“Community Aesthetics and Sign Regulations: How far can a city go to prescribe aesthetics?”

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ABSTRACT:

Relying on the police powers, local governments frequently seek to regulate on-premise signs to reduce visual blight. They often rely on interpretations of sign law that do not fully spell out the First Amendment protections afforded to on-premise signs. The underlying basis for these regulations is that unattractive places are impediments to a healthy commercial economy, as well as the overall psychological health and well-being of city residents. The courts are divided as to the legality of sign regulations that are primarily grounded in aesthetics. This division has been further reinforced by legal scholarship that adds to the confusion. This session will examine the spectrum of jurisprudence on the topic and provide some guidance for local governments, as well as commercial interests, that stand to benefit from the overall improvement of aesthetic quality in U.S. cities.

There is little dispute about the impact of the automobile on the urban landscape. Since the 1950s, localities have been designed to service the automobile. The auto-dominated, land-use pattern is best characterized by the number and width of lanes of roadway controlled by traffic signals. Adjacent commercial development is set back from the road to allow drivers to park their vehicles in front of the places they shop. Parking lots are oversized to allow drivers on the busiest shopping day a year to find a place to park that is convenient to the store in which they shop. Due to the advent of big-box retail, drivers are not expected to park once to access multiple stores. Rather, ample parking is provided for each establishment because the walk between these stores is too far and potentially too unsafe given the amount of automobile traffic.

Residential neighborhoods are completely segregated from commercial areas, with the exception of the occasional corner store or home-based occupation. The roads in residential neighborhoods are typically narrower than in commercial districts. However, setbacks in these areas are also significant. The typical suburban home provides ample covered and uncovered space for automobiles. The garage of the average, single-family home greets guests; the front door is typically recessed for the sake of privacy.

This is not a paper that seeks to vilify the suburban form that permeates much of the American landscape. However, knowledge of these design practices is useful in understanding the sizing and location of on-premise commercial signs. Consider the traditional layout of Main Street America. Typically formulated before the turn of the century, these places follow a typical form. They are situated on a roadway that is wide enough to allow a wagon to circle around. The buildings are two to three stories in
height. They are evenly set back from the street. Limited street parking is available in the locations historical used to tie off horses. Street lights have been installed to illuminate the sidewalks.

A Very Brief History of Sign Regulations

*Signs and the Urban Landscape: Pre-Car*

The signs of historic Main Streets are beloved. There are many forms of advertisement, from painted windows and wall signs to projecting signs and theatre marquees. These iconic and artistic signs are often preserved, even after the expiration of the businesses with which they were associated. Some of these signs are retrofitted for new lives. Others are preserved, untouched, as artifacts of another time. Historic-preservation entities fight to preserve these signs, as well as to ensure that more-modern signs do not distract from the historic character of these areas. The reason for this is simple. Signs were historically a very important part of the urban landscape. As Loshin (2006, p. 106) explains, “Signs were a source of communication and identification, a public and omnipresent register of the goods and services available for purchase. A street without signs would have been a disorienting experience indeed.”

Aesthetics of commercial streetscapes was an issue at the turn of the century, but it was privately managed. Competition in the marketplace incentivized the construction, installation, and maintenance of high-quality and attractive signs (Loshin, 2006). Commercial enterprises during this era were deeply committed to “…places and the people living in them” (Rae, 2003, p. 88). As such, business owners took care to ensure that their signs were aesthetically pleasing to potential customers.

The marketplace, however, was not able to preserve this quality on its own. Municipal sign regulations emerged during this period as a result of the activities of “sign vigilantes [who] posted handbills or painted messages on signboards, walls, fences, trees, and just about any other piece of property that would bear their message” (Loshin, 2006, p. 107). These signs, typically advertising entertainment events like vaudeville shows, were installed by snipers throughout urban areas (Id). Because snipers were paid by the sign, the visual tranquility of urban areas and small-town Main Streets was jeopardized.

Municipal regulations followed. In New Haven, Connecticut, an 1870 ordinance was crafted to prevent “any sign, show-bill, lantern, or show-board, of any description whatever” from projecting more than three feet beyond the building to which it was attached (Loshin, 2006, citing New Haven, Conn., Ordinances Section 42 (1870)). As merchants began to experiment with other sign types, localities began to grapple with new regulatory schemes. As quickly as a new regulatory framework was develop, urban conditions changed. Most significantly, the advent and mass production of the automobile in the early 1900s transformed the urban and suburban landscapes.
Businesses found that, to be competitive in the new auto-dominated marketplace, they would need to install larger signs to draw attention from fast-moving consumers. Pole signs and billboards are edifices of this era.

**Signs and the Urban Landscape: Automobile Era**

Commercial enterprises, and the sign makers who serve them, have had to adapt to commercial geography. As Edge Cities allowed workers to live outside central cities, the form of commercial establishments changed. Main Streets and downtowns were replaced by regional shopping centers and strip malls. Big-box retail followed a generation latter. The urban landscape transformed. The marketplace also changed, particularly as a result of the forces of globalization. Local businesses struggled (and continue to do so) as a result of the proliferation of chain stores.

In many places, local government officials did little to manage the development patterns which transformed the landscape for more than a century. The majority of local governments utilized land-use regulations to mitigate the nuisance effects, associated with this form of development, with some attention given to the regulation of commercial signs. Environmental groups brought national attention to the effects of auto-oriented development patterns when they led the first charges against the Outdoor Advertising Association and the billboards that lined the highways. They charged that these signs “desecrate[d] scenic and civic beauty” and led to billboard blight (Gudis, 2004, p. 173). The outcome of this national debate resulted in litigation and national-level regulation.

In the 1960s, local governments began to include sign regulations, to a small degree, in their zoning codes under the auspices of urban renewal and the mitigation of blight. These ordinances began the process of distinguishing the type and characteristics of signs by land-use category, with the most-restrictive regulations applicable to residential neighborhoods. Concerted efforts by municipal governments to regulate commercial signage began in most places in the late 1970s and early 1980s. In Ewald and Mandelker's 1977 book, Street Graphics, this seminal work provided local regulators with a pragmatic approach to regulating signs. Through their work, the authors sought to:

…allow individuals and institutions the freedom to express their personalities and purposes—but within the framework of official guidelines that will insure that these expressions are compatible with the areas around them, appropriate to the activities to which they pertain, and clearly readable under the circumstances in which they are seen (Ewald et al., 1977, p. forward).

The primary purpose of street graphics is to index the environment—that is, to tell people where they can find what. Selling is a subordinate purpose to be tolerated, but selling is auxiliary to indexing. (Emphasis in original.)

Ewald and Mandelker saw signs as identifiers for businesses and sought to reduce visual clutter by restricting the size, type, number, and location of signs. They suggest that such regulations are justified in the promotion of the police powers relating
to public safety and aesthetics. This basis continues to permeate modern zoning codes. Recently, local governments across the country have grappled with the decision of whether to allow electronic message boards and other digital signs to operate in commercial areas, due to fears that these signs will distract drivers. In the early stage, before research on the topic was commissioned, local governments simply did not allow businesses to utilize this new and highly effective communication technology. Policymakers had forgotten that signs are not really comparable to other land uses under the scheme of the police powers. Signs are speech, afforded Constitutional guarantees under the First Amendment to the U.S. Constitution.

The State of Sign Law

Sign law is complicated. As in many other areas of Constitutional law, court opinions that are intended to bring clarity to issues merely add to further confusion. In his new book, land-use scholar Dan Mandelker suggests that localities should not be discouraged by these complexities (2012). However, local governments undertaking the adoption of new sign codes should be cautious in drafting them. Mandelker very generally suggests:

Local governments can regulate sign display through content-neutral sign ordinances that are fair, objective, even-handed and supported by accepted government purposes without creating constitutional problems.

He intimates that this process is straightforward. It is not.

The U.S. Supreme Court has long held that commercial speech is protected under the First Amendment to the U.S. Constitution. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the high court held that because speech is commercial in nature it does not “justify the narrowing of First Amendment protections (Jourdan, 2012). The next term went further to characterize the nature and importance of commercial communications in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976). The high court reinforced “the right of a commercial advertiser to share his message and the right of a potential consumer to receive it” (Jourdan, 2012). The Court steadfastly held that “The free flow of commercial speech should be considered …an instrument to enlighten public decision making in a democracy” (Id. at 766).

Subsequently, the high court considered the case of *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977). The controversy in this case centered around a municipal regulation that prohibited the display of for-sale signs in residential areas. The City of Willingboro sought to justify this regulation on the basis of concerns that too many for-sale signs might offer the false impression of neighborhood instability and lead to further decline. The Court invalidated the regulations as an unlawful interference with the commercial-speech rights. They court explained that this type of regulation took away the power of a commercial entity, ie, home sellers, to choose the best form of communication for home sales.
Mandelker, and others, have been dismissive of these three early sign cases. Mandelker suggests that these cases have merely provided “general principles” that have been “…supplemented with more detailed tests” (p. 9). These cases, however, remain good law and are often turned to for clarification in the face of the confusion surrounding more recent case law (Jourdan, 2012).

In 1980, the high court developed its first “test” applicable to the regulation of commercial advertising displays. In *Central Hudson Gas & Electric Company v. Public Service Commission*, 447 U.S. 557 (1980), the Court found invalid a state statute preventing companies from promoting their products through advertising, utilizing a four-pronged test referred to as the Central Hudson factors. According to the high court, commercial speech is protected by the First Amendment if:

1. it concerns lawful activity and isn’t misleading;
2. the asserted government interest is substantial.
3. the regulation directly advances the governmental interest asserted, and
4. if the regulation is not more extensive than is necessary to serve that interest (Id. at 566).

The term “governmental interest” remains undefined. Courts have deferred to the discretion of local governments to determine what activities fall within the scope of this term. With respect to signs, regulations are typically justified in the name of police powers like aesthetics and traffic safety. Courts have rarely questioned or delved into these justifications. However, this is beginning to change as more research has been produced which questions these claims, especially with respect to traffic safety.

The U.S. Supreme Court was again asked to review the state of the law, with respect to the regulation of commercial signs, both on- and off-premise, in *Metromedia v. City of San Diego*, 453 U.S. 490 (1981). Outdoor-advertising companies challenged the City of San Diego’s off-premise sign code which, among other components, banned off-premise billboard signs. The ordinance exempted on-premise signs from this blanket ban. The Court’s decision was split, with the justices issuing five separate opinions. Ultimately, the court upheld the ban on off-premise signs. No conclusion was definitively reached with respect to the regulation on on-premise signs. Yet, many localities reach to the dicta of this case to justify their sign code’s provisions relating to the regulation of on-premise signs.

A decade later, the Supreme Court struck down a state law the prevented accountants from making personal solicitations to attract new clients. The Court held that personal solicitations were First Amendment protected. The Court shifted the burden of proof to the local government stating: “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” (Id.). This case is important to the evolution of sign law because it represents a departure from the traditional deference protocols. Instead of merely alleging traffic-safety issues,
local governments must provide evidence that their ordinances can alleviate the identified issues (Jourdan et al, 2008).

In 1993, the U.S. Supreme Court invalidated a Cincinnati ordinance that prohibited the adjacent location of newsracks, both commercial and noncommercial, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The Court found that the purpose of the ordinance was not justified because newsracks, regardless of the type of speech, were similar in form (Id. at 425). Improving aesthetics in areas where newsracks were located would best be improved by another set of restrictions involving both form and number (Id.) Importantly, the high court found that a rational basis was no longer a sufficient justification for the regulation of commercial speech (Id. at 417).

The Supreme Court issued its next important decision pertaining to commercial speech in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). In this case, the Supreme Court invalidated a Rhode Island law that prevented the advertisement of alcoholic drinks by distributors, as a result of the public goal of promoting temperance. While rational, the Court held that the regulation went beyond what was necessary to achieve this end. This case sheds light on how the Court views justifications offered for regulations that touch on Constitutionally protected areas. The Court will consider the quality of the evidence upon which the justification is based. Further, the Court will consider if the regulation goes too far in limiting speech rights.

The Court’s most recent decision, with respect to the regulation of signs, was issued in 2001. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the Supreme Court invalidated a State statute that restricted tobacco companies from advertising their products within 1,000 feet of schools and playgrounds. The regulation further required indoor advertising to occur at least five feet off the floor. The Court ruled that the burden on commercial speech was disproportionate to the value to children’s health, reminding governments that such regulations must be narrowly tailored. *Lorillard* is also important for sign law because it markets a “potential shift in the level of scrutiny applied in challenges to on-premise sign ordinances from, intermediate to strict scrutiny, when regulations are content specific” (Jourdan et al, 2008).

In sum, the high court has also recognized the value of commercial speech. While it is not afforded the same degree of protection as political speech, local governments must demonstrate the reasonableness of the regulation and its ability to accomplish the intended end in the least-restricted means. Given the growing body of research on legibility, conspicuity, and the economic value of signs, future courts are likely to render decisions that are sympathetic to the needs of businesses to advertise their goods in the open market, so long as those signs do not interfere with the free flow of passersby. This may necessitate an effort by the planning community to think more holistically about their approaches to regulating on-premise commercial signs.
The Demise of Zoning and the Rise of Form-Based Regulation

For decades, developers, property owners, environmentalists, planners, and others have been frustrated by the inflexibility of modern zoning codes and the type of development it generates. This critique has been made by many, but it gained real traction with the advent of New Urbanism and later, Andres Duany’s Smart Code. The interest in form-based codes has grown beyond Duany's Smart Code to embrace a new way of thinking about the organization of land use activities between the public and private realms.

The primary difference between zoning regulations and those contained in the form-based codes relates to the designation of land use. Zoning codes promote the segregation of development by the use of the land. Early codes were coarse, creating only three primary land-use categories: residential, commercial and industrial. These codes sought to mitigate potential nuisances arising from the co-location of opposing land uses. For example, owners of single-family homes are often negatively affected by the intrusion of a fast-food establishment with a drive-thru in their neighborhood. The zoning code was intended to prevent these land uses from locating next to one another. What ensued in most localities was the development of a very segregated land use that forced people to commute to work, for shopping, and even to take their children to school or soccer practice.

Form-based codes are a reaction to this segregation. This concept for development seeks to allow people to live, work, shop, and play in an area containing a mixture of land uses. Nothing in these codes prevents a fast-food establishment from locating next to a single-family home. Instead, these codes focus on design, rather than land use. The basic idea behind this approach is that nuisances can be mitigated through good architectural design. Instead of zoning districts, form-based codes seek to draw transects based on architectural character. In theory, all land uses are appropriate in each, as long as they are designed to mitigate any negative effects of the use.

Form-based codes are gaining increasing popularity across the United States. In 2004, then Governor Schwarzenegger worked with the legislature to reformulate California’s standard enabling legislation to permit localities to adopt and implement form-based codes (Hall and Crawford, 2004). While the number of form-based regulations is growing, it’s important to note that few localities are fully embracing these tools, due to an overall reluctance to totally abandon the controls on land-use classification offered by zoning codes. Instead, they have adopted hybrid, form-based codes, which allow land-use designations to remain within existing transects. This enables localities to facilitate better urban design, but it allows property owners to continue to insulate themselves and their properties from unwanted land uses.

Form-based regulation has a great deal to offer in the discussion of sign regulations. For decades, land-use attorneys and city planners have sought to regulate the type, size and location of on-premise commercial signs. Sign codes are, and have
always been, more like urban design guidelines, than zoning regulations. These regulations have troubled business owners, among others, because they can be seemingly insensitive to demands for advertising in an auto-dominated landscape.

While sign codes have governed like sign regulations, zoning codes have not. Thus, the development patterns that line arterial roads can be chaotic and disorganized. All too often, businesses are not evenly set back from the street. They are, however, set back a significant distance from the street as a result of rules that mandate parking at the front of businesses. This development pattern resembles the jagged teeth of a Halloween pumpkin. Given this lack of organization, businesses along these streets often feel that they need more and larger signs to attract their potential customer base. It is possible, therefore, that the problem with signs is not a problem with signs at all. Rather, the visual clutter that results from signage in these areas is merely a symptom of a larger problem with urban form. The form-based code offers a foundation for correcting both issues.

An Evaluation of Miami’s Form-Based Sign Code

Miami, Florida is a pioneer in the frontier of form-based regulation. After having conducted more than 400 public meetings, the City adopted its hybrid code in 2011. This code replaced a traditional zoning code adopted in 1991 that was continuously amended until 2011. According to Attorney Nancy Stroud, the new code, referred to as Miami21, embraces many of the traditions of Andres Duany’s Smart Code:

- Transect-based districting allows for graduated increases in density, intensity and height, but generally encourages a mix of uses in all but the least dense transects (existing single-family neighborhoods).
- A regulatory process de-emphasizes legislative discretionary approvals by relying instead on form-based regulatory standards, and increasing the use of administrative processes and standards for granting waivers to those standards.
- Form-based regulatory standards increase attention to the design of buildings and public spaces at the street level, for example, by requiring more lively facades and appropriate sidewalks, parking, open spaces and setbacks.
- Appropriate transitions between single-family residential areas and multi-family or commercial areas, including the use of building stepbacks and setbacks.
- Targeted use of commercial corridors to encourage transit-oriented developments and use of neighborhood centers.
- Emphasis on the downtown as a focus for the region’s economy and culture
- Creation of a transfer of a development-rights system to protect historical districts.
- Extensive use of graphics and charts to create a more readable and understandable code

Until very recently, signage was regulated by the City’s traditional sign code.

In July, 2013, Miami adopted a new form-based sign code. The purpose statement of the regulation embraces many of the concerns of the past, such as “visual
clutter,” “protecting scenic beauty,” and “preserving aesthetic character.” However, the statement begins with a commitment to “optimizing communication and design quality,” which denotes an understanding of the value of signs as speech. Of the 12 items listed in the intent section of the ordinance, more than half acknowledge the value and constitutional protections afforded to commercial speech.

This ordinance crafts a set of sign regulations for each transect by sign type (wall, window, projecting, hanging, awning, monument, and directional) and degree of restriction: restricted, limited and open). The code predetermines an aggregate area maximum for signs based on transect, as depicted in Appendix 1. While the rationality for these maximums is not explained in the code, it is clear that this approach prioritizes legibility, without regard for message. As new development occurs that conforms to the form-based regulations, these sign guidelines will help create a visually attractive landscape that is easily readable to travelers.
Works Cited


## Article 10, Table 15 Sign Design Standards

### T5 - Urban Center T6 - Urban Core Zone

#### Single Establishment Without a Building

<table>
<thead>
<tr>
<th>Approvals/Signs</th>
<th>Monument</th>
<th>Retail/Board</th>
<th>Directional</th>
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<tbody>
<tr>
<td>6 in. H. max.</td>
<td>6 in. H. max.</td>
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#### Building with More Than One Establishment Lining the Street

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<th>Retail/Board</th>
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<tr>
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#### Illumination Design

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<th>Directional</th>
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<td>Rear Light</td>
<td>150 watts max.</td>
<td>150 watts max.</td>
<td>150 watts max.</td>
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### Address

- Use M-size, maximum 7 signs
- 4 in. H. max. on all signs

### Other Notes

- Must be in accordance with City, State, and federal laws.
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