Portsmouth,[45] the New Hampshire Supreme Court held that where properties are not of historical significance, the redrawing of historic boundaries for the purpose of removing the properties from an historic district did not constitute illegal spot zoning. The mere fact that the amendment zoned a small area at the request of a single landowner did not itself make the result spot zoning. Rather, the appropriate question is whether the area had been unjustifiably singled out for treatment different from that of similar surrounding land.

§ 5:24 —Sign controls

Research References

For further discussion, see Ziegler, Rathkopf's The Law of Zoning and Planning (4th ed.), Ch 14A

Municipalities often try to maintain property values and neighborhood character by regulating the use of signs. Regulations may range from limits on size and height to complete bans on certain types of signs. Federal courts have upheld statutes prohibiting signs advertising certain products, such as liquor,[1] and a plurality of the Supreme Court has indicated that communities may ban altogether off-site commercial billboards.[2] Generally, municipalities have a great deal of freedom in sign control. A typical sign

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[45]Portsmouth Advocates, Inc. v. City of Portsmouth, 587 A.2d 600 (N.H. 1991).

[Section 5:24]

[1]Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983), cert. denied, 104 S. Ct. 3553 (1984) (upholding a ban on in-state liquor advertising as no broader than necessary and not violative of the First Amendment).

[2]Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981). See also Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988) (upholding an ordinance effectively limiting the number of off-site billboards in the entire village to one because of size, distance, and zoning restrictions); cf. Outdoor Sys., Inc. v. City of Mesa, 169 Ariz. 301, 819 P.2d 44 (1991) (city ordinances prohibiting all off-premises signs on previously undeveloped land before a building permit would be issued held to be a valid exercise of municipal power under a state enabling statute to regulate signs and billboards. Under the municipal ordinances, the city did not have to condemn or purchase nonconforming billboards to eliminate them where the landowner changed the use of the property—a change which itself transformed the status of the nonconforming billboards from legal to illegal).

control ordinance regulates the size, height, and number of signs an owner may display on his property.[3] Moreover, an owner may be required to conform nonconforming signs in accordance with ordinance regulations or remove them within a reasonable period of time.[4]

The power to control signs is not without limits, however, as has been discussed earlier in this text.[5] Because ordinances regulating the use of signs may infringe on constitutionally permitted speech, courts must balance the property owner's First Amendment rights against the exercise of police power. In 1977, for example, the Supreme Court resolved the balance in favor of the First Amendment by finding a statute prohibiting "For Sale" and "Sold" signs to be content-based and unconstitutional.[6]

Traffic safety is a common reason given for the regulation of signs and billboards. For example, in *Metromedia, Inc. v. City of San Diego*,[7] the city stated that it was attempting to "eliminate hazards to pedestrians and motorists occasioned by distracting sign displays." Although little empirical data exists to demonstrate that sign control actually increases traffic safety, courts readily accept the justification. For

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[3]See, e.g., Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982), where the Supreme Court of New Mexico reversed a lower court decision declaring unconstitutional a municipal sign ordinance which regulated size, height and number of signs; Schoen v. Township of Hillside, 155 N.J. Super. 286, 382 A.2d 704 (1977) (invalidating size and color restrictions on "for sale" signs); see also National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300 (Ill. App. 1990) (upholding city ordinance regulating size and height of off-site signs); cert. denied, 501 U.S. 1261 (1991); Real Estate Bd. v. City of Jennings, 808 S.W.2d 7 (Mo. App. 1991) (holding that ordinance limiting size of real estate signs to six-by-thirteen inches was unreasonable under state statute).

[4]Adams Outdoor Advertising v. East Lansing, 483 N.W.2d 38 (Mich. 1992) (on remand to determine whether ordinance constitutes a taking).

[5]See supra § 3:10.

[6]Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977); see also City of Chicago v. Gordon, 497 N.E.2d 442 (Ill. App. 1986).

[7]Metromedia, Inc. v. City of San Diego, 453 U.S. at 490, 101 S. Ct. at 2882, 69 L. Ed. 2d at 800.

example, in *Major Media of the Southeast v. City of Raleigh*,[8] plaintiffs challenged an ordinance on grounds that no objective research was conducted by the defendant to determine the impact of signs on traffic safety, nor did the city rely on research conducted at other locations. The court rejected this argument, stating that no empirical studies are necessary for reasonable people to conclude that billboards pose a traffic hazard since by their very nature they are designed to distract drivers. The question of traffic safety is also generally an issue left to the discretion of local officials.

The district court's deference to the local legislative judgment in *Major Media* seemingly coincides with the increasing deference of the Supreme Court with respect to restraints on commercial speech. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[9] the Court largely deferred to the Puerto Rico legislature in upholding a partial ban on casino advertising to local residents. Nevertheless, counsel should not totally abandon the strategy of challenging the relationship between a given regulation and the advancement of a substantial governmental interest, since *Posadas* was a narrowly decided 5—4 decision which represents a sharp break with the Court's earlier decisions in the commercial speech context.[10]

Municipalities also list aesthetics as a reason for sign control. Until recently, most courts held that aesthetic values alone were insufficient justification for infringing on a property owner's First Amendment rights. However, a growing number of courts now hold that aesthetics alone is sufficient to justify sign control so long as it does not infringe on constitutionally protected speech.[11] For example, in *South-Suburban Housing Center v. Greater South Suburban Board*

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[8]Major Media of the Southeast v. City of Raleigh, 621 F. Supp. 1446 (D.C.N.C. 1985), aff'd, 792 F.2d 1269 (4th Cir. 1986), cert. denied, 107 S. Ct. 1334 (1987).

[9]Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986).

[10]See infra notes and accompanying text.

[11]Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982); City of Lake Wales v. Lamar Advertising Ass'n, 414 So. 2d 1030 (Fla. 1982); Singer Supermarkets, Inc. v. Hillsdale Bd. of Adjustment, 183 N.J. Super. 285, 443 A.2d 1082 (1982); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987), cert. denied, 484 U.S. 1007 (1988); Lamar Advertising of Montgomery, Inc. v. State Dep't of Transp., 694 So. 2d 1256 (Ala. 1996) (holding signs that violated State Highway Beautification Act were illegal even though the city had issued a

of Realtors,[12] the Seventh Circuit upheld municipal ordinances that prohibited real estate "for sale" signs where the ordinances were enacted solely for aesthetic reasons. By way of comparison, an Ohio federal district court[13] declined to extend the Seventh Circuit's holding to a case where a similar ordinance was adopted because of a perceived threat that numerous real estate "for sale" signs were causing panic selling and adversely affecting property values.

In reference to the Constitutional dimension of sign control, the Supreme Court in 1941 formulated the so-called time, place and manner test of local government restrictions on speech.[14] This test allows restrictions if the local government has important reasons for the restrictions, and the restrictions are applied in a neutral fashion, without regard to content.[15]

Until the mid-1970s, the content neutrality doctrine applied only to noncommercial or political speech and commercial speech was given little, if any, First Amendment protection. With its decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[16] the Supreme Court afforded commercial speech some First Amendment protection but still a lesser degree than noncommercial speech. In a later case, the Court developed a test which it has subsequently applied to sign control ordinances. Basically, any ordinance restricting commercial speech must now meet four criteria: (1) the speech must concern a lawful

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permit for the signs). See generally Bufford, "Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetics Regulations," 48 U.M.K.C. L. Rev. 125 (1980), indicating that sixteen states permit land use regulations premised solely on aesthetics.

[12]South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir.), cert. denied, Greater S. Suburban Bd. of Realtors v. Blue Island, 112 S. Ct. 971 (1992).

[13]Cleveland Area Bd. of Realtors v. Euclid, 833 F. Supp. 1253 (N.D. Ohio 1993).

[14]Cox v. New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941) (Supreme Court upheld a statute that required a person to obtain a license before holding a public meeting).

[15]Note, "What Happened to the First Amendment: The Metromedia Case," 13 Loy. U. Chi. L.J., 463-88 (1982).

[16]Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (the Supreme Court held that First Amendment protected advertisements seeking to disseminate prescription drug prices).

activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must advance the governmental interest; and (4) the regulation must not be more extensive than necessary to serve that interest.[17]

The Supreme Court first applied the test to a sign control ordinance in *Metromedia, Inc. v. City of San Diego.*[18] The San Diego ordinance prohibited off-site signs, which advertise a product or service unavailable on the premises where the sign is located. With numerous exceptions, noncommercial speech was prohibited everywhere. Two billboard companies challenged the ordinance and sought to enjoin the city from enforcing it. With respect to commercial speech, a plurality of the Court found the ordinance to be constitutionally acceptable; however, because it gave preference to commercial speech and drew content distinctions among a variety of types of noncommercial speech, it found the ordinance unconstitutional on traditional First Amendment grounds.[19]

Two members of the Court's plurality wrote a separate concurring opinion finding no substantial governmental interest since the city failed to demonstrate that it was improving overall aesthetics other than its ban of billboards. Similarly, these Justices were not convinced that a total ban on off-site commercial signs was constitutionally permissible since that inevitably involves the municipality in impermissible content evaluation.[20] Given these differences, the decision left municipalities and commentators quite uncertain as to the limits of local police power in restricting commercial speech. In his dissent, Justice Rehnquist summed up the *Metromedia* opinion by characterizing it as "a virtual Tower

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[17]Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 563-66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (invalidating a New York statute which prohibited promotional advertising of a utility).

[18]Metromedia, Inc. v. City of San Diego, 453 U.S. at 490.

[19]See also National Advertising Co. v. Town of Niagara, 942 F.2d 145 (2d Cir. 1991); Runyon v. Fasi, 762 F. Supp. 280 (D.C. Haw. 1991) (holding that a prohibition of outdoor political signs was content-based, and less drastic means were available to the city to promote its interest in traffic safety, aesthetics, and safety of pedestrians).

[20]The California Supreme Court on remand agreed with the concurring opinion that it was impermissible to have the city draw distinctions between commercial and noncommercial speech. Metromedia, Inc. v. City of San Diego, 32 Cal. 3d 180, 649 P.2d 902, 185 Cal. Rptr. 260 (1982).

of Babel from which no definitive principle could be clearly drawn."[21]

Some of the confusion has abated. For example, in *Supersign of Boca Raton v. City of Fort Lauderdale*,[22] the Eleventh Circuit held that an ordinance limiting the presence of advertising vehicles in the city did not violate the First Amendment. The ordinance did not apply to buses, taxicabs, or other vehicles whose main purpose was other than advertising. The ordinance was designed to promote the safe movement of vehicular and waterborne traffic and to improve the authentic appearance of the city.

In determining the constitutionality of the ordinance, the court of appeal applied the four-part *Central Hudson*[23] analysis. The satisfaction of the first two criteria was not challenged. As for the third, whether the regulation directly advances the governmental interest asserted, the court said that it does not follow to say that an ordinance fails to address the problems of traffic safety or aesthetic improvement simply because its coverage is incomplete in addressing all advertisements. The city may "directly advance" its interests by pursuing a partial solution to its problems. Further, the court noted that the ordinance was designed to reduce the overall amount of advertising on display. It did this by prohibiting the presence of vehicles whose sole purpose was advertising and thereby chose the least costly solution.

The court also found that the ordinance was no more extensive than necessary, thus satisfying the fourth criterion.[24] A more narrow method, such as limitation on the type of signs displayed, would not be as effective as the current

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[21]Id. at 569.

[22]Supersign of Boca Raton v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir. 1985).

[23]See supra note and accompanying text.

[24]In *Supersign*, the evidence suggested that limiting the type of signs displayed would be a less restrictive method of achieving the government's objectives. Nevertheless, the fourth criterion was satisfied because the less restrictive method did not achieve the ordinance's goals as well as the total ban on advertising vehicles. Thus, if there is no evidence that less restrictive means are available, the court should not speculate as to whether less restrictive means exist. Rather, the court should limit its analysis to whether the means are reasonably and narrowly drawn to further the objective. See also Harnish v. Manatee County, Fla., 783 F.2d 1535 (11th Cir. 1986), reh'g denied, 818 F.2d 871 (11th Cir. 1987). Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987), cert. denied,

ordinance. Thus, the court concluded that the ordinance was content-neutral and went no further than necessary to meet its ends.

In *City of Ladue v. Gilleo*,[25] the Supreme Court revived the concurring opinion of *Metromedia*, written by Justices Brennan and Blackmun, which had argued that the San Diego ordinance was impermissible because it had eliminated an effective medium of communication. *Gilleo* involved the display of an 8-by-11-inch antiwar sign in the window of a house during the Persian Gulf War. At issue was an ordinance that prohibited all signs except for those falling within one of ten exemptions. Exemptions included "residential identification signs," "for sale" signs, and commercial signs in commercial or industrial districts. The stated purpose of the ordinance was to preserve the aesthetic qualities of the community.

Relying on the plurality opinion in *Metromedia*, the court of appeals had ruled that the ordinance was invalid as a content-based regulation because the city treated commercial speech more favorably than noncommercial speech and favored some kinds of noncommercial speech over others.[26]

The Supreme Court, in a 9-0 opinion, affirmed the court of appeals' ruling. The *Gilleo* Court, however, declined to invalidate the ordinance because it was content-based, as the court of appeals had. Justice Stevens, writing for the Court, identified two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs: (1) that the ordinance prohibits too little speech; i.e., the ordinance is content-based and favors certain types of speech over others or (2) that the ordinance may prohibit too much protected speech by foreclosing an important medium of expression.

Justice Stevens found support for this second prong in the

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108 S. Ct. 1280 (1988); Messer. v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), cert. denied, 508 U.S. 930, 113 S. Ct. 2395 (1993); Jim Gall Auctioneers, Inc. v. City of Coral Gables, 210 F.3d 1331 (11th Cir. 2000) (holding that city's prohibition of commercial auctions and their advertising in residential areas was valid because the city allowed the advertising and auctioning in nonresidential areas, and this "balancing effort," along with the absence of any evidence of less-burdensome alternatives, satisfied the "narrowly tailored" requirement).

[25]City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[26]Gilleo v. City of Ladue, 986 F.2d 1180 (8th Cir. 1993).

concurring opinion in *Metromedia* and in earlier cases in which the Court had invalidated ordinances that completely banned pamphlets, handbills, and live entertainment.[27]

The ordinance prohibiting virtually all residential signs, concluded the Court, was nearly a complete foreclosure of a unique and important medium of expression. Since the display of residential signs is unique, adequate alternatives were unavailable. Such signs are unique, according to the Court, because they convey information about the identity of the "speaker," are inexpensive and convenient, and may be more influential upon neighbors than other media. Additionally, the Court noted that individual liberty in the home is an important part of our culture and that most Americans would be dismayed to learn that it was illegal to display in the window of their home an 8-by-11-inch sign expressing their political beliefs.

The Court discounted the city's fear of an "unlimited" proliferation of residential signs. Unlike those who put signs on other people's land, in other people's neighborhoods, and on public property, the Court concluded, individual residents have strong incentives to maintain their own property values.

Gilleo raises new questions for the practitioner because of the difficulty of determining whether the regulation of certain expression will be considered a foreclosure of a unique and important means of communication. Justice O'Connor, in a concurring opinion, addressed this issue. While admitting that the traditional inquiry into whether a regulation is content-based has its flaws, Justice O'Connor argued that a predictable rule based upon an objective test is superior to the discretionary and subjective balancing test used by the Court in *Gilleo*.

Although the *Gilleo* court stressed that its decision did not leave the city powerless to address the problems of residential signs, it declined to elaborate on what would be permissible, beyond mentioning that the regulation of signs placed on residential property for a fee would be permissible. The extent to which a municipality can limit the display of signs at a personal residence not placed for a fee, whether commercial or noncommercial, after *Gilleo* is unclear.

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[27]Lovell v. Griffin, 303 U.S. 444 (1938) (pamphlets); Jamison v. Texas, 318 U.S. 413 (1943) (handbills); *Schad v. Mount Ephraim*, infra § 7:44 (live entertainment).

Following *Gilleo*, the Court of Appeals of Ohio upheld an ordinance which regulated the maximum square footage for signs based on type (political, real estate, construction, safety) and zone location (residential, institutional, business).[28] A mayoral candidate was cited for violating the ordinance on two occasions. Despite the varying sizes for different types of signs, the court found the restrictions to be content neutral because the ordinance was adopted purely for aesthetic reasons and not for disagreement with content. By regulating size, said the court, the ordinance served a legitimate city interest of maintaining the aesthetic quality of the neighborhood and promoting safety. The court also found the ordinance to be narrowly tailored to serve the city's interests, since other venues of communication were left available to display signs, either by making the signs smaller or placing them in appropriately zoned areas.

Addressing and upholding some of the same issues as *Gilleo* is the Supreme Court of Georgia's decision in *Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc.*[29] First, the court ruled that a city ordinance restricting the content of on-premise signs in residential zoning districts was unconstitutional. Referring to *Gilleo*'s decision giving more flexibility to the content of messages which could be displayed in one's residence, the court ruled that the banning of "permanent signs expressing the political, religious, or other noncommercial personal views of the residents" was not constitutional, as it was a content-based restriction.[30] The court also found that time restrictions for these on-premise signs were unconstitutional as well. In this case, the city sign ordinance limited the duration for which a political sign could be displayed in certain zoning districts to a period of seven weeks, six weeks preceding an election and one week following it. Again, the court rejected this content-based restriction, not willing to accept the city's argument that it served a compelling state interest. The court noted that political signs detracted from aesthetics and posed threats of traffic danger no more than any other type of sign displayed in the affected districts.

Similarly, an ordinance limiting political sign placement

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[28]Davis v. City of Green, 106 Ohio App. 3d 223, 665 N.E.2d 753 (1995).

[29]Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996).

[30]467 S.E.2d at 880.

to windows, requiring permits for larger signs, and imposing durational limits on larger signs was held unconstitutional in *Knoeffler v. Town of Mamakating*.[31] The court reasoned that the ordinance did not serve a compelling public interest ("attracting economic development activity by maintaining an attractive community") and was a content-based regulation of speech that violated the First Amendment.

An interesting question is whether *Gilleo* would apply to private covenants in a scenario where neighborhoods were empowered, pursuant to state enabling acts, to promulgate private covenants designating "sign-free" zones that could be ratified by a simple majority vote.[32] In such a hypothetical case, *Gilleo* might not be implicated because the government has not directly enacted restrictions.

There is an emerging consensus among land use practitioners on when a sign control may be challenged. A sign ordinance which fails to recite the purpose of the controls (*e.g.*, traffic safety, aesthetics, preservation of property values) or how the ordinance furthers these goals may well be vulnerable. This is especially true in light of the Supreme Court's decision in *Discovery Network*,[33] which invalidated a Cincinnati ordinance that did not meet the fourth prong of the *Central Hudson* test.[34] The Court held that the city failed to show a "reasonable fit" between the city's interest in aesthetics and safety, and the means chosen to promote those interests, namely the selective banning of commercial, but not noncommercial, newsracks. Pursuant to *Metromedia*, an ordinance which is more generous to commercial than to noncommercial signs will likely be in most cases per se invalid.[35] While some have advised cities to avoid this problem by inserting the word "commercial" in the description of the

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[31]Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322 (S.D.N.Y. 2000)

[32]See Linn Valley Lakes v. Brockway, 824 P.2d 948 (Kan. 1992), infra § 5:62.

[33]City of Cincinnati v. Discovery Network, 113 S. Ct. 1505, 129 L. Ed. 2d 39 (1993), see infra § 5:25.

[34]Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), modified by Board of Trustees of State Univ. v. Fox, 492 U.S. 469 (1989).

[35]National Advertising Co. v. Babylon, 900 F.2d 551, cert. denied, 111 S. Ct. 146 (1990) (invalidating ordinances of four towns and a village on Long Island that heavily restricted off-premises billboards containing either commercial or mixed commercial and noncommercial messages as violating free speech rights), aff'd, 970 F.2d 895 (2d Cir. 1992).

regulated signs, that may not be constitutionally sufficient given the content implications,[36] and the court's renewed appreciation for commercial speech in *Discovery Network*, infra.

Prior to *Discovery Network*,[37] a lower court decision provided further interpretation of *Metromedia*, supra. In *Burkhart Advertising, Inc. v. City of Auburn*,[38] an Auburn ordinance, banning all off-premise billboards, was challenged on First Amendment grounds. The *Burkhart* court, as did the *Metromedia* court, applied the *Central Hudson*[39] four-part test. Although it satisfied the first three prongs of the test, the Auburn ordinance, unlike a similar ordinance being challenged in *Metromedia*, did not satisfy the fourth criterion under *Central Hudson*. Rather, the ban of all off-premise billboards within Auburn was found to be "more extensive than . . . necessary." The *Burkhart* court distinguished the *Metromedia* decision, reasoning that the city of Auburn could enforce restrictions on billboard placement, sizing, spacing and lighting more easily than a large metropolis, such as San Diego. In addition to finding that the Auburn ordinance failed the *Central Hudson* test, the court held that the ordinance treated commercial speech more favorably than noncommercial speech, thus facially violating the First and Fourteenth Amendments.

The Third Circuit has announced a "new test" that would allow certain speech to be exempted from a general ban on signs.[40] The statute at issue prohibited the posting of signs within 25 feet of the right of way of most state highways or on the right of way of any public highway. Several exceptions were provided for in the statute. The constitutionality of the statute was challenged by defeated congressional candidate Daniel Rappa after the Delaware DOT removed

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[36]Zoning and Planning Law Handbook. But compare Major Media of the Southeast v. City of Raleigh, 621 F. Supp. 1446 (D.C.N.C. 1985), aff'd, 792 F.2d 1269 (4th Cir. 1986), cert. denied, 107 S. Ct. 1334, 123 L. Ed. 2d 99 (1987), where the plaintiff challenged a sign ordinance on the basis, inter alia, that the city failed to define commercial speech. Citing *Metromedia*, the district court indicated that there was no need for the city to define the term since judicial precedent provided adequate guidance.

[37]See infra § 5:25.

[38]Burkhart Advertising, Inc. v. City of Auburn, 786 F. Supp. 721 (N.D. Ind. 1991).

[39]Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

[40]Rappa v. State of Delaware, 18 F.3d 1043 (3d Cir. 1994).

several of his campaign signs from public highway right-of-ways and other areas.

Although the court found the statute to be content-based, it explained that certain content-based exceptions could be permissible under its new test. To be exempted from a general ban there must be a significant relationship between the content of particular speech and a specific location or its use. A sign can be significantly related to property in either of two ways: (1) the sign is particularly important to travellers on the nearby road, for example, a directional sign or a sign conveying the nearest location for food; or (2) the sign conveys its information more effectively in its particular location than it could anywhere else, for example, an address sign is most effective when it is actually on the property with that address. Additionally, the exemption must not be an attempt to censor certain viewpoints or to control what issues are appropriate for public debate. The court also ruled that the exemption must survive the test proposed by the concurrence in *Metromedia*; i.e., the state must show that the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, that the exemption is no broader than necessary to advance the special goal, and that the exemption is narrowly drawn so as to impinge as little as possible on the overall goal.

Exemptions from the general ban receiving court approval included tariff and directional signs, signs advertising the sale or lease of the real property on which they are located, signs advertising activities conducted on the premises, beautification/landscape planting sponsorship signs, and notices or advertisements required by law. The exception for signs announcing a town, village or city and advertising itself or its local industries, meetings, buildings, historical markers, or attractions did not meet the courts new test. Signs advertising a local city or industry are not related to the land they are on or to the function of the highway. These were no more related to the land, stated the court, than signs advertising local stores or local politicians. The court conceded, however, that if the exception had been limited to signs directing people to local towns, historical sites or attractions it would probably be acceptable.

A New Jersey court addressed an interesting sign restriction in *State v. Calabria*.[41] Three business owners were charged with violating a town ordinance prohibiting the use of neon signs. The court acknowledged that the ordinance was content-neutral and that alternative means for communication existed. However, the court refused to find the town's aesthetic goal was narrowly advanced by an arbitrary ban of all neon signs. Regulation of size, brightness, or number, suggested the court, was less restrictive. The town's aesthetic goal was to avoid a look of "highway" signage, yet the court noted that other signs, such as illuminated signs for gas stations, "could constitute the look of a highway commercial zone."[42]

The Supreme Court considered sign control of a different nature in *Members of the City Council v. Taxpayers for Vincent*.[43] A city council candidate challenged the validity of Section 28.04 of the Los Angeles Municipal Code, which prohibited the posting of signs on public property. Even though the ordinance pertained to noncommercial, political speech, the Court held that the ordinance was no more restrictive than necessary in promoting the city's goals of safety and aesthetics.

In another case, however, the promotion of aesthetic and safety interests did not justify the implementation of a county ordinance which limited the number of signs that political parties could place on private property.[44] The Fourth Circuit held that the county's substantial interests could be promoted through other, less restrictive means. Thus, the ordinance was found to impermissibly infringe on the candidates' and property owners' First Amendment rights. Similarly, the Eighth Circuit struck down a municipal ordinance which prohibited the display of political election signs more than thirty days prior to the election, or more than seven days afterwards, and prohibited the external illumination of political signs.[45] The court held that the regulations were content based and thus unconstitutional under

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[41]State v. Calabria, 693 A.2d 949 (N.J. Super. Ct. Law Div. 1997).

[42]Id. at 954–55.

[43]Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

[44]Arlington County Republican Comm. v. Arlington County, 983 F.2d 587 (4th Cir. 1983).

[45]Whitton v. Gladstone, Mo., 54 F.3d 1400 (8th Cir. 1995).

the U.S. Supreme Court's plurality decision in *Metromedia, Inc. v. San Diego*,[46] because they placed greater restrictions on political speech than other speech. The court found that the city's asserted interests in traffic safety and aesthetics were significant but not compelling under a strict scrutiny analysis. Furthermore, the restrictions were not narrowly tailored to serve the city's asserted interests.

Similarly, a city ordinance selectively governing signs, banners, and flags was held to be an unconstitutional content-based regulation in *Young v. City of Roseville*.[47] Here, plaintiff's raising of the "Jolly Roger" (skull and crossbones) flag ran afoul of the statute's mandate that only "flags of foreign nations having diplomatic relations with the United States" could be displayed without regulation. The court reasoned that drawing any such distinction between the display of the Cuban flag, for example, and the flags of NATO nations was an impermissible restriction of noncommercial expression that bore no clear relationship to Roseville's professed goals of aesthetics and traffic safety.

By comparison, the Eleventh Circuit utilized a similar analysis to determine whether a "viewpoint neutral" ordinance, banning off-premise noncommercial signs within a designated area, was a valid time, place and manner restriction.[48] The court found that the ordinance was narrowly tailored to promote the city's significant aesthetic and safety interests within its historic district. Realizing the limited scope of the ordinance, the Eleventh Circuit held that the city's concerns regarding the historic district were "sufficiently significant to override the First Amendment rights of a property owner."

§ 5:25 —Newsrack displays

Research References

For further discussion, see Ziegler, Rathkopf's The Law of Zoning and Planning (4th ed.), Ch 14B

For some time now, the placement of newsracks has been triggering a constitutional confrontation between the munic-

[46]Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

[47]Young v. City of Roseville, 78 F. Supp. 2d 970 (D. Minn. 1999).

[48]Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992).