billboard owners than non-electronic billboards. In order for cities to make informed judgments about whether to allow an electronic billboard to replace one or more existing non-digital billboards, cities should consider having a third-party valuation of the anticipated value of a requested digital billboard and of the non-electronic billboards which it would replace. If the City decided

to allow a non-digital billboard in a high-value location to be converted to an electronic billboard, the city should require a great many — potentially dozens — of “regular” billboards be taken down to equal the value of the new electronic billboard. Such value-based trades have the benefit of removing the visual scourge and depression of property values caused by billboards existing in those neighborhoods. Once existing billboards are taken down, continuing the policy of no new billboard locations (only conversions to be allowed) can create a market for equivalent or even increased value for future digital billboard owners.

**Protection #3:** Every digital billboard should have a sunset provision built into the permit. If a city protects its significant areas and gets a good exchange deal, the final piece to having a clutter-free city is to require that every digital billboard be removed after a reasonable period of time (anywhere from 10 to 30 years). While a comprehensive long-term “exchange and sunset” program would require exceptional courage, tenacity and diligence on the part of the City, a carefully crafted and implemented “exchange and sunset” program could be an enlightened approach to reclaiming a city’s scenic environment.

**Protection #4:** Finally, this is an extremely litigious arena. Therefore, to draft an ordinance that will likely withstand legal challenge, consult an attorney who specializes in first amendment speech issues.

#### **B. “Face” and Square Footage Swaps – Ordinances Relating to Digital Billboards and Exchange Trends.**

If a city decides that it wants to initiate and/or participate in a program whereby it reduces a large amount of traditional billboard inventory in exchange for a small increase in its digital billboard inventory, there are two ways to proceed. The first is the “face” swap whereby traditional billboard faces are traded for digital billboard faces, resulting in several traditional billboards coming down for every one digital billboard erected. The second way involves an

exchange of *square footage* where the amount of traditional billboard square footage removed is greater than the amount of digital square footage erected. However, larger cities usually derive more benefit from this practice because they naturally have larger amounts of billboard inventory. Below are specific references to three cities' exchange rates and their respective ordinances that provide the most "comparable" digital billboard codes for larger cities.

**1. Tampa, FL - See Ch. 20.5, Sec. 20.5-11(d) - Billboard Signs**

- Exchange Rate: Ten (10) traditional faces for one (1) digital face.
- Upgrades to electronic billboard signs [begins on page 10 of 25].

Code Link:

<http://library.municode.com/index.aspx?clientId=10132&stateId=9&stateName=Florida>

**2. Orlando, FL - See Ch. 64 “Signs,” Part 3 - Billboards and Other Off-Site Signs,**

- Exchange Rate: Four (4) traditional faces for one (1) digital face.
- Sec. 64-277 Off-Premises Digital Billboard Signs  
[beginning on p. 22 of 27].

Code Link:

<http://library.municode.com/index.aspx?clientId=13349&stateId=9&stateName=Florida>

**3. St. Paul, MN - See Title VIII, Ch. 64, Article III**

- Exchange Rate: Six (6) traditional faces for (1) digital face.
- Sec. 64.300 – Nonconforming Signs, Subsection
- Sec. 64.302 – Nonconforming advertising signs; conversion to billboard with dynamic display [begins at bottom of page 8 of 34].

Code Link:

<http://library.municode.com/index.aspx?clientId=10061&stateId=23&stateName=Minnesota&customBanner=10061.jpg&imageclass=L&cl=10061.txt>

Below is a list of other cities/counties around the country that have also done "swaps" that would be more applicable to smaller cities that have fewer billboards to trade.

Hayward, CA	Four (4) traditional faces exchanged for one (1) digital face.
Cheyenne, WY	Three (3) traditional faces exchanged for one (1) digital face.
Sacramento, CA	Twenty-four (24) traditional faces exchanged for eight (8) digital faces for a ratio of 3 to 1, plus substantial financial consideration.
Gulfport, MS	Six (6) traditional structures for one (1) digital structure, including certain requirements applicable to square footage of faces.
Minnetonka, MN	Removal of fifteen (15) traditional faces exchanged for six (6) digital faces.
Tacoma, WA	Exchanged fifteen (15) existing signs and permits (5 of which had to include existing signs) for one (1) digital face
Tukwila, WA	Seven (7) traditional faces exchanged for one (1) digital face.
Stuart, FL	Seven (7) traditional faces exchanged for one (1) digital face.
Pinellas County, FL	Eight (8) traditional faces exchanged for one (1) digital face with a 15-second interval limitation (ordinance currently pending).

**IV. REGULATORY CHALLENGES**

**A. Common Errors in Sign Ordinances**

- Too much discretion in permitting; approval required but no rules stated.

- General rules with content based exceptions (no neon, except beer).
- Rules deviate from solid *time, place and manner* restrictions.
- Granting variances (the more variances you grant, the more you erode the underlying intent and effectiveness of the ordinance)
- Political sign rules regulating when they can be displayed.
- Lack of a substitution clause.
- Lack of enforcement.

## **B. Substitution Clauses.**

Most ordinances, to some degree or another, are subject to scrutiny on their face or as applied. However, ordinances regulating signage and billboards are particularly subject to attack because they attempt to regulate the highly controversial subject of free speech and an industry that is extremely lucrative to say the least.

One of the most vulnerable areas of any sign and/or billboard ordinance is whether the ordinance distinguishes or otherwise favors commercial speech over noncommercial speech. Avoiding such an attack necessarily requires the drafter to include a “substitution clause” within the text. While the wording may vary, the underlying effect of any substitution provisions is the same: noncommercial messages may be substituted in place of any commercial message on any *lawful* sign. For example, if the local mechanic shop has a legal on-premise (on-site) sign that displays the commercial message “Oil Change Special \$19.99,” that same shop can change that sign to read the noncommercial message “Support Our Troops.”

Unfortunately, most ordinances *as written* do not specifically articulate a sign owner’s ability to display commercial messages as well as noncommercial messages on his/her lawful on-premise sign. Instead, what happens is sign owners routinely substitute noncommercial

messages all the time without any thought to whether or not it is allowed under local ordinance. In most instances, the amendment of an existing sign and/or billboard ordinance to include a substitution clause is simply codifying a practice that is already in place. Unfortunately, the failure to include a substitution clause in a sign / billboard ordinance opens the door for anyone to challenge the *entire ordinance* based on the presumption that the ordinance favors commercial speech and thus, the movement to strike down the entire ordinance as unconstitutional is born.

**SUBSTITUTION CLAUSE EXAMPLE:**

“Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs.”

**C. Concurrent Regulatory Jurisdiction: TxDOT and the Municipality.**

The Texas Department of Transportation (TxDOT) exercises regulatory authority over the erection and operation of off-premise outdoor signage along interstate highways and federal aid primary highways according to the Highway Beautification Act. The Highway Beautification Act requires every state to adopt a method to control outdoor advertising or be penalized by losing ten (10) percent of their highway funding. The Highway Beautification Act represents the *minimum standard* for outdoor advertising regulation.

In addition to the Highway Beautification Act, TxDOT represents an additional level of tighter regulation for outdoor advertising signs from the main-traveled way of a federal interstate or primary highway. Signs may only be erected or maintained along a regulated federal highway in accordance with state regulation, which includes receiving a permit. The greatest regulation is at the city level which can include the complete prohibition of billboards and digital signage in

the city’s corporate boundaries and well as within the city’s extraterritorial jurisdiction (ETJ). As such cities and TxDOT share concurrent jurisdiction to the extent federal interstate or primary highways are located within a city corporate boundaries and ETJ.

In practice, TxDOT by default enforces its outdoor advertising regulations along all federal interstate or primary highways, regardless of whether these highways pass through a city’s corporate limits or not. However, if a city demonstrates to TxDOT that it has established and will enforce outdoor advertising standards and regulations for size, lighting, and spacing of established by TxDOT, a city can become “certified” to police its own interstate corridor within its jurisdiction. Thus, if a city has established a TxDOT approved program regulating signs, a permit issued by the city shall be accepted in lieu of a state permit issued by TxDOT. However, TxDOT’s certification of a city does not relieve TxDOT of its responsibilities to enforce its outdoor advertising regulations. In the event a certified city fails to satisfy its obligations, TxDOT may de-certify the city.

**1. Extension of regulation into the extraterritorial jurisdiction (EJT).**

It is important to remember that any city ordinance regulating or even prohibiting signs and billboards altogether can be extended to apply in the city’s ETJ pursuant to Texas Local Government Code Sec. 216.902 entitled “Regulation of Outdoor Signs in Municipality’s Extraterritorial Jurisdiction.” Below is an example of language for an ordinance extending a city’s regulation of outdoor signs to the ETJ.

**WHEREAS**, the City Council finds that TEX. LOC. GOV’T. CODE § 216.902 provides for the application of its outdoor advertising sign regulations to extend into the extraterritorial jurisdiction (ETJ) of the city;<sup>8</sup>

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<sup>8</sup> See Appendix B, Sample Ordinance.

## 2. Avoiding waiver and estoppel arguments.

The existence of concurrent jurisdiction between TxDOT and local municipalities creates an environment ripe for challengers to sign and billboard regulations based on waiver and estoppel. This usually occurs when the sign or billboard developer obtains a TxDOT permit for his/her billboard sign based on an application that necessarily requires verification from the municipality if the proposed sign is located within the boundaries of an incorporated city. Previous versions of TxDOT's application form was particularly problematic because it did not inquire as to whether or not the municipality with the overlapping jurisdiction had a prohibition against off-premise outdoor advertising structures for the proposed location. As a result, arguments like the one below appear in lawsuits alongside the customary First Amendment constitutional challenges.

**D. The City previously signed off on permits for two similar signs owned by [REDACTED]**

20. The City apparently considered the foregoing when it signed off on [REDACTED]'s permit applications submitted to TxDOT to erect two signs adjacent to I- [REDACTED] in 2003. (Ex. 3, RFA 1 and 2; Ex. 4, RFA 1 and 2; Ex. 9; Ex. 10; Ex. 14) Thus, the City has previously agreed that [REDACTED]'s Application should be granted as a permitted use within the [REDACTED] Zone.

21. In addition, based on this prior issuance of permits to [REDACTED], the City has waived the right to now claim that the Application should not be approved and the permit should not be granted.

Fortunately, arguments by billboard developers like the ones above are less likely since TxDOT revised its permit application for outdoor advertising signs which is more specific than previous versions. Of particular importance is the fact that the new application specifically

requests the municipality to state whether it has “a prohibition on off-premise outdoor advertising structures” as shown in an excerpt in the new application form below.

Form ROW-OA-4 (Rev. 09/10)  
Page 5 of 6

Part VIII - City / Municipality Verification		
<p>This part of the application MUST be completed by an authorized city official if the proposed sign location is within the boundaries of an incorporated city / municipality. The purpose of this section is to confirm the zoning of a proposed sign location and any applicable sign ordinances.</p>	Name of City:	
	Official's Name & Title:	
	Address:	
	Phone Number:	
<p>Does your city / municipality have a comprehensive zoning ordinance? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>What is the zoning designation of the location described in Part II, above: _____</p> <p>Is the above zoning designation a commercial or industrial type zone that allows the erection of off-premise outdoor advertising structures? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><b>Does your city / municipality have a prohibition on off-premise outdoor advertising structures? <input type="checkbox"/> Yes <input type="checkbox"/> No</b></p> <p>If yes, please clarify if exceptions to the prohibition on off-premise outdoor advertising structures exists for this proposed location:</p>		
City Official's Signature:	Date:	Address of Property:
_____	_____	_____

# **APPENDIX “A”**

## **Texas Legislative Update**

## 1. Electronic Billboard Stateside System proposed in H.B. 1765/S.B. 971

In February 2011, Representative Sid Miller (R) and Senator Juan Hinojosa (D) filed House Bill 1765 and Senate Bill 971, respectively. The stated intent of the companion bills was to create an emergency public service message system. However, as applied, the bills would amend Ch. 418 of the Texas Government Code thus allowing the construction of hundreds, if not thousands, of commercial digital billboards in the corporate limits or extraterritorial jurisdictions of Texas municipalities free of state or local control or regulation. The companion bills would, among other things do the following:

(1) require the governor's Emergency Management Division, with cooperation from the Texas Department of Transportation and emergency management directors, to create an emergency information network system consisting of at least **200 digital displays** to display local **public health and safety information** and availability of fuel, food, lodging, and pharmacy services in certain urban areas;

(2) require the division to contract with **vendors** who will erect and maintain the signs within city limits or within extraterritorial jurisdiction of a city;

(3) allow the **vendors** to display commercial messages when emergency information is not being displayed; and

(4) allow the erection of such signs **without requiring compliance with municipal sign ordinances or permission from the city in which the sign is located.**

Among the definitions contained within the proposed statutory amendments, "**vendors**" is not defined.

**a. Proposed Amendments to Ch. 418 under H.B. 1765 (S.B. 971).**

**Chapter 418, Subchapter I. EMERGENCY PUBLIC SERVICE MESSAGE NETWORK**

Sec. 418.201. DEFINITIONS. In this subchapter:

- (2) “Emergency information network” means a system of digital displays that is controlled remotely from a centralized location.

Sec. 418.202. LOCAL PUBLIC HEALTH AND PUBLIC SAFETY ALERTS.

(a) With the cooperation of the Texas Department of Transportation and emergency management directors, the division shall develop and implement a system for *municipalities and counties* to issue local public health and public safety alerts through an emergency information network developed under Section 418.203.

- AMBER alerts<sup>1</sup>
- Silver alerts<sup>2</sup>
- Blue alerts<sup>3</sup>
- Homeland security alerts
- Emergency public service message provided to motorist during severe weather, evacuations or following a declared state of disaster

Sec. 418.203. EMERGENCY INFORMATION NETWORK.

(b) The division shall coordinate with the Texas Department of Transportation to implement an emergency information network along designated high traffic evacuation routes and highways in metropolitan areas located within 50 miles of a designated evacuation route.

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<sup>1</sup> America’s Missing: Broadcast Emergency Response

<sup>2</sup> Nationwide public notification system used to broadcast information about missing persons, especially seniors with Alzheimer’s Disease, dementia or other mental disabilities.

<sup>3</sup> Texas’ notification system providing information identifying the vehicle of suspected assailants which hinders violators’ ability to flee the state and facilitates their speedy capture.

**A digital display that is part of the emergency information network must be located only within the corporate limits or extraterritorial jurisdiction of a municipality.**

- (d) The emergency information network must include a least **200 digital displays** and, to the extent possible, use **double-sided digital displays**. The digital displays must be **installed in a sufficient number** and **located in sufficiently high population and high traffic areas** to ensure the emergency information network disseminates information to the maximum number of motorists.
- (g) **If a digital display authorized under this section is not being used to display the information described by Subsection (c), the contractor may:**
- (1) **display commercial digital messages;**
  - (2) **charge the prevailing market rate** for displaying commercial digital messages, and
  - (3) **retain the prevailing market rate** for displaying commercial digital messages.
- (h) Not later than January 31 of each year, the **contractor shall pay two and one-half of the gross revenue generated** from each digital display during the preceding year to:
- (1) the comptroller for deposit in the general revenue fund; and
  - (2) **the municipality in whose corporate limits or extraterritorial jurisdiction the digital display is located.**
- (j) The **contractor shall operate** the emergency information network **to maximize the payments** required under Subsection (h).

The effective date for the amendments was to be September 1, 2011.

**Summary — the Real Story:** Under the guise of public safety emergency messaging, the bill would actually allow commercial sign companies (i.e., vendors) to build digital billboards in urban areas to be used for commercial advertising when emergency messages are not being displayed. In fact, at the Senate hearing, it was revealed that public safety messaging would account for only 1 to 5% of the messages while commercial advertising would account for 95-99% of the messages. A representative of a newly created organization, the Texas Emergency Network (TEN), spoke in favor of the bill. He was questioned about the purpose of the bill and why TEN was created. He admitted that the sole purpose of creating the organization was to lobby for the passage of S.B. 971 so TEN could bid on the highly lucrative job of placing digital displays that, as stated by TEN, would likely display commercial advertising for all but four days a month.

Even more disturbing, the bill would expressly preempt city and state sign regulations. At the senate committee public hearing, several city officials testified about the importance of local control over signs and emphasized the important safety and aesthetic considerations cities have made when choosing whether to allow electronic signs on a local level. The witnesses agreed that emergency messaging is valuable, but they testified that present TxDOT signage and other media outlets adequately serve this purpose. Due to a substantial amount of opposition, the senate bill was left pending in committee.<sup>4</sup>

**HEAR THE SENATE TRANSPORTATION AND HOMELAND SECURITY**

**COMMITTEE HEARING AT**

<http://www.senate.state.tx.us/avarchive/?mo=03&yr=2011&lim=50>

**<CLICK ON MARCH 16, 2011>**

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<sup>4</sup> See TML website: [http://www.tml.org/leg\\_updates/legis\\_update031811f\\_electronic\\_billboards.asp](http://www.tml.org/leg_updates/legis_update031811f_electronic_billboards.asp).

After the Senate hearing, the bill was left in committee. However, the House Bill was considered in public hearing on March 29, 2011 and proceeded to the Calendars Committee on April 29, 2011, where it died. Although neither Bill advanced, there is still the risk that its contents could be amended to another bill.

## **2. County Authority to Prohibit New Billboards proposed in H.B. 1360/S.B. 1354**

Representative Garnet Coleman (D) of Houston and Senator John Carona (R) of Dallas filed House Bill 1360 and Senate Bill 1354 they were considered in public hearings but left pending in committee. These companion Bills relate to the regulation of off-premise signs in the unincorporated areas of a county and would amend Ch. 240 of the Texas Local Government Code. Specifically, the Bills provide as follows:

Sec. 240.908. REGULATION OF OFF-PREMISE SIGNS.

- (b) Notwithstanding any other law, **the commissioners court of a county by order may prohibit the erection of off-premise signs along road in the unincorporated area of the county.** The commissioners court may not require the relocation, reconstruction, or removal of an off-premise sign in existence on the effective date of this section.

Any prohibition requires a public hearing, with fifteen (15) days notice published in a newspaper of general circulation in the county. County commissioners and scenic advocates supported these bills but billboard company representatives opposed them. These bills would have given optional authority to county commissioners to control the proliferation of billboards in unincorporated areas of the county, including the ETJ of a city only if a city has not extended its sign authority into the ETJ.

# **APPENDIX “B”**

## **Notifications & Model Ordinance**

**SAMPLE LETTER SENT TO ALL CITIES FOLLOWING TxDOT AMENDMENT TO  
ALLOW DIGITAL BILLBOARDS**

<DATE>

Mayor \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**RE: ALERT: NEW TxDOT RULES ALLOW DIGITAL BILLBOARDS IN CITIES.  
PLEASE FORWARD TO CITY MANAGER, CITY COUNCIL & CITY ATTORNEY**

Dear Mayor \_\_\_\_\_:

On February 28, 2008, the TxDOT highway commissioners voted to allow multi-colored electronic changeable message light emitting diode (LED) billboards in your city and your city's extraterritorial jurisdiction (ETJ) beginning June 1, 2008. Unless you take immediate action, you may soon have signs that look like giant color TV screens with brilliant messages dominating your city's appearance. But, unlike a TV, you will have no control over the on/off button and no ability to switch stations since content is protected by the First Amendment Free Speech clause.

***What exactly will happen?*** On June 1, the new rules will allow outdoor advertisers to apply for an unlimited number of LED permits across the state. The applications will be to erect brand new LED billboards or to convert existing billboards into LEDs along every Interstate and Federal Highway that runs through your corporate and ETJ limits. *Before TxDOT is allowed to issue a permit for a LED, the outdoor advertising applicant must first obtain the city's permission.*

***What can you do to protect your city?*** Adopt the attached suggested ordinance language (or other language recommended by your city attorney) if your city does not currently prohibit new off-premise billboards and converted LED billboards in both the corporate and ETJ limits. If you do not act, you may have no legal basis to refuse an application. Once these billboards are turned on, it will be virtually impossible to unplug them, and you will be watching the face of your city change forever.

***Why shouldn't the city allow LED signs?*** First, the Federal Highway Administration recently announced plans to publish a report on LED billboard safety in the latter part of 2009. Second, the intrusive nature of LED billboards has become increasingly apparent given the adverse public reaction across the country. Third, for future highway improvements/widenings, LED billboards will result in higher condemnation costs to the taxpayers. Fourth, there have been numerous citizen concerns about any added light and noise pollution that may be emitted from these billboards. Finally, a prohibition will put your city in the strongest possible legal position before applications are filed on June 1. Prohibiting changeable message LED billboards

now will provide you with time to hold public hearings, carefully study these issues, and make an educated decision about the full impact these signs will have on the citizens of your city and visitors to your city.

Scenic Texas, Inc. is a non-profit public policy organization dedicated to the preservation of Texas' scenic views, particularly as seen from our interstates, highways and streets. For more information on the safety, condemnation costs, scenic and other environmental impacts and public reaction to these signs, or to simply see what these signs look like in other states, go to [www.scenictexas.org](http://www.scenictexas.org).

We are happy to answer questions or provide more information on this or other scenic issues. Please call Margaret Lloyd, our Policy Director, at 713-533-9149 or 713-898-2819 or email her at [lloyd@scenictexas.org](mailto:lloyd@scenictexas.org).

Very truly yours,

Don M. Glendenning  
President

Enclosure: Proposed ordinance language

**SAMPLE ORDINANCE BANNING OFF-PREMISES  
CHANGEABLE ELECTRONIC VARIABLE MESSAGE SIGNS (CEVMS)**

**ORDINANCE \_\_\_\_\_**

**AN ORDINANCE OF THE CITY OF \_\_\_\_\_ PROHIBITING  
\_\_\_\_\_ IN THE CITY OF  
\_\_\_\_\_ AND ITS EXTRATERRITORIAL JURISDICTION.**

**WHEREAS**, the City of \_\_\_\_\_ is a \_\_\_\_\_ formed pursuant to TEX. LOC. GOV'T. CODE § \_\_\_\_\_, et seq.; and

**WHEREAS**, the City Council agrees with the American Society of Landscape Architects' determination that outdoor advertising signs tend to deface nearby scenery, whether natural or built, rural or urban; and

**WHEREAS**, City Council agrees with courts that have recognized that outdoor advertising signs tend to interrupt what would otherwise be the natural landscape as seen from the highway, whether the view is untouched or ravished by man, and that it would be unreasonable and illogical to conclude that an area is too unattractive to justify aesthetic improvement; and

**WHEREAS**, the City Council has determined that outdoor advertising signs, including changeable electronic variable message signs, pose a distraction to drivers, bikers and pedestrians from the roadway; and

**WHEREAS**, the City Council has determined that in order to preserve and enhance the City as a desirable community in which to live and do business, a pleasing, visually attractive environment is of foremost importance; and these regulations are a highly contributive means by which to achieve this desired end and have been prepared with the intent of enhancing the visual environment of the City and promoting safety and continued well-being; and

**WHEREAS**, the City Council has determined that these regulations maintain and enhance the aesthetic environment, improve pedestrian and traffic safety, lessen unnecessary visual clutter that competes for the attention of pedestrian and vehicular traffic, regulates signs in a manner so as to not interfere with, obstruct the vision of or distract motorists, bicyclists or pedestrians, conserve, protect, and enhance the aesthetic quality of the City, protect property values by precluding sign-types that create a nuisance to the occupancy or use of other properties; and

**WHEREAS**, the City Council has determined that off-premise signs, commonly known as billboards, are inconsistent with the above-stated goals; and

**WHEREAS**, the City Council has determined that changeable electronic variable message signs (CEVMS), as defined herein, are inconsistent with the above-stated goals; and

**WHEREAS**, the City Council finds that TEX. LOC. GOV'T. CODE § 216.902 provides for the application of its outdoor advertising sign regulations to extend into the extraterritorial jurisdiction (ETJ) of the city; and

**WHEREAS**, the City Council adopts the following definitions in the interpretation of this Ordinance:

**Changeable electronic variable message sign (CEVMS)** shall mean a sign which permits light to be turned on or off intermittently or which is operated in a way whereby light is turned on or off intermittently, including any illuminated sign on which such illumination is not kept stationary or constant in intensity and color at all times when such sign is in use, including an LED (light emitting diode) or digital sign, and which varies in intensity or color. A CEVMS sign does not include a sign located within the right-of-way that functions as a traffic control device and that is described and identified in the Manual on Uniform Traffic Control Devices (MUTCD) approved by the Federal Highway Administrator as the National Standard.

**Off-premise sign** shall mean any sign, commonly known as a billboard, that advertises a business, person, activity, goods, products or services not located on the premises where the sign is installed and maintained, or that directs persons to a location other than the premises where the sign is installed and maintained.

**On-premise sign** shall mean any sign identifying or advertising the business, person, activity, goods, products or services sold or offered for sale on the premises where the sign is installed and maintained when such premises is used for business purposes.

**Sign Code Application Area** shall mean the corporate limits of the city and the area of its extraterritorial jurisdiction as defined by TEX. LOC. GOV'T. CODE § 42.021.

**NOW THEREFORE,  
BE IT ORDAINED BY THE CITY COUNCIL OF  
THE CITY OF \_\_\_\_\_ THAT:**

SECTION 1. The recitals set forth above are found to be true and correct, and they are hereby adopted by the City Council and made a part of this ordinance for all purposes.

SECTION 2. From and after the effective date, no new construction permit shall be issued for the erection of an off-premise sign, including but not limited to a new off-premise CEVMS and the conversion of an existing non-CEVMS off-premise sign to a CEVMS, within the Sign Code Application Area.

SECTION 3. From and after the effective date, no CEVMS shall be allowed within the Sign Code Application Area.

SECTION 4. This ordinance will remain in force and survive any future recodification of state statutes cited herein.

SECTION 5. This ordinance becomes effective \_\_\_\_\_, \_\_\_\_\_.

**PASSED AND APPROVED BY THE \_\_\_\_\_ CITY COUNCIL ON THIS  
THE \_\_\_\_ DAY OF \_\_\_\_\_.**

**APPROVED:**

\_\_\_\_\_

\_\_\_\_\_, **Mayor**

**ATTEST:**

\_\_\_\_\_  
\_\_\_\_\_, **City Secretary**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
\_\_\_\_\_, **City Attorney**

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**2011 Applications Available Now!**  
**Applications will be accepted**  
**January 1 – March 31, 2011.**

**OUR MISSION**

The mission of the *Scenic City Certification Program* is to support and recognize Texas municipalities that implement high-quality scenic standards for public roadways and public spaces, with the long-term goal of improving the image of all cities.



The Scenic City Certification Program is a project of Scenic Texas. Scenic Texas has identified a direct correlation between the success of a city's economic development efforts and the visual appearance of its public spaces. In recognition of this link, Scenic Texas has developed the Scenic City Certification Program to support and recognize municipalities that implement high-quality scenic standards for public roadways and public spaces. The program will recognize Texas cities which already have strong scenic standards and will provide an incentive to others to adopt and implement the kind of stringent criteria that has been proven to enhance economic development, improve quality of life and foster a sense of place.

Earning certification will be very straightforward. A city should not [apply](#) unless it already has 1) a strictly regulated and enforced sign code, 2) a ban on new billboards, and 3) a landscaping and tree planting program. Certification points are awarded for these required elements. Then, under the application scoring system, an applicant city builds additional points toward certification with the goal of earning Recognized, Bronze, Silver, Gold, or Platinum Certification. These are earned by showing evidence of existing municipal ordinances, rules, regulations and programs that evidence a city's awareness and commitment to quality-of-life development.

The Scenic City application contains 73 possible criteria that earn points, including a high percentage of park and open space, implementation of multi-use trails and recreation areas, strong litter enforcement laws, street lighting standards, parking lot landscaping, utility line management, a budget that supports these programs and their ongoing maintenance, and more. Every applicant city will also be invited to describe other programs that fall outside the list of criteria but could be considered in the evaluation process (examples might include: historic preservation programs, beach/lake/river cleanups, retention basins, a scenic program related to a unique geographic feature).

The Scenic City Certification Program can play a vital role in giving voice to the proposition that all citizens of any city are entitled to a green, uncluttered, visually appealing place to live, work and play – a truly Scenic City.

[See the inaugural class of certified Scenic Cities!](#)

**BENEFITS**

Having in place the network of ordinances, rules, regulations and programs that earn Scenic City certification:

- improves property values
- attracts new business
- enhances economic development efforts
- educates your citizens about the importance and impact of local decision-making

[more ...](#)



Developed in partnership with:



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