NEW YORK ZONING LAW AND PRACTICE REPORT

March/April 2003 Vol. 3, No. 5

In This Issue

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Electronic Composition
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Published six times a year by West

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Municipal Regulations of Signs and Billboards

A Discussion of Governing Constitutional Principles (Part I)

By Adam L. Wekstein, Esq.*

I. Introduction

Signs and billboards can be unattractive and inconsistent with their surroundings. Their very mission is to attract attention and, therefore, they may distract drivers. Further, signs and, in particular, billboards, are often large fixed structures, which implicate the same building safety concerns as other structures. In short, they are the types of objects which zoning and other police power regulations would typically regulate.

However, unlike other structures, by definition a sign's purpose is to convey an idea. As such, signs are a medium of expression which is protected, in varying degrees, by the First Amendment to the United States Constitution. It is the inherent tension between legitimate police power objectives which serve to justify sign regulations and the substantial constitutional constraints imposed on limitations of free speech, which makes the regulation of signs and billboards so fraught with peril. It is this tension that has not only rendered sign regulation a fertile ground for litigation but has produced case law

New York Zoning Law and Practice Report is published by West, 50 Broad Street East, Rochester, NY 14694.

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that is far from consistent in the manner which it applies relevant constitutional rules.

II. Basic First Amendment Principles

A number of background principles merit brief discussion as a precursor to analyzing First Amendment cases relating specifically to billboard and sign regulation. As an initial matter, the government always bears the burden of justifying restrictions on speech. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L. Ed. 2d 388, 54 Ed. Law Rep. 61 (1989) ("*SUNY*"). Any regulation of noncommercial speech based on its content is subject to strict scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23 (1983). Under this standard, the State must show that the regulation of speech "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45. "It is the rare case in which...a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 200, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).[1]

All speech is subject to time, place, and manner restrictions which are content neutral. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) ("*Clark*").[2] Such restrictions survive First Amendment review provided that they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a substantial governmental interest; and (3) leave ample alternative channels for communication. *Clark*, 468 U.S. at 293; *see Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

Commercial speech[3] may be regulated even as to content if the regulation meets a four-pronged test: (1) the speech must concern legal activity and not be misleading to be protected under the First Amendment; the restriction on commercial speech is valid only if it (2) seeks to implement a substantial governmental interest; (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) ("*Central Hudson*")[4]; *SUNY*, 492 U.S. at 475 (1989). Although a number of Supreme Court Justices have suggested in various opinions that the same stringent strict scrutiny test should be applied to both commercial and noncommercial speech, at least twice within the past two years the Supreme Court has adhered to the *Central Hudson* test in evaluating First Amendment challenges to regulation of commercial speech. *Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001); *see Anderson v. Treadwell*, 294 F.3d 453 (2d Cir. 2002), cert. denied, 2003 WL 891925 (U.S. 2003). The Supreme Court has stated that the standards for commercial speech are substantially similar to those applicable with respect to content-neutral time, place, and manner restrictions. *SUNY*, 492 U.S. at 477.

III. Sign and Billboard Regulations In General

A. Metromedia, Inc. v. City of San Diego

Any analysis of First Amendment issues associated with regulation of billboards and signs begins with examination of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) ("*Metromedia*"), in which the Supreme Court invalidated a ban on off-site advertising. The fundamental limitation of *Metromedia* is that the principal opinion therein was by a plurality of the Court, which, in combination with concurring opinions that featured different rationales, invalidated San Diego's ordinance. Review of the various opinions discloses that a majority of justices would have upheld a regulation distinguishing on-site from off-site signs, had the ordinance in question not discriminated in favor of commercial over noncommercial speech.

In *Metromedia*, the sign ordinance at issue permitted on-site commercial advertising, that is, advertising of goods and services available on the property on which the sign is located, but banned other commercial and noncommercial advertising using signs on fixed structures. The ordinance contained 12 specified exceptions to the ban, including government signs, signs located at public bus stops, signs manufactured, transported, or stored within the City (if not used for advertising purposes), commemorative historical plaques, reli-

gious symbols, signs within shopping malls, "for sale" and "for lease" signs, signs on public and commercial vehicles, signs depicting time, temperature, and news, approved temporary off-premises subdivision directional signs, and temporary political campaign signs.

In beginning its substantive analysis, the plurality[5] noted the distinction between commercial and noncommercial speech, and the different degree of scrutiny each receives. In determining the validity of restrictions on commercial speech, the Court applied the test established in *Central Hudson*. The Court held that the challenged ordinance clearly met several criteria, in that it would impact on speech concerning lawful activity that was not misleading; it sought to implement substantial governmental interests—e.g., traffic safety and aesthetics—and was no broader than necessary to accomplish those particular objectives. The Court stated "[i]f the City has the sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Metromedia*, 453 U.S. at 508. The Court expressly declined to second-guess the City's judgment as to the relationship of the ordinance to its stated goals. Most significantly, the plurality concluded that the municipality could distinguish between on-site and off-site advertising without violating the First Amendment. In fact, subsequent Supreme Court case law has recognized that seven justices in *Metromedia* accepted the proposition that the City's "interest in avoiding visual clutter was sufficient to justify a prohibition of commercial billboards." City of Ladue v. Gilleo, 512 U.S. 43, 49, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

Nonetheless, the plurality held that San Diego's general ban on noncommercial advertising was invalid. The Court stated "[t]he fact that the City may value commercial messages relating to on-site goods and services more than it values commercial communications relating to off-site goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others." *Metromedia*, 453 U.S. at 513.

Accordingly, a plurality of the Court held that the ordinance in question unconstitutionally discriminated in favor of commercial speech and against noncommercial speech. In this respect, the opinion reads as follows:

> [a]s indicated above, our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. There is a broad exception for on-site commercial advertisements, but *there is no similar exception for noncommercial speech*. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. . . . insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages. . . .

Metromedia, 453 U.S. at 513 (emphasis added). The plurality also concluded that the exceptions in the billboard ordinance represented an impermissible governmental differentiation between various types of noncommercial speech based on content.

Justice Brennan and Justice Blackman concurred in the judgment, but set forth their own rationale for invalidating the ordinance. Their analysis was grounded on the premise that the challenged ordinance equated to a total prohibition of outdoor advertising, because off-site advertising is made available for both noncommercial or commercial messages, whereas on-site advertising is not so open. Their opinion stated: "[u]nless the advertiser chooses to buy or lease premises in the city, or unless its message falls within one of the narrow exempted categories, it is foreclosed from announcing either commercial or noncommercial ideas through a billboard." *Metromedia*, 453 U.S. at 513. While the concurrence stated that under certain circumstances a total billboard ban in a municipality could survive First Amendment scrutiny, it concluded that San Diego failed to provide adequate justification for its substantial restriction on a protected activity, in that it did not come forward with evidence demonstrating that billboards impaired traffic safety or harmed aesthetics to a sufficient degree.

Justice Stevens dissented, in part, from the judgment, and began by characterizing the plurality as holding that a total prohibition of the use of "outdoor advertising display signs" for commercial messages, other than those identifying or promoting a business located on the same premises as the sign, is impermissible. He would have found such a total ban to be permissible.[6] He agreed that the differentiation between on-site and off-site

signs in the San Diego ordinance was constitutional, but rejected the reasoning of the plurality. He suggested that the case, brought as it was by billboard industry operators, did not implicate or require resolution of issues concerning the legality of the regulation of on-site signs and should only have been decided based on the impact of the ordinance on the outdoor advertising industry. He also stated that the exemptions in the ordinance were not designed to favor one viewpoint over another, and were not inconsistent with the aesthetics goals of the ordinance.

In yet another dissent, Chief Justice Burger found that the ban on off-site signs, and the exceptions allowing some noncommercial information in limited categories, as well as the on-site sign exemptions, were within the police power of the City of San Diego. Finally, Justice Rehnquist held that even a total billboard prohibition would have been appropriate.

B. On-Site/Off Site Distinction

Notwithstanding the conclusion of the *Metromedia* plurality (and seven justices in total) that a distinction between on-site and off-site advertising is permissible, the application of the principle can be dicey. A number of courts have found that an ordinance which allows only a sign relating to activity located on the sign's site inherently discriminates against noncommercial speech. They reason that such a differentiation limits access for expression of noncommercial speech to the narrow class of speakers who actually own the property on which a sign is located.

For example, in City of New York v. Allied Outdoor Advertising, Inc., 172 Misc. 2d 707, 659 N.Y.S.2d 390 (Sup 1997) ("*Allied Outdoor Advertising*"), the court found that an ordinance allowing only on-site signs within a certain distance of arterial highways violates the First Amendment. In defending the case, the City of New York admitted that the regulation would have allowed the advertisement of a business located on the premises of the sign, but, among other things, that one of the billboards at issue in the action, which posted a reward for information leading to the arrest of individuals who have shot a policeman, would be prohibited. The court stated: "[a]lthough the city disingenuously argues that the 'Cop Shot' message would be permitted if it were on a sign located at a police station, such argument ignores the myriad of noncommercial messages that are not of necessity related to a parcel of real property." The court also found that such an exclusion inherently chooses one type of noncommercial message over another.[7]

Following the decision in *Allied Outdoor Advertising*, New York City amended its ordinance to restrict only off-site signs containing commercial speech in certain locations in certain zoning districts, while allowing both on-site and off-site signs conveying noncommercial messages. The on-site/off-site differentiation in the amended ordinance has been upheld as constitutional. *Infinity Outdoor, Inc. v. City of New York*, 165 F. Supp. 2d 403 (E.D. N.Y. 2001); *see Marathon Outdoor, LLC v. Vesconti*, 107 F. Supp. 2d 355 (S.D. N.Y. 2000). Indeed, as is evident from *Infinity Outdoor, Inc.* and *Marathon Outdoor, LLC,* a prohibition of only off-site commercial advertising is unlikely to pose issues under *Metromedia*. *See generally Long Island Bd. of Realtors, Inc. v. Incorporated Village of Massapequa Park*, 277 F.3d 622 (2d Cir. 2002) (upholding regulations which, inter alia, prohibited off-site commercial signs in residential zoning districts).

Several other courts have agreed with the analysis of *Allied Outdoor Advertising* that a rigid distinction requiring all signs, whether commercial or noncommercial, to relate to an activity located on the sign's site inherently discriminates against noncommercial speech. *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir. 1996); *see Infinity Outdoor, Inc.*, 165 F. Supp. 2d at 422, n.12; *see generally Metromedia, Inc. v. Mayor and City Council of Baltimore*, 538 F. Supp. 1183 (D. Md. 1982). Surprisingly, some authority from other jurisdictions reasons that even if an off-site speech prohibition may disproportionately affect noncommercial speech, such a prohibition passes constitutional muster because it is facially neutral. *Messer v. City of Douglasville, Ga.*, 975 F.2d 1505 (11th Cir. 1992); *Wheeler v. Commissioner of Highways, Com. of Ky.*, 822 F.2d 586 (6th Cir. 1987); *Rzadkowolski v. Village of Lake Orion*, 845 F.2d 653 (6th Cir. 1988)

The inclusion in a sign ordinance of a so-called "substitution clause," which allows noncommercial speech on any signs where commercial speech is authorized, is a simple expedient which enhances the chances of the ordinance's survival against judicial challenge. In *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990), the Second Circuit Court of Appeals considered a chal-

lenge to five separate sign ordinances, and found, inter alia, that one of the Towns' ordinances impermissibly discriminated against noncommercial speech, in favor of commercial speech. In so doing, the court relied *on the absence of a substitution provision,* stating:

> [a]fter *Metromedia* struck down San Diego's ordinance as granting more protection to commercial than noncommercial speech, *municipalities responded by adding provisions to their sign ordinances to overcome this defect by permitting noncommercial messages wherever commercial messages were allowed. . . . Not so Islip. Although it would have been a simple matter to draft such a provision, Islip's ordinance has none.* Accordingly, we agree with the District Court that Islip's sign ordinance, like that of San Diego a decade ago, violates the First Amendment.

National Advertising Company, 900 F.2d at 556-57 (emphasis added).

C. Review Under Intermediate Scrutiny

If a challenged sign regulation is categorized as a content-neutral time, place, and manner restriction or a content-based regulation of purely commercial speech, the intermediate scrutiny implicated by *Clark* and *Central Hudson*, respectively, requires an inquiry into the significance of the purposes of the challenged regulation, the degree of connection between the means employed by the regulation and those purposes, and the availability of other modes of communication. Needless to say that while each inquiry is fact-specific and the permutations and combinations of the regulatory mechanisms reviewed in case law are varied, some general themes can be observed.

1. Governmental interests—traffic safety and aesthetics

The most common interests on which regulators rely to justify sign ordinances are traffic safety and aesthetics. Courts will usually find such interests to be "substantial" under the applicable standards, and defer to the regulator's judgment in this regard. *Southlake Property Associates, Ltd. v. City of Morrow*, Ga., 112 F.3d 1114 (11th Cir. 1997) (which noted that traffic safety and aesthetics have been recognized as substantial interests supporting restrictions on the time, place, and manner of commercial signs); *Infinity Outdoor, Inc.*, 165 F. Supp. 2d at 417 (relying on *Metromedia* for the proposition that common-sense judgments of courts and lawmakers indicate that billboards are real and substantial traffic hazards and, by their very nature, can be perceived as an aesthetic harm regardless of location); *see, e.g., Ackerley Communications of Northwest Inc. v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1109 (5th Cir. 1987); *Mobile Sign Inc. v. Town of Brookhaven*, 670 F. Supp. 68 (E.D. N.Y. 1987); *but see Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996); *Adams Outdoor Advertising of Atlanta, Inc. v. Fulton County, Ga.*, 738 F. Supp. 1431 (N.D. Ga. 1990).[8]

2. Nexus between means and ends

The third and fourth prongs of the *Central Hudson* test are to be applied in combination to determine whether there is a sufficient nexus between means and ends in scrutinizing a restriction on commercial speech. Although decided in the context of governmental restrictions on broadcast of advertisements of gambling, rather than sign regulation, the Supreme Court's decision in *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999), provides helpful guidance as to the proper application of the third and fourth prongs of the *Central Hudson* standard. Therein, after noting that the last two prongs of the test are interrelated, the Court stated the following:

> The third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S., at 770-771, 113 S.Ct. 1792. Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." [Citation omitted.] We have observed that "this requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'"
>
> The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceiv-

> able, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—"a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." [Citation omitted.] On the whole, then, the challenged regulation should indicate that its proponent "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition."

Greater New Orleans Broadcasting Association, Inc., 527 U.S. at 188.

As noted, the third prong of *Central Hudson* requires the government to show that the challenged regulations will alleviate to a material degree the real harms sought to be remedied; however, the Supreme Court has recognized that the standard does not require that "empirical data come...accompanied by a surfeit of background information...[but permits] litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus and 'simple common sense.'" *Lorillard Tobacco Co.*, 533 U.S. at 555 (citation omitted). Further, it is clear that the final prong of the test, requiring that a regulation go no further than necessary, is less exacting than the least restrictive alternative test applicable under strict scrutiny. *SUNY*, *supra*.

Nonetheless, last year, in *Thompson, supra*, the Supreme Court appears to have applied the fourth prong of *Central Hudson* (that is, making the determination of whether a regulation goes no further than necessary) in a demanding manner to strike down rules of the Food and Drug Administration regulating advertisements by pharmacists of so-called compounded drugs. The Court stated: "[i]n previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, *the Government must do so*." *Thompson*, 122 S.Ct. at 1506 (emphasis added).

Another recent application of *Central Hudson* by the Supreme Court resulted in the invalidation of Massachusetts' regulations controlling advertising of smokeless tobacco products and cigars. In *Lorillard Tobacco Co., supra,* the challenged regulatory regimen, among other things, proscribed outdoor advertising of such products within 1,000 feet of a school, park, or playground, and advertising within a retail establishment that is directed toward or visible from the outside of the store within 1,000 feet of schools, parks, or playgrounds, and prohibited placement of any advertisement for such products less than five feet above the floor in any retail establishment located within the same 1,000-foot radius.[9]

In applying the third prong of *Central Hudson*, the Court stated that it was unable to conclude that the state's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat use of tobacco products by minors was based on "mere speculation and conjecture." However, the Supreme Court found that the challenged regulations, which effectively prohibited such advertising in almost 90 percent of the area of three of Massachusetts' major cities, could not pass scrutiny under the final prong of *Central Hudson*. The Court stated: "[t]he broad sweep of the regulations indicates that the Attorney General did not 'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by the regulations . . ." The Court also noted that the "uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring" and that "the range of communications restricted seems unduly broad." *Lorillard Tobacco Co.*, 533 U.S. at 563. Finally, the Court expressly held that the restriction requiring tobacco advertising within retail establishments to be located at least five feet above the ground could not pass muster under either the third or fourth prong of *Central Hudson*, noting that minors would be able to look above five-foot threshold and still see the advertisement.

Long Island Board of Realtors, Inc., supra, is a recent Second Circuit decision which also illustrates the application of the third and forth prongs of *Central Hudson* in the context of a sign ordinance. In that case, a group of realtors challenged an ordinance regulating signage. Among other things, the local regulations prohibited more than one sign on any single parcel of property, with an exception allowing one additional identification or professional sign. It provided that no sign was to be further than three feet from the dwelling or building line, or could exceed 15 inches in length and height, and required that residential signs be removed within 24 hours after the earlier of the transfer of title to or possession of the subject property. It also prohibited off-site commercial advertising in residential zones.

In applying the third and fourth prong of the *Central Hudson* test, the court stated the following:

> On their face, such regulations directly advance the Village's interest in aesthetics and safety.
>
> In addition, the regulations in Chapter 286 are not more extensive than necessary to serve the Village's interest in aesthetics and safety. Municipalities and other government bodies have "considerable leeway . . . in determining the appropriate means to further a legitimate governmental interest, even when enactments incidentally limit commercial speech." [Citations omitted.] Where a legislature's ends are aesthetics and safety, permissible means have included the regulation of the size, placement and number of signs [citation omitted], as well as the prohibition of off-site commercial advertising. [Citation omitted.] Moreover, nothing on the face of the challenged sections of Chapter 286 prohibits the Board from displaying real estate signs or otherwise conveying its message. [Citation omitted.] Thus, the restriction on the number, size, and location of signs, the duration for which signs may remain on residential property, and the presence of off-site commercial advertising further the Village's interest in aesthetics and safety while permitting the Board to display signs to inform the people of the availability of a home.

Long Island Board of Realtors, Inc., 277 F.3d 622, 627-28.

3. The potential significance of underinclusiveness of regulations

Even though *Central Hudson* requires "narrow tailoring" of legislative means to ends, a municipality seeking to advance the goal of aesthetics or traffic safety may normally regulate less speech than necessary to achieve its objective totally. An underinclusive regulation may still be held to advance materially its putative purposes. For example, the Fifth Circuit Court of Appeals sustained an ordinance prohibiting portable signs in *Lindsay v. City of San Antonio*, *supra*, a case in which the district court had found that the elimination of portable signs would have a de minimis impact on aesthetics because such signs represented a small proportion of all signage. The Fifth Circuit concluded that the lower court's analysis was flawed in the following manner:

> [s]uch an approach seems to be at odds with the principle that the district court itself recognized—that the elimination of all visual blight is not the Constitutional prerequisite to an ordinance regulating a type of signage. The case law makes clear that a city is not precluded from curing only some of its visual blight, *see, e.g., Vincent*, [supra] ("Even if some visual blight remains, a partial, content neutral ban may nevertheless enhance the City's appearance"), or from pursuing the elimination of visual blight in a piecemeal fashion.

Lindsay, 821 F.2d at 1109.

Similarly, in *Mobile Sign, Inc., supra,* the Eastern District of New York upheld a sign ordinance which limited to six months the period during which off-site temporary or mobile signs featuring commercial speech could be displayed on a given premises. In reaching its conclusion, the court rejected the argument that the stated interests were not advanced by the code because the six-month limitation could be circumvented by converting the signs into permanent devices, and refused to second-guess the Town's legislative judgment. The court stated the following:

> The fact that the ordinance fails to regulate all equally unattractive mediums of commercial speech and ignores other available steps to enhance the Town's appearance is not generally a sufficient basis for finding that the ordinance does not advance its aesthetic objective if the Town reasonably restricted the scope of the ordinance. [Citations omitted] The [Supreme] Court in *Taxpayers for Vincent* [466 U.S. at 811. & n.28], for example, said that an aesthetically-motivated restriction on speech might be deliberately underinclusive so as to afford adequate alternative opportunities for communication.

Mobile Sign, Inc., 670 F. Supp. at 73 (citations omitted). *See People v. Professional Truck Leasing Systems, Inc.*, 185 Misc. 2d 734, 713 N.Y.S.2d 651 (City Crim. Ct. 2000), aff'd, 190 Misc. 2d 806, 737 N.Y.S.2d 767 (App. Term 2002), and *People v. Target Advertising, Inc., supra* (which in upholding a New York City ban on vehicles used only to display commercial advertising, while allowing vehicles to carry advertising incidental to their business or governmental purpose, recognized that a municipality may pursue a partial solution to its problems).

On the other hand, if various exemptions in an ordinance are not closely related to its putative goals or are too broad, the whole rationale for the regulation may be undercut. *City of Ladue v. Gilleo*, *supra* (stating that exemptions from regulatory schemes controlling speech not only risk viewpoint

discrimination, but may diminish the credibility of the justification for the scheme in the first place); *see generally City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993) (finding that a ban on sidewalk news racks containing commercial handbills, which did not prohibit such racks for newspapers, did not have a close enough nexus to the municipality's substantial interests in safety and aesthetics, where the record showed that only 62 out of more than 1,500 news racks featured commercial publications); *cf. Greater New Orleans Broadcasting Association, Inc.*, 527 U.S. at 190 ("We need not resolve the question whether any lack of evidence in the record fails to satisfy the standard of proof under *Central Hudson*, however, because the flaw in the Government's case is more fundamental: The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.").

IV. Content-Based Exemptions from Regulations

Exemptions from a sign regulation for limited classes of communication, such as real estate signs, political campaign signs, signs of charitable institutions, identification signs, and governmental signs are problematic. Ironically, such exemptions allow more speech than would otherwise be permitted, but may trigger heightened scrutiny because they are not content neutral. The law on the constitutional propriety of such exemptions is not uniform, although courts in the Second Circuit have condemned them.

In *National Advertising Company v. Town of Babylon, supra*, the Second Circuit invalidated exceptions to a sign ban for temporary political signs, signs identifying grand openings, parades, festivals, fund drives, or other similar occasions, as impermissible content-based discrimination between types of noncommercial speech. The court held, however, that an exception to the ban allowing real property sale signs was defensible.

More recently, in *Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322 (S.D. N.Y. 2000), New York's Southern District invalidated an ordinance which included a series of content-based exemptions from a permit requirement.[10] The court stated:

> [d]efendants argue that five of the Justices in *Metromedia* believed that the limited exceptions to the general prohibition of off-premises advertising in the ordinance at issue there were too insubstantial to constitute discrimination on the basis of content. This argument is not without appeal, and courts within other circuits have accepted it in relying on an inquiry of whether the ordinance regulates on the basis of the viewpoint expressed, instead of considering whether the ordinance discriminates on the basis of content, to determine constitutionality. ... However, as mentioned above, *the Second Circuit has interpreted Metromedia as requiring strict content neutrality for all regulation of noncommercial speech*. See *Town of Niagara*, 942 F.2d at 147; *National Advertising v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir.1990).

Knoeffler, 87 F. Supp. 2d at 330-331 (citations omitted; emphasis added).

Last year, in *Savago v. Village of New Paltz*, 214 F. Supp. 2d 252 (N.D. N.Y. 2002), the District Court invalidated a village's regulations because they exempted from the permitting requirements signs, including nameplates, construction signs, real estate signs, traffic or municipal signs, window advertising signs, temporary signs for political and sporting events, and noncommercial signs that met dimensional limitations, which varied among the preceding categories. The court annulled the ordinance under strict scrutiny because the regulations contained "content-based exemptions for certain classes of outsized noncommercial signs" and exempted certain temporary signs for political and sporting events, while requiring permits for other noncommercial signs. *Savago*, 214 F. Supp. 2d at 257-59.[11]

In contrast, several courts have not been troubled by content-based exemptions in upholding sign ordinances against challenge. In *Rappa v. New Castle County*, 18 F.3d 1043, 1065 (3d Cir. 1994), the Third Circuit upheld a sign regulation including a series of exemptions, adapting a novel theory under which if there is a significant relationship between the content of speech on a sign and the location of its site, then the state can exempt it from a general ban. *See Messer v. Douglasville*, 975 F.2d 1505, *supra* (finding that as a series of five exemptions from a permitting scheme were less extensive than those in *Metromedia*, they did not serve as a basis to invalidate the otherwise valid sign regulation).

People v. Weinkselbaum, 194 Misc. 2d 19, 753 N.Y.S.2d 284 (App. Term 2002), a convoluted opin-

ion emanating from New York's state court system, rejected a defendant's First Amendment challenge to a sign ordinance in the context of a criminal proceeding. The ordinance proscribed all signs in residential districts except aviation signs, professional name plates, sale, rental, or construction signs, house numbers and cautionary messages, and prohibited all off-premises commercial advertising, but provided permits for temporary (30-day) signs featuring noncommercial speech. The court's decision was premised, to some degree, on the defendant's failure to apply for a temporary sign permit, which the court said barred any claim that the Town's regulation of content aggrieved the defendant, and relegated him to a facial (overbreadth) challenge. It concluded that in light of the inclusion in the ordinance of the provision allowing temporary signs for all noncommercial speech, the ordinance was constitutional. *See People v. Weinkselbaum*, 185 Misc. 2d 889, 714 N.Y.S.2d 860 (Dist. Ct. 2000) (rejecting a pretrial motion to dismiss in the same criminal prosecution for violation of the same sign ordinance).

V. Durational Limits on Political Signs

The singling out of political campaign signs in residential areas for limitations on the permitted duration of display is almost certainly unconstitutional. For example, in *Knoeffler v. Town of Mamakating*, *supra*, the Southern District of New York invalidated a provision of a sign ordinance which allowed political signs no larger than two feet by four feet to be displayed in house windows on private property, but required a permit for larger signs, and compelled the permit applicant to agree to erect such a sign no sooner than 15 days prior to any election and remove it no later than 15 days after that election. After finding that the limitations on political signs were content-based and, therefore, could not survive strict scrutiny, the court recognized that "durational limits on signs have been repeatedly declared unconstitutional."

Last year, in *Sugarman v. Village of Chester*, 192 F. Supp. 2d 282 (S.D. N.Y. 2002), the same court was faced with a district attorney candidate's challenge to the sign regulations of more than 19 separate municipalities. Therein the court invalidated the ordinances, which included exemptions from permitting requirements for political signs that were conditioned on different size, fee, and durational limitations than those which triggered exemptions for other classes of temporary signs. Despite recognizing the important aesthetic objectives sought to be addressed, the court found the distinctions to be improper content-based regulation of noncommercial speech.[12] *See Outdoor Systems, Inc. v. City of Merriam, Kan.*, 67 F. Supp. 2d 1258, 1269 (D. Kan. 1999) (invalidating a durational limit on the display of political signs and stating "[n]early every court to address the issue has held that the government interest in aesthetics and safety is insufficient to justify a durational restriction on political signs in residential districts."); *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400 (8th Cir. 1995).

In short, a municipality seeking to limit the length of display of political signs should not merely single them out by imposing separate durational limits. Rather, to have a chance of achieving the objective of bringing about the removal of unwanted signs following elections, any regulations should impose durational limitations on all temporary signs without regard to content.

[Part II of this article will appear in the next issue.]

NOTES

1. Content neutrality is absent not only where a regulation discriminates by viewpoint, but where it forecloses discussion of an entire topic. *Burson*, 504 U.S. at 197.
2. Examples of content-neutral regulation of signs would include restrictions on height, size, color, number, illumination, and location. *See Regan v. Time, Inc.*, 468 U.S. 641, 655-60, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984); *National Advertising Co. v. Blankfein*, 155 A.D.2d 544, 547 N.Y.S.2d 357 (2d Dep't 1989), appeal dismissed in part, denied in part, 76 N.Y.2d 747, 558 N.Y.S.2d 485, 557 N.E.2d 778 (1990).
3. The test for deciding if a particular conveyance of information is commercial speech is whether the speech proposes a commercial transaction. *SUNY*, 492 U.S. at 473-74. The subtle distinctions between purely commercial speech and expressive or noncommercial speech are beyond the scope of this article.
4. Although the *Central Hudson* standard is almost universally referred to in case law as a four-part test, the first prong thereof merely determines whether the commercial speech is entitled to any protection under the First Amendment. If the speech does not concern legal activity, or is misleading, it is unprotected.
5. The plurality consisted of Justices White, Stewart, Marshall, and Powell.
6. Justice Stevens would have upheld a total ban on out-

door advertising if it were viewpoint-neutral and the market remaining open to the communication of popular and unpopular ideas was still ample.

7. This result is arguably inconsistent with the rationale employed by New York's highest court 20 years earlier, four years prior to *Metromedia* and three years prior to *Central Hudson*. In *Suffolk Outdoor Advertising Co., Inc. v. Hulse*, 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (1977), the Court of Appeals upheld a prohibition of nonaccessory billboards against First Amendment challenge. In so doing, it gave no apparent consideration to the impact of the regulation on noncommercial speech, but upheld the ban as a valid time, place, and manner restriction. In the author's opinion, it is not likely that the court would reach the same conclusion today if it analyzed the impact of the on-site/off-site distinction on noncommercial speech.

8. It should be noted that case law from a decade ago in the Second Circuit appears to have established a principle that in the absence of a specific statement of purpose in a sign ordinance, that legislation is invalid. *National Advertising Company v. Town of Babylon, supra*; *see also Abel v. Town of Orangetown*, 759 F. Supp. 161 (S.D. N.Y. 1991). More recent precedent indicates that no such statement of legislative purposes is necessary, so long as the government identifies the interests it seeks to advance when defending litigation challenging its ordinance. *Anderson v. Treadwell*, 294 F.3d at 461, n.5; *People v. Target Advertising Inc.*, 184 Misc. 2d 903, 708 N.Y.S.2d 597 (City Crim. Ct. 2000). Municipal attorneys would still be well advised to include a statement of purposes in any sign regulations.

9. The Court held that the Federal Cigarette Labeling and Advertising Act preempted those portions of the Massachusetts regulations which related to advertisements of cigarettes.

10. These exemptions included traffic control signs, flags, memorial plaques, and signs setting forth matters of public information and convenience.

11. *See Desert Outdoor Advertising, Inc. v. City of Moreno Valley, supra* (finding that a series of exemptions for certain off-site noncommercial signs—e.g., official notices and directional or informational signs—constituted impermissible content-based regulation of speech); *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980), judgment aff'd, 453 U.S. 916, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981) (finding that although each of the exemptions from a billboard ban reflected an appropriate governmental interest, they did not go far enough to provide the opportunity for expression of other messages—e.g., "Abortion is Murder").

12. Curiously, the court found that one legislative regimen, which actually imposed more lenient permitting requirements on temporary political signs than on other noncommercial signs, and exempted from fee requirements signs erected by service clubs, charitable, civic, religious organizations, and special promotional signs, was valid.

Updates From the New York State Courts

Second Department finds that no referral to the county planning board is required where application is denied.

Where the zoning board of appeals denied petitioner's request for a special use permit to build a three story building, the Board was not then required to refer the matter to the county planning board for review under General Municipal Law § 239-m. The court reasoned that since the board voted to the deny the application, no action having a significant effect on the environment was undertaken, and compliance with SEQRA was unnecessary. Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead, 753 N.Y.S.2d 527 (App. Div. 2d Dep't 2003).

Second Department upholds local laws requiring a fee in lieu of dedication of parkland and a fee for the cost of consultants for municipal review of subdivision application.

A real estate developer unsuccessfully challenged the constitutionality of two local laws that required fees to be paid in the development process. The first local law required a subdivision applicant to either dedicate parkland on its property pursuant to Town Law § 277, or, if it is determined that the applicant should pay a fee in lieu of the dedication, the amount of such fee would be $1,500 per lot. In finding that the plaintiff failed to meet its burden of proving that the local law did not substantially advance a legitimate governmental interest, or that it denied all economically viable use of the property, the court found, "There exists a nexus between the legitimate State interest of present and anticipated recreation requirements in the Town and the condition imposed of paying a fee in lieu of the dedication of parkland to be used for the purchase and development of permanent park and playground sites within the Town." The court also found that the plaintiff failed to offer any evidence that the $1,500 per lot fee was not roughly proportional to the needs it was supposed to serve. With respect to the plaintiff's argument that law violated the Due Process Clause by failing to provide a process whereby an applicant could participate in the establishment of the per lot fee, the Court found that the setting of the fee is a

NEW YORK ZONING LAW AND PRACTICE REPORT

May/June 2003 Vol. 3, No. 6

In This Issue

Editor-in-Chief
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Electronic Composition
Specialty Composition
Published six times a year by West
Editorial Offices: 50 Broad Street East, Rochester, NY 14694
Tel.: 585-546-5530 Fax: 585-258-3774
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 612-340-9378

MUNICIPAL REGULATIONS OF SIGNS AND BILLBOARDS:

A Discussion of Governing Constitutional Principles (Part II)

By Adam L. Wekstein, Esq.*

This is Part II of a two-part article providing an overview of the constitutional constraints on municipal regulation of signs and billboards. Part I, which appeared in the March/April 2003 issue of this newsletter, focused on controlling First Amendment standards and their application to several specific recurring areas of regulation and themes in litigation, including the regulatory distinctions made between on-site and off-site signs, the regulation of billboards, particularly the differential treatment of commercial and non-commercial speech, the legality of content-based exemptions included within sign ordinances, and the permissibility of durational limits on political campaign signs.[1] This installment analyzes the implications of the First Amendment with respect to the limitations on sign permitting schemes as prior restraints on speech, the regulation of signs on residential property, and the ability of municipalities to regulate signage on their own property. In addition, the constitutionality of so-called amortization provisions, featured in many sign ordinances as a methodology to eliminate legally nonconforming signs, is discussed in detail.

THOMSON WEST

New York Zoning Law and Practice Report is published by West, 50 Broad Street East, Rochester, NY 14694.

40082102

VI. Prior Restraints

A. Substantive Requirements for Sign Permitting Regulations

Municipal permitting schemes regulating signs and billboards are prior restraints. While prior restraints on speech are not unconstitutional *per se*, there is a presumption against their constitutional validity. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). Moreover, any system of prior restraints must contain "narrow objective and definite standards to guide the licensing authority." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992). The law imposes such standards to prevent the regulator from being vested with unbridled discretion, which could pose the risk that permit decisions would be based on the content of protected speech. The Supreme Court recently explained this principle in *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002), as follows:

> even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content....We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review. ...

Thomas, 534 U.S. at 323 (citations omitted).

Under this rubric, a sign ordinance which includes criteria that are not both objective and specific, such as with respect to size, shape, or height, but which simply imports the often amorphous approval standards commonly found in zoning or historical preservation ordinances, is probably invalid. Zoning, land use, architectural, and historic preservation regulations often vest local boards or officials with expansive power to consider the impacts a proposed land use may have on the value of surrounding properties, or the consistency of that use with the character of its environs, as a basis to grant or deny approvals. While such a framework may provide legitimate grounds for approval or disapproval of development, it likely falls short of the constitutional minimums when the activity for which government permission is sought is expressive.

The court found this to be the case in *Lamar Advertising Co. v. City of Douglasville, Georgia*, 2003 WL 1857466 (N.D. Ga. 2003). Therein, the court granted a permanent injunction preventing application of so much of an ordinance as imbued the local planning director with authority to grant or deny permits for temporary signs without imposing any standards aside from the requirement that the permit application meet the zoning code. The District Court stated that under Eleventh Circuit case law, "traditional criteria for granting or denying variances are insufficiently precise and objective when applied to parties engaged in First Amendment protected activities." In pertinent part, *Lamar Outdoor Advertising Company* reads as follows:

> ...City officials are to consider the value of the surrounding property, the environment of the surrounding property, the public good, and the purpose of the zoning ordinance before granting or denying a variance. Pursuant to *Lady J. Lingerie, [Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999),] the breadth of these criteria provides the City unbridled discretion in granting and denying the right to post signs....
>
> Similar to the provisions governing variance approvals, too much discretion is also vested in the Historic District Preservation Commission ("Commission") to approve or deny signs for display in the historic district of the City. Specifically, signs posted in the historic district must be approved by the Commission....Although the sign ordinance provides that the Commission shall "establish guidelines for color, size and design of signs which can be approved for use within the historic district," there is no indication in the record that the Commission has done so. Instead, it appears that the Commission relies only upon the standards described in the Historic Preservation Ordinance, which governs all structural changes within the historic district. Appropriate considerations under the Historic Preservation Ordinance include the "effect on the aesthetic, historic, or architectural significance and the value of the historic property"...These standards, unlike objective standards regarding size, shape, or height, allow the Commission significant discretion in approving signs...Because these standards cannot be distinguished from those held unconstitutional in *Lady J. Lingerie*, the court finds that the Commission has unbridled discretion in approving signs in the historic district. *Id.* More precise and objective standards must be developed to make the ordinance constitutional.

Lamar, supra at *4 (citations to local regulations omitted). *See also North Olmsted Chamber of Commerce v. City of North Olmsted*, 86 F. Supp. 2d 755 (N.D. Ohio 2000) (invalidating a city's sign ordinance which it found, among other things, vested unbridled discretion in the city's building officials); *Lawson v. City of Kankakee, Ill.*, 81 F. Supp. 2d 930 (C.D. Ill. 2000) (invalidating a regulation requiring consent of a public or private landowner to allow a third party to post a sign on its property, which contained no criteria governing the grant of permission, as vesting unbridled discretion in the governmental official with respect to signs on public property); *Young v. City of Roseville*, 78 F. Supp. 2d 970 (D. Minn. 1999) (annulling a sign permitting scheme which, among other things, required consideration of whether a sign "interferes with enjoyment of neighboring land"); *Outdoor Systems, Inc. v. City of Merriam, Kan.*, 67 F. Supp. 2d 1258 (D. Kan. 1999) (holding that an ordinance allowing a municipal building official to remove signs found to be unattractive or out of conformance with the aesthetics of the surrounding area vested unbridled discretion in that official).[2]

B. Procedural Requirements for Sign Permitting Regulations

Prior restraints not only need to include objective and specific criteria controlling permitting decisions, but have been required to incorporate rigorous procedural safeguards to protect the First Amendment rights of an applicant seeking approval. Until last year, it appeared that a permitting scheme constituting a prior restraint on speech was required to include the following procedural safeguards:

> (1) Any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) Expeditious judicial review of that decision must be available; and (3) The censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). These safeguards are commonly referred to as the *Freedman* procedural requirements, because they are derived from *Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), a case in which the Supreme Court invalidated the State of Maryland's legislation which required films to be reviewed by a board of censors for approval of content.

Indeed, the Second Circuit expressly and recently applied the *Freedman* procedural requirements to invalidate permitting schemes and governmental attempts to regulate signage on public property. In *New York Magazine, a Div. of Primedia Magazines, Inc. v. Metropolitan Transp. Authority*, 136 F.3d 123 (2d Cir. 1998) ("*New York Magazine*"), the court recognized both that there is a heavy presumption against any prior restraint and that legislation imposing the restraint must: (1) place the burden of instituting judicial proceedings and proving that the materials are unprotected on the government; and (2) require a prompt judicial determination.

However, in *Thomas v. Chicago Park District*, *supra*, the United States Supreme Court held that while a *content-neutral* permitting scheme regulating assembly of large groups in public parks was required to include adequate substantive criteria to guide the reviewing official's decision and render it subject to effective judicial review (*see* Section VI.A. above), such regulations did not have to meet the *Freedman* procedural requirements. The Court explained that the procedural safeguards set forth in its earlier case law, which were imposed to prevent the censorship that could result where the regulation of speech is related to its content, do not have the same compelling basis and have never been mandated by it in the context of regulations which are content-neutral. *Thomas*, 534 U.S. at 321-24. Thus the Court dismissed the contention that every time a governmental entity denies a permit affecting speech, the entity must initiate litigation and the ordinance establishing the permit must specify a deadline for judicial review of the permit denial.

Of course, *Thomas* did not consider the regulation of signs or billboards, but instead explicitly addressed permits for use of public parks for any purpose, communicative or otherwise. Nonetheless, both logic and the scant case law decided during the less than one-year period since *Thomas* was handed down indicate that content-neutral sign and billboard permitting provisions need not adhere to the *Freedman* procedural requirements. *See Lamar, supra*; *Cafe Erotica v. Florida Dept. of Transp.*, 830 So. 2d 181 (Fla. Dist. Ct. App. 1st Dist. 2002), review denied (Fla. Apr. 25, 2003) (finding that under *Thomas* a content-neutral billboard ordinance does not have to provide such procedural safeguards).

VII. Regulation of Residential Signs

Regulation of signs posted by residents at their private homes has received particularly close examination by courts. *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994), invalidated an ordinance banning all residential signs but those falling within one of ten exemptions. In so doing, the United States Supreme Court stated that exemptions from the prohibition, although allowing more speech, may represent an impermissible attempt to give one side the advantage in public discourse, or in combination with the prohibition itself, to select the proper subjects for political debate. *Ladue*, 512 U.S. at 51. Nonetheless, the Court presumed, without deciding, that even with the exemptions the prohibition was content-neutral.

Even in light of its assumption of content-neutrality, the Supreme Court found that the prohibition of all signs on residential properties impermissibly foreclosed an entire medium of expression. In so doing, it recognized residential signage as a venerable, important, and unique means of communication. It rejected the municipality's assertion that because the ordinance was not content-based and allowed alternative means of communication, such as flyers, handbills, letters, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings, it should be upheld.[3] The decision stated:

> [r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute....Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.

Ladue, 512 U.S. at 57. The Court also noted the significance of the fact that landowners have a special interest in avoiding the proliferation of unsightly signs in the area of their residences, perhaps diminishing the imperative for regulation of such signs. *Ladue*, 512 U.S. at 58.

In *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 1996 FED App. 0197P (6th Cir. 1996), the court invalidated an ordinance prohibiting all lawn signs in residential areas and requiring that such signs, if any, be posted in the windows of the residence on the site. The appellate court held that "the wholesale ban on lawn signs is not narrowly tailored to withstand constitutional scrutiny." *Cleveland Area Bd. of Realtors*, 88 F.3d at 387. It found that for legislation to be "narrowly tailored," it cannot burden substantially more speech than is necessary to further the government's legitimate interest, and that the challenged ordinance was fatally deficient in that respect. Relying heavily on *Ladue's* expressed concern over banning an "entire medium of communication" and a recognition of the uniqueness and importance of lawn signs, the *Cleveland* court also held that the ban on lawn signs did not leave open ample alternate channels of communication. *See Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322 (S.D. N.Y. 2000) (recognizing the importance of residential signs and that regulations of their size and shape are permissible, but indicating that a regulation restricting the location of signs to windows may only allow an ineffective means of communication);[4] *Curry v. Prince George's County, Md.*, 33 F. Supp. 2d 447 (D. Md. 1999).

VIII. Regulation of Signs on Public Property

Signs on public property raise different concerns from their counterparts on private land and, under many circumstances, will trigger a different standard of judicial scrutiny. When the government seeks to regulate expressive conduct on public property, the first step in determining whether the regulation transgresses the First Amendment entails ascertaining the nature of the "forum" in which the speech occurs. The United States Supreme Court has created three categories of government property, and set forth standards for reviewing sign regulation in each. This analysis is succinctly described in the Second Circuit's decision in *New York Magazine*, *supra*, as follows:

> The Supreme Court has created three categories of government property, and announced standards for reviewing government restriction of speech according to those categories...a traditional public forum is one that "by long tradition or by government fiat ha[s] been devoted to assembly and debate."...The second kind of

> public forum is the designated public forum, a place the government has opened for use by the public for expressive activity....*In both traditional public fora and designated public fora content-based regulations survive only if "narrowly drawn to achieve a compelling [governmental] interest."...All remaining government property constitutes a non-public forum. The government may limit speech in a non-public forum if the limitation is reasonable, and not based on the speaker's viewpoint.*

New York Magazine, 136 F.3d at 128 (emphasis added; citations omitted).

The standards applicable to judging the regulation of signs on private property apply with equal vigor to signs located in traditional or designated public fora. A designated public forum is created only when the government intends to open its property to expressive activity and, accordingly, the government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

As the government may reserve property which is a non-public forum for its intended purposes, it may limit speech in a non-public forum so long as the limitation is reasonable and not based on the speaker's viewpoint. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-49, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23 (1983). "In the concept of the non-public forum is the right to make distinctions in access on the basis of the subject matter and speaker identity." *Perry*, 460 U.S. at 49.

Encompassed somewhere in the three categories of fora is the more recently developed subcategory of a "limited public forum." A limited public forum exists where the government reserves property, which is otherwise not a public forum, for use by certain groups, or limits the use of the property to the discussion of certain topics or for a specified genre of communication. *See Good News Club v. Milford Central School*, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001). Notably, the courts have not even been able to agree as to whether a limited public forum is a species of designated public forum (*Daily v. New York City Housing Authority*, 221 F. Supp. 2d 390 (E.D. N.Y. 2002); *Anderson v. Mexico Academy and Central School*, 186 F. Supp. 2d 193, 162 Ed. Law Rep. 262 (N.D. N.Y. 2002)), or a subset of a non-public forum. *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *People for Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294 (S.D. N.Y. 2000). The disagreement over categorization, however, is little more than semantic. The constitutional constraints on the government's power to regulate speech in a limited public forum are clear: "The restriction [on expression] must not discriminate against speech on the basis of viewpoint...and must be 'reasonable in light of the purpose being served by the forum' . . ." *Good News Club*, 533 U.S. at 207 (citations omitted).[5] The standard is essentially the same as that which applies in a non-public forum. *Daily, supra*; *People for the Ethical Treatment of Animals v. Giuliani, supra.*

In some instances it is easy to determine whether property is a public forum, such as streets, sidewalks, and parks, which are prototypical public fora. *See Perry*, 460 U.S. at 45 ("At one end of the spectrum are streets and parks which have immemorially been held in trust for use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions") (internal quotation marks omitted). Even on property which is a public forum, communication is subject to the same regulatory constraints as speech in general. In fact, the Supreme Court upheld a relatively broad prohibition of the posting of signs on public property in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) ("*Vincent*"). Therein, the Court rejected a First Amendment challenge to an ordinance which prohibited the posting of any signs on public property. The Court found that the ordinance was equally applied to all and was content-neutral on its face and, therefore, upheld the ordinance under the test for content-neutral, time, place, and manner restrictions. *Vincent*, 466 U.S. at 805.

Relying on an analysis of the opinions in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), and prior cases in which the Court had upheld bans of certain types of communication viewed as intrusive (*e.g.*, sound trucks), the *Vincent* Court found that "municipalities have a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression." It further held that an accumulation of signs on public property

worked a "visual assault" on citizens—a substantive evil within the city's power to prohibit. Holding that the prohibition did not go further than necessary to advance its ends, and that there existed ample alternative means of communication, the Court upheld the challenged ordinance.

Although arguably not needing to do so to reach its result, the Court specifically rejected the argument that the public property covered by the ordinance was a public forum on which sign posting was a protected activity. It stated that property such as lampposts, which were a prime example of the property on which the *Vincent* plaintiffs claimed they had the right to post signs, did not constitute a public forum. The Court stated:

> [a]ppellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks, and it is clear that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." United States Postal Service v. Greenburgh Civic Assns., 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981). Rather, the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

Vincent, 406 U.S. at 814. *See Brown v. California Dept. of Transp.*, 321 F.3d 1217 (9th Cir. 2003) (which on a motion for a preliminary injunction found that railings on highway overpasses are a non-public forum, but that a rule allowing the display of the American flag on such railings, but prohibiting or requiring permits for display of banners, was unconstitutional, both because it lacked a reasonable basis and was not viewpoint-neutral).[6]

Review of a few recent cases which applied the public forum rules to determine the constitutional propriety of a municipality's actions follows. In *New York Magazine, supra*, the court faced the question of whether New York's Metropolitan Transportation Authority (the "MTA") could remove advertisements for the plaintiff magazine from its buses which featured the New York Magazine logo and the statement "possibly the only good thing in New York Rudy has not taken credit for." The MTA argued that the advertisement violated a provision of the New York Civil Rights Law which prevents the use of a person's name (in this case former Mayor Rudolph Giuliani's) for promotion of a commercial product without his or her consent. In rejecting the MTA's claim and granting the magazine a preliminary injunction, the Second Circuit recognized that where the government opens its property for speech in order to raise revenue or facilitate the conduct of its own business, the property may still be considered a non-public forum which does not have to be opened to all expressive activity. However, where the government allows political speech that evidences a general intent to open the advertising space for public discourse, it has created a designated public forum. In turn, the court concluded that, as the MTA's standards permitted political and non-political advertising alike, attempted rejection of the Mayor Giuliani parody was invalid viewpoint-based discrimination which could not survive strict scrutiny.

In contrast, in *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), the Ninth Circuit Court of Appeals reviewed the rejection of anti-abortion posters from bus advertising panels. In undertaking the same analysis as did the Second Circuit in *New York Magazine*, the court noted that the City of Phoenix had a long-standing policy of rejecting all political and religious advertising. The court held such a ban to be reasonable in light of the city's interest in maintaining neutrality and preventing a reduction in income earned from selling advertising space. It found that the rejection of the anti-abortion advertisements did not constitute impermissible viewpoint discrimination. *See Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority*, 148 F.3d 242 (3d Cir. 1998) (finding that a regional transportation authority's refusal to display anti-abortion advertising in subway and rail stations was unconstitutional, where in the past it had—on only very limited occasions—exercised its contractually retained discretion to review advertisements, and where the proposed advertisements were not inconsistent with the purposes for which the public property was intended); *Planned Parenthood Ass'n / Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225, 1230, 1232, 2 Fed. R. Serv. 3d 1479 (7th Cir. 1985) (finding a public forum given the transit authority's history of accepting controversial public issue advertising).[7] *See also Anderson v. Mexico Academy and Central School, supra* (finding on a motion for a preliminary injunction that

a school's project allowing community members to install bricks bearing messages in a school walkway created a limited public forum and that, therefore, the plaintiffs were likely to be able to show that the school board's vote to remove bricks referencing a god revered by a particular religious sect, such as Jesus, but not those referring to God in general, was unconstitutional).

People for the Ethical Treatment of Animals v. Giuliani, supra, raised the issue of what kind of forum is embodied by fiberglass cows decorated by artists and located on sidewalks and in other public spaces as part of New York City's "Cowparade."[8] Therein, the city and its private partner in the event accepted the design of one cow bearing the message of an animal rights advocacy group ("PETA"), but rejected certain graphic slogans incorporated in the design of PETA's second proposed cow. PETA sought an injunction to compel inclusion of its second cow in the display. After finding the artificial bovines to be either a limited public forum or a non-public one, the court determined the city's action to be viewpoint-neutral and reasonable in light of, *inter alia*, the program's artistic and revenue-generating purposes.[9] Therefore, it denied PETA's motion.

IX. AMORTIZATION PROVISIONS AND TAKINGS WITHOUT JUST COMPENSATION

Many sign ordinances contain provisions requiring the elimination of nonconforming signs after a period of years, or upon the happening of some specified event. Such provisions, which may require destruction or removal of privately-owned property, have implications under the takings clauses of the Federal and New York Constitutions.[10] Among other purposes, they are designed to reduce the chances that the municipality which is eliminating a nonconforming billboard will have to pay "just compensation" to those holding an interest in the billboard or the property on which it is situated.

Under both the New York and Federal constitutions, a zoning or land use regulation or other enactment affecting property constitutes a prohibited regulatory taking without just compensation (1) if it denies an owner economically viable use of his property; *or* (2) if it does not substantially advance a legitimate state interest.[11] *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 548-49, 542 N.E.2d 1059 (1989); *see also Nollan v. California Coastal Com'n*, 483 U.S. 825, 834, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), the Supreme Court clarified that a "categorical taking" exists where a law denies an owner "all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015-16. In explaining this rule the Court stated:

> We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, *that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation...[f]or what is the land but the profits thereoff[?]*"...Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life,"...

Lucas, 505 U.S. at 1017 (citations omitted; emphasis added). Once such a showing is made, the government can only avoid payment of compensation, and/or invalidation of the law, if it can demonstrate that the landowner's rights in the property did not embrace the right to engage in the prohibited uses in the first instance. *Lucas*, 505 U.S. at 1015-16, 1027-28.

Even where a regulation does not render property valueless, or otherwise constitute a *per se* taking under *Lucas*, it may nonetheless effect a taking on an *ad hoc* factual basis. Under the *ad hoc* factual inquiry, courts typically analyze three factors: first, the economic impact of the regulation on the claimant; second, the extent to which the regulation interferes with the distinct investment-backed expectations of the property owner; and third, the character of the governmental action. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Under New York State case law, an economic taking exists, *inter alia*, where the regulation deprives a landowner of the ability to earn a reasonable economic return on his investment. *Marcus Associates, Inc. v. Town of Huntington*, 45 N.Y.2d 501, 410 N.Y.S.2d 546, 382 N.E.2d 1323 (1978).

General takings clause principles apply in the particularized context of sign regulations that require the elimination of nonconforming billboards following a specified grace period. A party afforded a number of years to amortize his use of a billboard would face a daunting task to establish a *per se* economic taking—that is, that he was

deprived of all economically viable use of his property. After all, he has been given a period in which to generate income. However, under the *ad hoc* formulation of *Penn Central,* a taking can be established under the facts of a given case. Analysis under the test requires consideration of a wide range of facts, and involves judgments as to the reasonableness of a landowner's investment-backed expectations.

A. Billboard Amortization Cases in Federal Courts

In *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988), the Court of Appeals for the Fourth Circuit remanded the case to the District Court to determine whether an ordinance providing a five and one-half year amortization period for the removal of off-site signs constituted a taking of property without just compensation. The appeals court expressly held that disposition of the question of whether the ordinance effected an economic taking required a plenary hearing. The court stated "[r]ecent cases decided by the Supreme Court raise questions about the propriety of summary judgment on takings claims without a fully developed factual record." *Naegele*, 844 F.2d at 175. In *Naegele*, the Fourth Circuit cited a number of fact issues which prevented summary judgment in the following passage:

> [t]he parties differ about the economics of moving signs, their salvage value, the effect on "sharing" sales, and the overall impact of the ordinance on Naegele. The city suggests that Naegele will benefit from the growth and economic development that the ordinance is intended to foster. Naegele does not subscribe to this prediction. These factual differences cannot be deemed immaterial as a matter of law simply because the city has allowed an amortization period of five and one-half years.

Naegele, 844 F.2d at 175.

The court also portrayed as a key issue the unit against which a taking was to be measured—e.g., was each sign to be examined individually, or were all signs owned by a plaintiff in a community the unit against which a taking was to be measured? Further, the Court of Appeals instructed the District Court to apply the three-factored *ad hoc* takings test established by *Penn Central, supra.*

On remand, the District Court found the correct unit against which to judge a taking was all of the plaintiff's signs in the metropolitan area, since advertisements were almost always sold and shown on a multi-sign basis. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068, 1073-74 (M.D. N.C. 1992), aff'd, 19 F.3d 11 (4th Cir. 1994). Applying both the *ad hoc* takings test and the *per se* standard of *Lucas,* and analyzing in detail all of the factors outlined by the Court of Appeals, the District Court found that the plaintiff still had a viable business in the metropolitan area, was able to maintain 54 percent of its signs, had earned substantial income during the amortization period, and that the loss of the signs would reduce the plaintiff's revenue by 29.75 percent in the Durham area. The court stated that the revenue earned during an amortization period is relevant to the determination of whether a taking has occurred and that, in the case before it, over the course of the amortization period the plaintiff had recouped more than double the value of the signs to be removed.

The District Court also held that Naegele had no reasonable expectation that the signs it purchased one year *after* the challenged ordinance went into effect could be used beyond the expiration of the amortization period. The court concluded as follows:

> Without question, Naegele has suffered a significant loss in the economic value of its property, as much as if the City had put a highway directly over the underpinnings of its billboards. Regulatory deprivations, however, have been held by the Supreme Court to be outside the scope of the takings clause unless they go "too far." It has also been held that the Constitution does not protect economic values from diminution by government regulation. Applying these standards, the court must conclude that the Durham ordinance does not go too far. Naegele has not suffered a physical invasion of its property in the usual sense, and it has not been deprived of all economically viable use of its property interest as a whole.

Naegele, 803 F. Supp. at 1080.

Earlier Fourth Circuit cases certainly leave open the possibility that a takings claim against a municipality, which after an amortization period requires removal of a billboard, can be amenable to summary judgment. *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 900 F.2d 783 (4th Cir. 1990), vacated a District Court's finding that an ordinance, which effectively outlawed all billboards but provided a four-year amortization period, was constitutional on its face. The Fourth

Circuit expressly stated that summary judgment is not always precluded in a takings challenge to an amortization period. However, it remanded the matter to the District Court for a trial on whether the ordinance, including the four-year grace period, worked a taking. Among other things, the court said that in determining whether the statute precluded economically viable use of the property, the District Court must determine the unit of property against which the taking is to be measured, the number of billboards containing noncommercial copy (which were allowed even offsite), the terms of any leases for the billboards, the number of leases rendered useless, whether the billboard and the land on which it was located were in common ownership, whether the remaining portion of the billboard site was susceptible to other uses, the amount of depreciation of the billboards taken for tax purposes, and the initial cost of the billboards.[12]

In *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973), the court recognized amortization as a valid method of terminating signs, but held that reliance on a sign's replacement value to establish the length of the amortization period was unreasonable. The decision reads as follows:

> [t]he replacement cost of the signs is not related to any of the relevant factors in the reasonableness tests, and presents no valid basis for different treatment of different signs ranging from three to five years. It has no bearing on the landowner's problem, nor on the signowners' situation nor on the City's position. The most that can be said for replacement cost is that it could indicate, as of the date used, the size or complexity of a sign, but this is no real help.

Art Neon, 488 F.2d at 122. Accordingly, the court invalidated the graduated schedule and held that with the five-year period left intact and made applicable to all nonconforming signs, the law was reasonable.

B. Billboard Amortization Cases in New York

A body of case law emanating from New York State, which has been cited widely in other jurisdictions, appears to represent an approach that may be even slightly more favorable to amortization provisions than the cases discussed above. In *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958), a seminal case, New York's Court of Appeals found that a reasonable amortization period for termination of nonconforming use (a steel drum manufacturing plant) was not unconstitutional. The court stated: "When the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid." *Harbison*, 4 N.Y.2d at 562-63, 176 N.Y.S.2d at 605.

The *Harbison* court also required inquiry into whether the injury to the user will be relatively slight and insubstantial, and found that among the fact questions needing resolution are the nature of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which petitioners might relocate, the cost of such relocation, as well as any other reasonable costs which bear upon the kind and amount of damages which the plaintiff might sustain.

In the specific context of amortization of billboards, *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977), considered an appeal from summary judgment in favor of the defendant. The court reversed the judgment and remanded the case for a trial on the question of whether a sign ordinance with a six and one-half year amortization period effected a taking. The court stated that a regulation requiring the immediate removal of billboards might in some instances constitute a regulatory taking.[13] It also reiterated the *Harbison* holding that as long as the amortization period is reasonable it should be upheld. Specifically, the court stated:

> *[w]hether an amortization period is reasonable is a question which must be answered in light of the facts of each particular case*...Certainly, a critical factor to be considered is the length of the amortization period in relation to the investment....Naturally, as the financial investment increases in dimension, the length of the amortization period should correspondingly increase. Similarly, another factor considered significant by some courts is the nature of the nonconforming activity prohibited. Generally, a shorter amortization period may be provided for a nonconforming use as opposed to a nonconforming structure.

Modjeska, 43 N.Y.2d at 479-80, 402 N.Y.S.2d at 367 (emphasis added; citations omitted). The court emphasized that the "critical question" in such an analysis is whether the public gain achieved by the exercise of the police power outweighs the private

loss suffered by owners of nonconforming uses. *Modjeska* also elaborated that the amortization period need not be so long as to allow the owner of a nonconforming use to recoup completely his investment, but should not be so short as to result in a substantial loss thereof.

The *Modjeska* analysis was again applied by the Court of Appeals in *Suffolk Outdoor Advertising Co., Inc. v. Town of Southampton*, 60 N.Y.2d 70, 468 N.Y.S.2d 450, 455 N.E.2d 1245 (1983). New York's highest court held that the plaintiffs' claim could not succeed because:

> they had "fully recouped their investments, substantially depreciated their billboards for income tax purposes, had relatively insubstantial lease and license obligations and, thus, would not incur any substantial financial loss." Nor with respect to benefit-burden analysis can it be said that the town board's conclusion that the public benefit from removal of the billboards outweighs the detriment to petitioners is arbitrary or capricious.

Suffolk, 60 N.Y.2d at 77, 468 N.Y.S.2d at 453 (citation omitted).[14]

NOTES

1. Familiarity with the first installment of this article is presumed, as the discussion herein will not reiterate the background principles addressed or analyze case law cited in the last issue of this publication.

2. In *East Timor Action Network, Inc. v. City of New York*, 71 F. Supp. 2d 334 (S.D. N.Y. 1999), the Southern District of New York held that New York City's process of deciding applications to rename various streets to honor individuals or events vested just such overly-broad discretion in the government. The court interpreted the application review process to allow denial of any sign based on a finding that the message sought to be expressed would generate controversy. In turn, it found the decision-making process to be wholly subjective, encouraging impermissible viewpoint discrimination, and invalidated it for lacking the "narrow objective and definite" standards necessary for a prior restraint to withstand First Amendment scrutiny.

3. The Court expressly recognized that displaying a sign at one's residence carries a distinct message in and of itself, by providing information about the identity of the speaker and his circumstances. *Ladue*, 512 U.S. at 57.

4. Mr. Knoeffler's signs might be just the type the *Ladue* court characterized as having added significance when located at the speaker's residence. Upset over his neighbor's dog and use of a wood-burning stove, and unsuccessful at remedying his perceived grievances in justice court, Mr. Knoeffler posted signs in his yard saying, among other things: "Warning: Town Justice Allows Neighbor's Biting Dog To Run Loose," "Tie Up Your Biting Dog," "Poison Your Own Air, Not Ours," and "Neighbors and Town Want to Do Away With Our Freedom of Speech and Our Right to Protest!"

5. In *Good News Club*, the court held that where a New York State school district opened its facilities for a variety of groups and uses, its exclusion of a group teaching religious values was impermissible viewpoint discrimination.

6. On remand, following the trial in *Brown*, the District Court reached the same conclusion and issued a permanent injunction prohibiting the California Department of Transportation from allowing the display of United States flags while requiring permits for, or prohibiting the hanging of, signs or banners on its overpasses. *Brown v. California Dept. of Transp.*, 2003 WL 21038139 (N.D. Cal. 2003).

7. In *East Timor Action Network, Inc. v. City of New York*, *supra*, New York's Southern District found that the policy of the New York City Department of Transportation ("DOT") allowing the installation of temporary street signs to commemorate cultural events, persons, events of public significance, or community or public service announcements made such signs a limited public forum. It held that the DOT's refusal to allow a street sign protesting an allegedly unprovoked massacre in a foreign country, in proximity to the consulate of the country that supposedly perpetrated the atrocity, was invalid under strict scrutiny. The court went on to hold that, even if the street signs were a non-public forum, the rejection of the proposed sign was not viewpoint-neutral and, therefore, would be invalid in any case.

8. The court framed the central question in the case as "whether a cow is a forum, a forum is a cow, and then when and where such a cow/forum may be found." *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d at 297.

9. In *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 215 F. Supp. 2d 120 (D.D.C. 2002), the court found that the fiberglass donkeys and elephants in Washington's similar "Party Animals" program were a limited public forum, and that the government had engaged in impermissible viewpoint discrimination by rejecting PETA's design for an elephant depicting cruelty to circus animals, while allowing other fiberglass mammals conveying messages. The distinction between the species of artificial animal sculptures in New York and those in Washington apparently played no role in the disparate outcomes.

10. The Fifth Amendment to the United States Constitution provides in part: "nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. The Takings Clause of the Fifth Amendment is made applicable to the states and, consequently, their subdivisions, by the Due Process Clause of the Fourteenth Amendment. Likewise, Article I, Section VII of the New York State Constitution states: "Private property shall not be taken for public use without just compensation." N.Y. Const., Art. I, § VII.

11. While it is clear that a taking exists if the challenged regulation violates either prong of the standard

(*Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479 (1994)), this article does not address issues arising under the second prong of the takings test. If a billboard or sign regulation passes scrutiny under the applicable First Amendment standards, it is hard to envision a basis for its invalidation for failure to have a sufficient nexus to a legitimate state interest.

12. Other federal cases assessing amortization schemes which are worthy of review include *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690 (8th Cir. 1996) (upholding an ordinance requiring removal of billboards from residential neighborhoods and providing a five-year amortization period); *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986) (granting summary judgment to the defendant municipality and dismissing the plaintiff's takings claims directed at an ordinance with a five and one-half year amortization period and stating that if the amortization period at issue is "reasonable," the ordinance will be upheld); *Patrick Media Group, Inc. v. City of Clearwater*, 836 F. Supp. 833 (M.D. Fla. 1993) (finding that on the defendant city's motion to dismiss, the existence of a seven-year amortization period for nonconforming billboards was not, as a matter of law, sufficient to avoid a plenary hearing), and *Brewster v. City of Dallas*, 703 F. Supp. 1260 (N.D. Tex. 1988) (upholding a scheme under which the owner of a nonconforming sign was given a ten-year amortization period for removal and depreciation).

13. The Court indicated that while aesthetics is a legitimate goal under the police power, such a regulatory purpose is weaker than the purpose of public safety, and that the latter purpose would be more likely to justify immediate removal of a nonconforming use.

14. More recent case law has reaffirmed that analysis of the legality of amortization periods is a fact-specific inquiry which involves balancing the harm to the landowner against the benefit to the public arising from the challenged regulation. *See Chekenian v. Town Bd. of Town of Smithtown*, 202 A.D.2d 542, 609 N.Y.S.2d 280 (2d Dep't 1994).

Of note is that in *Village of Valatie v. Smith*, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994), the Court of Appeals rejected a facial challenge to an amortization period (as opposed to an argument about the depreciation in value of specific properties) where the ordinance required removal of nonconforming mobile homes either when the property on which they were located, or the mobile homes themselves, were conveyed. The court stated that the primary issue was whether the mere enactment of an amortization period that uses the transfer of ownership as the endpoint is reasonable. The court stated that: "[a]n amortization period is presumed valid, and the owner must carry the heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power. . ." and recognized that "[i]n some circumstances, no amortization period at all is required . . .". *Village of Valatie*, 83 N.Y.2d at 401, 610 N.Y.S. at 944 (emphasis added; citations omitted).

From the Federal Courts

U.S. Supreme Court Upholds City Zoning Referendum Process As Facially Neutral.

On March 25, 2003, the U.S. Supreme Court handed down a unanimous decision holding, among other things, that the zoning referendum requirement in the charter of the City of Cuyahoga Falls set forth a facially neutral petition procedure and that it enabled public debate on the issues, thereby advancing First Amendment values. In essence, the Court held that the non-profit developer failed to show that the City had a racial motive in delaying construction (where the delay included a 10-year fight over the construction of low-income apartments).

According to the City Charter, voters are vested with, "the power to approve or reject at the polls any ordinance or resolution passed by the Council" within 30 days of passage, and the charter further provides that any ordinance so challenged "shall [not] go into effect until approved by a majority of voters."

The Buckeye Community Hope Foundation (hereinafter referred to as "Buckeye") purchased land in the City that was zoned for apartments. Shortly thereafter, Buckeye submitted a site plan to the City Planning Commission for multifamily low-income housing, which was immediately met with community opposition. Despite the opposition, the planning commission negotiated various development conditions with Buckeye, and the commission unanimously approved the proposed site plan and forwarded it to the city council for final authorization. Although faced with significant community opposition to the site plan once again, the City Council ultimately approved the plan by City ordinance.

A group of citizens filed a formal petition with the City requesting that the ordinance be repealed or submitted as a referendum to the voters. Although Buckeye sought an injunction against the petition, the state court denied injunctive relief. Despite the ruling, Buckeye requested building permits from the City to begin construction, which request was denied by the city engineer upon advice of the city law director since, according to the charter, the ordinance approving the site plan had been stayed by the referendum request.

In November 1996, seven months after the City Council approved the site plan by ordinance, the