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Common Features Of Sign Codes

As mentioned earlier, sign codes are typically written by local authorities. The text becomes part of the overall municipal law that governs your community. A copy of the local code should

be available from the responsible department. For instance, the sign ordinance for the city of Albany, New York can be obtained by contacting the city's Division of Planning.

Sign codes were originally intended to impose order in communities and minimize signage abuses taken by businesses. Photographs of cityscapes from fifty, sixty, or eighty years ago show business districts that were chaotic and uninhibited in their capacity to advertise. However, in too many cases, the zeal to regulate within local government has swung the pendulum too far in the other direction. Many small businesses, attempting to communicate with customers through on-premise signs, have encountered difficulties with restrictive sign code provisions.

There are "good" sign codes, and there are some that are not. For the most part, however, sign codes generally address three main community goals: traffic safety, land use (or zoning), and aesthetics.

Traffic Safety

In communities that take traffic safety seriously, regulations are designed not only to control signs, but also promote the safe passage of vehicles. These goals are achieved by setting physical limits on sign type, size, and placement, as well as time, place, and manner conditions (more on this later). Standard regulations in this category are based on minimum size and height measurements. These standards specify that a sign must be at least a certain size or height if it is to be safely seen and reacted to by passing motorists.

Unfortunately, many communities, while promoting traffic safety as a goal, craft regulations that do exactly the opposite. As mentioned in Chapter 1, such codes are rooted in the thought that commercial signs are capable of distracting drivers, and can also mask the visibility of highway signs. Such regulations still exist in many places, despite research by such groups as the Federal Highway Administration and the Institute of Traffic Engineers that shows that it is the regulations themselves that are the risk.

For example, a code may state that an on-premise sign cannot be more than six feet off the ground. In many circumstances, parked cars or idle traffic will obscure this sign from the view of drivers who are in the left lane or on the opposite side of the

street. When this occurs, not only does the sign fail in communicating its message, it encourages unsafe traffic maneuvers by those who may be looking for it.

Land-Use (or Zone) Regulation



Community authorities carve up the land within their boundaries and designate each part for a specific purpose. Zoning recognizes certain areas as available for business locations, while other areas are designated as strictly residential, school, or for some other non-business purpose. Commercial zones must have certain features - for instance, a

defined geographic buffer to separate it from residential areas - in order for businesses to function there.

Businesses must abide by the local commercial sign code regulations. These regulations generally concentrate on sign type, size, height, placement, and source of illumination. Such provisions should, at their best, be designed to encourage businesses to function at their fullest capacity. When business volume increases, so does the efficiency of existing retail space. This is especially of interest to communities looking to limit urban sprawl.

Effective signage is an important tool for accomplishing this goal. Signs can help turn a site that is not productive into one that is well-used and valuable - one that generates higher sales and pays more in taxes. Each business site has particular communication needs if it is to function at its maximum. The selection of a specific kind of sign - such as pylon, projecting, awning, etc. depends on where it will be installed. A good professional sign company can help figure this out for you.

A sign code that restricts particular sign types - for example, those that prohibit projecting or roof signs - denies some businesses the ability to communicate effectively, which restrains their business activity. For freeway-oriented sites or districts, a tall sign can be especially beneficial for the city. The sign can attract impulse customers who otherwise would have bypassed the site and done business elsewhere.

Aesthetics

Many communities are concerned with appearance, and write sign codes to protect against visual clutter. Such codes must comply with the First Amendment's guarantee of freedom of expression because signs, including a business' on-premise signage, are a constitutionally protected form of expression.

The U.S. Supreme Court has ruled that a sign code must be "content-neutral" - in other words, it can only be concerned with signs based on issues of time, place and manner. Time refers to "when" a message may be displayed; place refers to "where" the message may be displayed; and manner refers to "how" the message may be displayed.

The Court also has stated that time, place and manner restrictions on commercial speech are permissible if:

- (1) they are justified without reference to the content of the speech;
- (2) the restrictions serve a significant government interest; and
- (3) they leave open ample alternative channels for communication of the information.

Many sign codes do consider a sign's content, however, to treat signs differently. It is up to the town to prove that sign restrictions based on content are in the best

interests of the community. Failure to do that, in the eyes of the courts, makes that restriction unconstitutional.

For example, the town of Moreno Valley, California, once had a sign code that gave a local official the power to approve or deny a sign permit based on this standard: "[the sign] will not have a harmful effect upon the health or welfare of the general public... [and] will not be detrimental to the aesthetic quality of the community." In 1996, a federal district court found that this standard gave the government official too much authority in determining what the "aesthetic quality of the community" should be. If allowed to stand, the code would have legalized a form of censorship by letting the official approve or deny a sign based solely on its content. The code was deemed unconstitutional, and struck down.

Sign codes are effective when written with respect for aesthetics in economically vital zones. As mentioned in Chapter 1, the town of Barberstown, Ohio offered bonuses to businesses for custom sign designs. The town successfully rehabilitated its business district by encouraging merchants to incorporate their messages on one, custom-designed sign. Businesses were not severely restricted as to which materials, fonts, colors, and other embellishments they could use in expressing their unique messages. This is an example of a sign code that was written intentionally to achieve visually attractive signage, without imposing a series of restrictions and punishments.

At minimum, if the commercial site and its signage are to function at their best, then the governing sign code should reflect these principles:

1. It should reasonably relate to normal business activities and communication needs so that legal conformity is the rule and not the exception. In other words, the code should not try to apply standards to business districts that are more applicable to quiet residential areas.
2. It should be clear, concise, and objective so that discriminatory interpretation is prevented. More information on this can be found in the "Legal Rights of Sign Owners," below.
3. It should be based on prescribed time, place, and manner limits.

Variances

When you and/or your sign company have committed to a sign, a permit must be obtained from a zoning or building official in your local area. Usually, the application has detailed instructions on completing the form, and outlines specific criteria that the sign must meet. Requirements vary from place to place, but, generafly, you'll need to inform your town of your construction and installation plans.

If your business is to be located in an historical district, you'll need the additional permission of the local historical commission. If you sign an agreement in order to develop your business in a planned use development (PUD), then be aware that any sign restrictions in the agreement will supersede your city's sign code.

On occasion, you might wish to obtain an exception, or variance , which is an entirely different procedure from obtaining a permit. A variance is the authority to use a parcel or structure in a way that would otherwise violate a city ordinance.

Pursuing a variance requires an investment of your time, resources, patience, and money. It is not something that you should seek lightly. If you cannot commit to the process, it is wise to compromise between what you want and what your town allows. If you are willing, then below is a description of what you (and, if you're wise, the sign company that you've hired to help) can expect.

In a given locality, there may be multiple boards that hear variance requests: the zoning board of appeals, the housing board of appeals, the building board of appeals, the city planning commission, the historic district commission, etc. Variances may only be granted by these boards after a finding is made that the variance request meets certain standards set out in both the ordinance and state law.

Some basic concepts in both state law and city ordinances are that variances can

only be granted when the property owner has a hardship or practical difficulty (based on something physical), making it difficult (if not impossible) to reasonably use his or her land. Another important concept is that the hardship or difficulty cannot be self-created.

Situations in which a sign code imposes a practical difficulty include the requiring of a minimum distance that a sign must be set back from the curb, or a maximum height from the ground, or strict size dimensions, and so on. If your business is located behind a grove of trees, and those trees obscure a driver's view of your sign, then you might want to pursue a variance to allow the sign to be installed lower to the ground.

Another motivation for obtaining a variance is to allow a small business to better compete with franchises that have national advertising. For instance, McDonald's asks for very few variances, but, because of their signcentric design (described in Chapter 2), their entire building acts as a sign. To compete, smaller restaurants ought to consider a variance (most likely to obtain a sign with larger dimensions).

You might want to approach an application for a variance with one of these strategies:

. Illustrate the benefits that the sign will bring to the land, not to your business. For example, if you are in an older building, point out the proposed sign will contribute to the revitalization of the business district as a whole. If you can demonstrate that the sign will improve the areas tax base, then your community might be more inclined to grant your variance.

. As has been written earlier, traffic safety is a paramount concern to a community. Don't simply lament to a variance board that your sign won't be able to communicate to potential customers. Instead, remind them of the studies mentioned in Chapter 1 that concluded that signs that cannot be readily seen and understood are a menace to passing motorists.

. Should your business be located in a business district with a "theme," know that many jurisdictions are agreeable to variances that permit the renovation of a building's face in order to better fit the theme.

Pursuing a variance can be time-consuming. In many places, boards that make the decision meet infrequently, and may have only a select number of slots on their docket to hear your case. If there are no open slots, then you must wait until there is one. In addition, the process requires a certain amount of diplomacy - greater familiarity with persons on the board might improve your chances of success.

If interested, it's in your best interest to work with those who have the experience. Some states (such as New York or New Jersey) mandate that you have an attorney present. If your state doesn't require an attorney being present, there are consultants who offer their services in this field. For example, larger sign companies often have staff that help with variance requests.

Pursuit of a variance is really a negotiation - you can propose a suggestion, but be prepared to compromise. Your willingness to do so has an impact on whether or not you'll succeed. Other factors that influence your chances of getting a variance include how far your request deviates from the code, and the town's history in granting them, and the level of resources that you use to obtain one.



Another factor is the current economic climate of your community. If landlords are having difficulty in leasing office space, they might be more inclined to consider signage exceptions. Keep in mind, though, that such exceptions are not free. As one consultant based in New York City said, "We advise our clients right up front that altering their signage requirements might mean higher

rent for retail spaces.

The cost of a variance depends on your state and city, and is influenced by the number of meetings that must be attended, the level of preparation, the amount of the filing fees, and whether or not you choose to use a sign company consultant or an attorney. It is also recommended that you consult a signage valuation expert to construct a cost/benefit analysis before applying for a variance.

In addition, since the procedures and requirements for variances differ substantially between municipalities, it is recommended that you consult a qualified attorney if you have any questions or uncertainty regarding practices in your community.

A sample sign variance application:

ANYTOWN, U.S.A. SIGN VARIANCE APPLICATION

The Planning Commission is required by law to make findings as defined by the City Ordinance. Please note that sign variances can only be granted for variances from the following regulations: height of placement; or location, or, within the allowable total square footage, the number of signs on a frontage. Your answers to the following questions can assist the Planning Commission in making the decision as to whether the findings can be made for your request. Please type or write neatly in ink. Refer to the back of this form for assistance with these questions.

- a. Describe the exceptional or extraordinary circumstances or conditions applicable to your property that do not apply to other properties in this area.
- b. Explain why the variance request is necessary for the preservation and enjoyment of a substantial property right and what unreasonable property loss or unnecessary hardship might result from the denial of the application.
- c. Explain why the proposed signage at the proposed location will not be detrimental or injurious to property or in the vicinity or to public health, safety, general welfare or convenience.
- d. How will the proposed signage be compatible with the aesthetics, mass, bulk and character of the existing and potential signage on adjoining properties in the general vicinity?

Legal Rights Of Sign Owners

The First Amendment - Signs as Free Speech

Several years ago, a law in Virginia stated that pharmacists were banned from advertising prescription drug prices. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), the U.S. Supreme Court declared this to be unconstitutional. In its opinion, the Court stated that "[t]he fact that the advertiser's interest in a commercial advertisement is purely economic does not disqualify him from protection under the First and Fourteenth Amendments. Both the individual consumer and society in general may have strong interests in the free flow of commercial information."

This decision began a reversal of a trend. Up until the mid-1970s, it was common for a city to have an ordinance that banned commercial speech (that is, advertising) from printed public notices. Advertising was considered to be an occupation, not a form of expression, and small businesses had to carry the burden of proof that such regulations harmed them. After the mid-1970s, the courts began to recognize that the First Amendment applies to commercial speech - including signs that simply identify a business and/or advertise a lawful product.

In 1980, the Supreme Court greatly expanded on the Virginia Board case in their ruling on another case involving commercial advertising. In *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980), a challenge arose to a New York

state law that prohibited public utilities from advertising. In their ruling, the Court devised a four-part test to determine when regulation of commercial speech is allowed:

1. Does the commercial speech contain "truthful information" about a "lawful activity"?
2. Is the government interest served by the regulation "substantial"?
3. Does the regulation "directly advance" the governmental interest asserted?
4. Is the regulation "no more extensive than necessary" to serve that interest?

In cases from the early 1990s, the Supreme Court refined further the Central Hudson test to require the government to show that:

- . a substantial government interest justifies the regulation;
- . the regulation directly advances that interest;
- . the regulation is narrowly tailored to achieve that interest, although it doesn't have to be the "least restrictive means," and
- . the regulation leaves ample alternative avenues of communication for those it affects.

With each passing year, the Supreme Court has provided additional rulings that further advance these tests. As a result of these precedents, lower courts have become increasingly critical of local government sign regulations that make distinctions based on the content of on-premise signs. Because the First Amendment has been found to protect commercial speech, the burden of proof is now placed on the local government to prove the merits of its sign code regulations. By applying these stricter standards, more and more codes - either whole or in part - are being struck down for their unconstitutionality.

The Fifth Amendment - Due Process & "Takings"

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

The due process clause - "No person shall ... be deprived of life, liberty, or property, without due process of law" - protects citizens from government action that arbitrarily deprives them of a fundamental right. The "takings" clause - "... nor shall private property be taken for public use, without just compensation" - is designed to prevent the government from forcing individuals to bear public burdens which more fairly should be carried by the general public. These provisions apply not only to the federal government. For over a century, the Supreme Court has interpreted the due process clause as applicable to the actions of state and local governments as well.

When signage is affected by a "takings," it is generally the result of either a) its location being condemned or b) a change in the regulation that makes a previously legal and conforming sign suddenly illegal.

Compensation is due whenever property is taken by government for a valid public purpose. It is well-established that business signs possess a measurable dollar value, but compensation depends on the kind of sign. For example, the various federal Highway Acts mandate fair compensation for owners of outdoor advertising (i. e., billboards, generally). However, compensation for regulatory downsizing, removing, condemning or banning is relatively new to on-premise signage.

Some progress for on-premise signage is being made. Currently, thirty-five states have some type of statute recognizing and protecting the real property value of on-premise business signs. Also, recent case decisions have said that, yes, local governments may undertake zoning or regulatory actions - even those that diminish property values (which include on-premise signage) - without being required to compensate for the diminution. However, when the government takes too much, compensation must be paid.

As studies continue to expand our understanding of the significance of signs in the economic survival of a business, and as attempts are made to retroactively downsize signs below the visual level of the average consumer, the federal government should

extend its present compensatory protection of outdoor advertising to include on-premise signs as well.

Nonconforming Signs / Amortization

From time to time, local governments revise sections of their sign codes, or change them entirely. As a result, a number of existing signs that complied with the "old" code would not be approved under the new one. A sign in this situation is known as a legal non-conforming sign.

Generally, the owner of such a sign is not required to comply with the new code, and can continue to maintain and repair it as seen fit. This is an example of being "grandfathered in". In addition, in most cases if the owner sells the business, the new owner has the right to retain the non-conforming sign, although some sign codes make it illegal to change text or design without making the whole sign conform to the new code.

Keep in mind that it is perfectly constitutional for a new sign code to prohibit an increase in the area or height of a non-conforming sign, or to require a conforming sign to be built when the old structure is removed.

Some sign codes contain provisions requiring the removal of non-conforming signs within a specified time limit - anywhere between two to ten years. This is commonly known as the amortization period, and is based on what a local government considers to be a sufficient passage of time to allow the owner to have recaptured the cost of the original sign. A majority of state courts have found to date that amortization is a constitutionally acceptable method of removing non-conforming signs without having to compensate their owners.



(This is not the case on the federal level. Congressional legislation states that amortization is an impermissible method for compensating owners for signs that are removed or relocated as a result of the federal Highway Beautification Act. In addition, federal law says that an owner is required payment whenever his or her sign is removed, or obscured, as a result of roadway improvements that involve federal money.)

On the state and local level, you should be aware that amortization is a hotly debated area of the law. More and more, legislatures and courts recognize that an on-premise sign is worth far more than its original cost - it's been adding value to the business since it was first erected. Amortization, then, is not seen as a way of fairly compensating the owner.

If you are told that your non-conforming sign must be removed because its amortization period has ended, you might want to consult an attorney before agreeing to do so.

The Fourteenth Amendment - Prior Restraint

The Supreme Court has also ruled that the Fourteenth Amendment makes the First Amendment's guarantees enforceable against actions of state and local government. A local sign code, therefore, must comply with the First Amendment's guarantee of freedom of expression.

In addition, regarding the regulation of commercial signs, the Fourteenth Amendment is often applied with issues regarding the sign permit procedure. In order to be considered constitutionally valid, the permitting, licensing or variance request procedure must be written for easy understanding of requirements. Also, reasonable application fees, speedy decision on the application, and the opportunity to swiftly appeal a denied application must also be available to all.

Because a sign is essential to communicating your business' presence and effectively

competing in the marketplace, a failure in any of these minimum due-process requirements can give rise to a prior restraint issue. Prior restraint occurs when the right to communicate is subject to the prior approval of a government official.

While the Supreme Court has not yet applied the prior restraint doctrine to a sign code permitting issue, it made the following points clear in *Freedman v. Maryland* (1965):

- . The decision to issue a permit must be made within a specific, brief period.
- . The scheme must also assure a prompt final judicial decision, to minimize the possibility of an interim (and possibly erroneous) denial of a license; and
- . The censor must bear the burden of instituting judicial proceedings, and providing that the expression is unprotected.

In the case *North Olmsted Chamber of Commerce, et al. v. City of North Olmsted* (1998), filed in a U.S. District Court for the Northern District of Ohio, the Court found that the city's sign ordinance was written in such a way as to give government officials too much discretion in awarding permits. In other words, the ordinance did not abide by the points made above. For this and other reasons, the Court found the ordinance unconstitutional in its entirety.

Copyrights, Patents and Trademarks

There are federal laws protecting a sign company or business owner when someone tries to "copy" the design, artwork, or wording of a business sign without permission. For example, an innovative method for constructing a sign may be protected by a patent, the original artwork on a sign may be copyrighted, and a unique business logo may obtain both trademark and copyright protections.

When you are looking to design a sign, it is common to research the styles already in use by other businesses. It is one thing to be influenced by what you see; it's quite another to copy outright without getting permission. Be careful of the latter. You run the risk of being sued for infringing on that sign owner's copyright, patent and/or trademark. If found guilty, the cost could be a death knell for your business - for instance, infringing on copyrighted works can result in having to pay the copyright owner monetary damages, attorneys fees, substantial financial penalties, and on, and on. Six figure judgments are not out of the ordinary.

Other useful tidbits of information on this subject include:

- Pictorial graphics, pictures, and company logos are entitled to copyright protection. Typefaces are not.
- Information on obtaining a copyright can be found at the Web site of the U.S. Copyright Office (www.copyright.gov).
- Patents have been issued for innovations in designing sign frames, building materials, attachments, and so on. Those who infringe on a patent by using these innovations without authorization can be sued by the patent holder. If found guilty, the patent holder is entitled to, at minimum, a court order that bars further infringement, as well as compensation for any lost revenues.
- A trademark is any combination of words, phrases, symbols or designs that are meant to uniquely identify a product or service.
- It is the responsibility of the holder to vigorously defend its trademark. Stories routinely appear in the press about corporations like Disney threatening a small organization that may have incorporated an image of their characters on a document, a Web site, or wherever. At first glance, these cases appear to be heavy-handed (though they are usually settled quietly, for a nominal use fee). They act in this manner because courts will not rule a trademark has been infringed if its owner is indifferent in protecting it.
- Trademarks can be filed with a state, the federal government, or both. Federal protection provides the most advantages. In the eyes of the law, a federal trademark presumes nationwide ownership. Laws, fees, and other information on patents or trademarks can be found at the Web site of the U.S. Patent & Trademark Office (www.uspto.gov)

The Federal Lanham Act

The Federal Lanham Trademark Act protects federally registered trademarks. The plain language of this law prohibits federal, state and local governments from requiring the alteration of a registered trademark or copyrighted slogan as a condition of obtaining a sign permit. (Sign ordinances can, however, outright ban the display of a registered trademark or logo.)

A recent case involving this is Blockbuster Videos Inc. & Video Update v. City of Tempe (AZ) (1998). In Blockbuster the city required that mall signage conform to certain color schemes as set out in a comprehensive sign plan approved by the city in concert with shopping center owners. Neither registered color scheme of the video stores conformed with the city's color scheme, and sign permits were not granted to allow the trademarked colors to appear.

Legal Means

During this chapter, several court cases were cited. Trying a case requires great expenditures in time and money, and the plaintiffs mentioned had sufficient resources to pursue their interests in legal proceedings. For example, the plaintiff in the Central Hudson case was (and still is) a major electrical utility that services parts of New York State. One of the primary plaintiffs in the North Olmsted Chamber of Commerce case was a major Dodge automobile dealership. The Blockbuster Videos case, cited earlier, obviously refers to the national video rental chain.

There are several instances like this. However, what if your small business is not a member of the Fortune 500, and does not have such deep resources at its disposal? What recourse do you have?

First, such cases should be entered only after exercising a great deal of caution. It is unlikely that you and your cause, standing alone, will get very far. Notice, again, the name of the plaintiff in the North Olmsted . The suit was originally brought by the Chamber of Commerce in that Ohio city. It was a collective of numerous businesses, each of whom ostensibly were faced with one hardship or another when dealing with the local sign ordinance. There's strength in numbers.

Also, legal proceedings should be your last resort. If you want to take on City Hall, are you prepared for the possibility of some form of reprisal? Again, the legal path should only be taken when both sides are at an impasse.

The American Civil Liberties Union uses as its motto, "Defending the Bill of Rights". This chapter has discussed how some of those rights pertain to commercial free speech, including on-premise signs. If you are among a class of businesses in your community that feels its speech is being restricted, then the ACLU is an organization that might be interested in assisting you. Their Web site is www.aclu.org .

Lastly, keep in mind that town planning/building boards are not necessarily your enemy. Their interests and yours need not be exclusive of one another. As was mentioned in the section on variances, often times you and your town can come to a compromise that benefits both parties, without the time, effort, and money that comes with legal proceedings.

web source:

<http://www.shoreguide.info/signdesign/>