

Local Regulation of Billboards: Settled and Unsettled Legal Issues

Frayda S. Bluestein

Local ordinances regulating billboards, like other local land use regulations, must strike a balance between achieving a regulatory purpose and minimizing interference with private property rights. Since billboards contain constitutionally protected speech, both commercial and noncommercial, an additional layer of legal principles must be taken into account in developing billboard regulations. In addition, evaluating the impact of regulations on property rights has become complicated and unsettled due to several recent federal court decisions dealing with claims that local regulations containing amortization or removal provisions for nonconforming signs effect an unconstitutional taking of property without compensation. As in any other area of regulation, settled law gives clear guidance to the ordinance drafter; unsettled law makes for difficult drafting and policy decisions. The purpose of this article is to summarize some of the legal issues that have been raised in federal and North Carolina state court cases involving challenges to billboard regulations, to identify some of the issues that appear to be settled, and to discuss some that are not.

Statutory Authority and Public Purpose

A local regulation, to be valid, must serve a public purpose and must be within the scope of a state statute granting the local government the power to regulate the subject matter. The public purposes local governments have cited in support of billboard regulations have evolved along with the billboard structure itself and changing social values. Early sign ordinances were designed to protect against safety and fire hazards posed by wooden signs placed low to the ground. As signs have become larger, higher and more numerous along

roadways, the basis for regulating them has changed. The primary purposes identified in support of modern billboard regulations are traffic safety and aesthetics. Related regulatory goals include economic development, promotion of tourism, historic preservation, and protection of the public investment in the highways. Any of these purposes is likely to be upheld as a legitimate public purpose for billboard regulations, as long as they are articulated and rationally related to the means used to regulate (as contained in the ordinance).

When local ordinances are challenged, the courts are careful not to second guess the legislative decisions and policy choices made by the local government, instead deferring to the judgment of the legislative body. Accordingly, early decisions dealing with billboard regulations summarily approved the health and safety justifications for regulating signs.¹ Later, when reviewing regulations based on aesthetics, the courts were initially hesitant to find that aesthetics alone was a sufficient public purpose to justify billboard regulation. Most billboard ordinances are based on aesthetics along with other purposes, usually traffic safety, so courts could uphold the ordinance without having to directly address the strength of the aesthetics basis.

In 1981, perhaps reflecting a change in social values and the growing environmental movement, the United States Supreme Court handed down the landmark billboard case of *Metromedia v. City of San Diego*, upholding, for the most part, a comprehensive local billboard ordinance.² The *Metromedia* decision held, among other things, that the city's interest in avoiding visual clutter was a legitimate public purpose for billboard regulation. Both federal and state courts in North Carolina have also now expressly sanctioned billboard regulation for aesthetic purposes, along with other types of aesthetics-based regulation, such as those for junkyards and for historic preservation.³ Although the type and extent of regu-

Frayda S. Bluestein is an attorney who has practiced primarily in the fields of local government and land use law.

lation that may be justified by aesthetic concerns remain uncertain, it is now well settled that aesthetics is a legitimate public purpose upon which regulation may be based.

Since local governments derive all regulatory authority, by way of delegation, from the state legislature, billboard regulation must be within the scope of a state statute authorizing such regulation. Most sign regulations are contained in zoning ordinances and have uniformly been considered to fall within the scope of the zoning enabling legislation. A recent North Carolina case addressed the question of whether billboard regulations adopted outside of a zoning ordinance are statutorily authorized.

Henderson County, like most North Carolina counties, does not have zoning throughout the county. Nonetheless, the county sought to regulate billboards county-wide by adopting a billboard ordinance under its general ordinance-making authority rather than its zoning authority.⁴ A billboard company challenged the ordinance on the grounds, among others, that the zoning authority, which requires consistency with a comprehensive plan, public hearing, notice and other procedural protections, is the only authority pursuant to which local billboard regulations may be adopted. The court rejected this argument and ruled that the general ordinance-making statute authorizes billboard regulation.⁵ It is important to note that in the Henderson County case, public hearing and notice were provided, even though they were not required as would have been the case had the regulation been a zoning ordinance. Thus there was no evidence that the general ordinance-making authority was used to avoid the procedural protections built into the zoning enabling statute. If the general ordinance-making authority were used under circumstances where zoning was in place and could have been used, a question could be raised about whether the intent was to avoid the procedural requirements of zoning, and a court might reach a different decision. Furthermore, if a billboard ordinance were structured according to districts or otherwise established distinctions justifiable only by reference to a comprehensive plan, use of the general, rather than the zoning, authority could expose the ordinance to a constitutional equal protection or due process challenge. Bearing in mind these precautions, billboard regulations can be validly enacted pursuant to the general ordinance-making, as well as the zoning, authority.

The Outdoor Advertising Control Act

Another state statute indirectly affects local regulation of billboards: North Carolina's Outdoor Advertising Control Act. This act prohibits the erection of billboards within 660 feet of, or that would be visible from, federal aid primary highways.⁶ Signs located in commercial or industrial zones and areas are allowed within 660 feet of the highway under the statute. Local governments are not prohibited from regulating in areas outside of the coverage of the act, or through means that are more strict than those contained in

the act.⁷ With respect to removal or amortization of nonconforming billboards, discussed in more detail below, local government authority is explicitly limited by N.C.G.S. §136-131.1, a part of the state Outdoor Advertising Control Act. That section requires payment of compensation for removal of any sign that is allowed under the act and for which a valid permit has been obtained. To avoid potential conflicts with the state law, some local ordinances exempt signs located on federal aid primary highways from amortization and other provisions.

The state Outdoor Advertising Control Act, along with the various enabling statutes governing local regulatory authority, are, of course, subject to change, and should be reviewed before drafting or adopting local billboard regulations.

Constitutional Issues: Free Speech

Unlike other land use regulations, sign regulations affect communication that is protected by both the state and federal constitutions. Regulations affecting speech fall into two major categories for purposes of judicial review: content-neutral and content-based. The standards of judicial review are more stringent if a regulation is content-based, that is, if the regulation targets a particular message. On the other hand, regulations that restrict the time, place and manner of speech on a content-neutral basis, that is, without reference to the particular message, are less strictly reviewed by the courts and are likely to be upheld as long as they have a rational basis. In addition, although the Constitution protects both commercial speech (advertising) and noncommercial speech, commercial speech receives less protection than noncommercial speech. This means that the courts scrutinize more closely regulations that affect noncommercial speech and will require a stronger justification for restrictions on noncommercial than for commercial speech.

Most billboard ordinances are content-neutral time, place, and manner regulations, designed to regulate the impact of the structure, not the content of the message it displays. The courts have determined that regulations based on distinctions between commercial and noncommercial signs are content-neutral. Similarly, regulations that distinguish between on-premise and off-premise⁸ signs are considered content-neutral. In contrast, in the *Metromedia* case, discussed above, the United States Supreme Court made it clear that narrower categories of signs are considered content-based and, in that case, did not withstand the stricter level of scrutiny. The San Diego ordinance exempted, among other categories, government signs, religious symbols, time or temperature signs, commemorative plaques, and temporary political signs. The Court held that, "Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative

interests."⁹ Thus, courts may give more leeway for distinctions among types of commercial speech, since it is afforded less protection under the constitution, as long as the distinctions have a rational basis. But distinctions among types of noncommercial speech are likely to be invalidated unless supported by a very strong governmental justification.

Another extremely important rule emanating from the *Metromedia* decision relates to the comparative effect of a billboard regulation on commercial signs and noncommercial signs. The ordinance that was the subject of the *Metromedia* decision prohibited all off-premise commercial signs, but allowed on-premise commercial signs. Certain narrow categories of noncommercial signs were exempt from the ordinance, as discussed above. In general, however, the effect of the ordinance was to favor commercial over noncommercial expression because on-premise commercial signs were allowed but an on-premise sign containing a nonexempt, noncommercial message would be prohibited. The court held that this reversed the priority of protection mandated by the constitution which has been held to afford the greatest protection to noncommercial (usually political or religious) expression, and only a lesser degree to commercial expression. To avoid this unconstitutional reversal of priorities an ordinance can allow noncommercial speech in any forum and under at least equal conditions as commercial speech. An ordinance does not violate the constitutionally mandated hierarchy if it contains a statement that the ordinance does not apply to noncommercial signs, or that any sign allowed under the ordinance may display noncommercial in lieu of commercial messages.

Constitutional Issues: Takings

The major unsettled area of law relating to billboard regulations arises out of the constitutional requirement that property may not be taken for governmental purposes without just compensation. Regulations that substantially interfere with private property rights have been held to effect a regulatory taking, that is, a taking without the formal exercise of the condemnation power, and are unconstitutional if compensation is not paid to the affected property owner. Takings claims increasingly have become a basis for challenging local land use regulations that fail to strike the balance, discussed above, between regulatory goals and individual property rights. A takings claim is very difficult to establish because it requires a showing that all or nearly all use of the property is restricted by the challenged regulation. No reported North Carolina case has ever held (and withstood appeal) that a local regulation effected a taking. Several recent federal court cases arising out of North Carolina have refused to dismiss takings claims asserted against local billboard ordinances, and the outcome of those cases, which are still pending, is uncertain. The takings analysis applied in those cases is important to review and follow as much as possible in developing future billboard and other local regulations.

The courts have developed a descriptive test for determining when a law effects a regulatory taking. In North Carolina, the "law of the land" clause contained in Article I, Section 19 of the state constitution (the state equivalent of the federal takings clause) has been interpreted by the courts to require that a regulation must be reasonably related to a legitimate

public purpose and may not completely deprive property owners of the beneficial use of their property. Stated another way, a regulation effects a taking if it deprives the owner of all practical use of property and the property is rendered of no reasonable value. The United States Supreme Court has articulated the standard for purposes of federal constitutional takings analysis by stating that an ordinance effects a taking if it does not substantially advance a legitimate public purpose or if it denies an owner economically viable use of his land. The federal and state standards are viewed to be substantially the same.



Sign regulations often do not distinguish between on-premise and off-premise signs. An on-premise sign (shown at left) advertises a business or activity located on the same lot or parcel as the sign.

The first element of the takings standard is essentially an ends-means analysis. The issue is whether the means chosen are reasonably necessary to accomplish the stated purpose of the regulation. The second part of the test focuses on the interference with property rights, in determining whether that interference is reasonable in degree. Obviously, these judicial tests are not susceptible to formulaic application, but must be applied and evaluated on a case-by-case basis. Although the tests, as applied in previous cases, give some guidance, it is often difficult to know when an ordinance will be ruled to have gone too far in interfering with property rights so as to effect an unconstitutional taking.

In 1987, the United States Supreme Court handed down several important takings cases.¹⁰ The case most relevant to billboard regulations is *Keystone Bituminous Coal Association v. DeBenedictus*.¹¹ In that case the Court revisited the state of Pennsylvania's efforts to restrict the amount of coal removed from heavily mined areas in order to prevent subsidence of the surface land estate. A 1922 Supreme Court decision striking down a similar law was the first case to establish the regulatory taking doctrine.¹² The *Keystone* court upheld the modern law, which had undoubtedly been carefully researched, supported and drafted to avoid the pitfalls that led to the invalidation of the earlier law. The *Keystone* opinion reemphasizes two significant elements of takings law. The first element is that the takings analysis is a balancing test. Thus a strong public purpose may justify a more intrusive regulation than will a less compelling purpose. The second element is that to satisfy the second prong of the takings test, a property owner must demonstrate that the challenged regulation causes a deprivation of aggregate property rights, not just a decrease in profits that may be gained from use of the property, and not just the complete elimination of isolated segments of property.

Neither *Keystone* nor the other recent takings cases decided by the Supreme Court changed the substance of the takings analysis. Nonetheless, they seem to have inspired a move toward a more thorough evaluation of takings claims. This shift in judicial attitude can be seen in the billboard cases now pending in the North Carolina federal district courts.

In 1986, the Fourth Circuit Court of Appeals upheld a Raleigh sign ordinance against, among others, a takings challenge. The ordinance limited the size and location of billboards and required that billboards not brought into conformity with the ordinance within five and one-half years must be removed. On a summary judgment motion, a motion filed before trial, the court held that there was no evidence in the record demonstrating that the ordinance deprived the plaintiff billboard company of all use of its property. The five and one-half year period, called an *amortization* provision, was held to be a reasonable means of allowing the property owner to recover some of the investment in the signs prior to removal.¹³ Amortization provisions are used in other land



Unlike other land use regulations, sign regulations affect communication that is protected by the state and federal constitutions. In reviewing sign ordinances, courts look at the effect of the ordinance on non-commercial (sign at top) as well as commercial speech (sign at bottom).

use regulations and have been sanctioned by the courts as a way of decreasing the impact of regulations on affected property owners, and as a way of achieving the necessary balance more equitably than if the regulation were to take immediate effect.¹⁴

The cities of Durham and Waynesville adopted ordinances banning all off-premise signs and providing five and one-half year and four-year amortization periods, respectively. Both ordinances have been challenged, and both cases have been appealed to the Fourth Circuit Court of Appeals and have been remanded to the lower court for additional evidentiary proceedings. In the Durham case, the lower court, like the court in the Raleigh case, had decided in favor of the city on a summary judgment motion. The Waynesville ordinance was held to be invalid on a summary judgment motion. Both cases were remanded by the appellate court with specific instructions to determine, by thorough evaluation of the evidence, the impact of the respective ordinances on the claimants' property.¹⁵

Although the standard for what constitutes a taking has not changed since the decision in the Raleigh case and the decisions in the Durham and Waynesville cases, it appears that the court's approach to these cases has changed somewhat, perhaps shifting a burden to the local government to show that an ordinance is reasonable, rather than relying solely on the ability or failure of the claimant to come forward with evidence of a taking. The Durham court of appeals decision states that, "Recent cases decided by the Supreme Court raise questions about the propriety of summary judgment of takings claims without a fully developed factual record."¹⁶ In other words, the court cannot decide if an ordinance goes too far without detailed evidence as to how far the ordinance goes.

The Court of Appeals has given specific instructions to the lower courts in the Durham and Waynesville cases on the facts to be reviewed in determining the impact of the challenged ordinances on the claimants' property. The laundry list reads as follows:

The court should make findings pertaining to every aspect of [the claimant's] business that will be affected by the ordinance, including the number of billboards that can be economically used for noncommercial advertising, the number that are economically useless, the terms of [the claimant's] leases for billboard locations, the land [the claimant] owns for locations and whether it has any other economic use, the cost of billboards that cannot be used, the depreciation taken on these billboards and their actual life expectancy, the income expected during the grace period, the salvage value of billboards that cannot be used, the loss of sharing revenue, the percentage of affected signs compared to the remaining signs in [the claimant's] business unit, the relative value of affected and remaining signs, whether the amortization period is reasonable, and any other evidence presented by the parties that the court deems relevant.¹⁷

Motions on various legal issues are currently pending in both of these cases.

Perhaps the most unsettled and difficult issue raised in the Durham case is one that must be resolved before any of the factual inquiries listed above can take place. The court must first identify the appropriate unit of property to which the takings analysis is to be applied. The plaintiff billboard company argued that the appropriate unit of property is each individual billboard that must be removed under the ordinance. The court rejected this argument, stating that, as with the pillars of coal in the *Keystone* case, property rights are not viewed in segments for purposes of takings analysis. Instead, the court appears to suggest that the claimant's business or aggregate sign holdings in the area covered by the ordinance is the appropriate focus of the inquiry. Thus the parties may also have to present evidence relating to the particular corporate structure and marketing practices of the claimant in order to characterize a property interest that is entitled to constitutional protection.

Although the outcome of these and other pending billboard cases cannot be predicted, the factual disputes and legal issues being argued in these cases should be closely monitored by planners, drafters, and policy-makers considering billboard regulations. Settled issues and ordinances upheld in earlier cases can be used as guideposts in identifying provisions and regulatory schemes that are likely to be upheld if challenged. In each case, however, ordinance provisions and stated purposes must be tailored to the conditions existing in the regulating community. Despite numerous unsettled issues in applying the takings analysis, the clear message of the recent billboard cases is that takings analysis requires a detailed factual inquiry. Local governments are well advised to perform as much of this inquiry as possible and evaluate the potential impact of the ordinance within the community during the period before adoption of billboard regulations, rather than to risk having to develop the record for purposes of litigation. □

Notes

1. See, *Schloss v. Jamison*, 262 N.C. 108, 136 S.E.2d 691 (1964).
2. 453 U.S. 490 (1981).
3. See, *Georgia Outdoor Advertising, Inc. v. Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987); *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982) (junkyards); *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979) (historic preservation).
4. N.C.G.S. §153A-121.
5. *Summey v. Henderson County*, 96 N.C. App. 533, 386 S.E.2d 439 (1989), cert. denied, 326 N.C. 486, 392 S.E.2d 101 (1990).
6. N.C.G.S. §136-126 et seq.
7. For an in-depth discussion of the federal and state sign control programs, see R. Ducker, "Federal and State Programs to Control Signs and Outdoor Advertising," in *Popular Government*, Spring 1987, pp. 28-42.
8. An off-premise sign is one that does not advertise a business or activity located on the same lot or parcel as the sign.
9. 453 U.S. at 514.
10. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (held that the violation of the takings clause requires compensation, invalidation of the ordinance effecting the taking is insufficient); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (condition on permit requiring dedication of easement for public access constituted unconstitutional exaction); *Hodel v. Irving*, 481 U.S. 704 (1987) (statute escheating fractional interest in Indian allotments constituted unconstitutional taking of interests without compensation).
11. 480 U.S. 470 (1987).
12. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
13. *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987).
14. See, *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, appeal dismissed, 42 U.S. 1002, 95 S.Ct. 2618, 45 L.Ed.2d 666 (1975) (three-year amortization period for removal of junkyard); *Cumberland County v. Eastern Federal Corp.*, supra, (three-year amortization period for billboard removal); *R.O. Givens Company, Inc. v. Town of Nags Head*, 58 N.C. App. 697, 294 S.E.2d 388, cert. denied, 307 N.C. 127, 297 S.E.2d 400 (1982) (five and one-half year amortization for billboard removal).
15. *Naegele v. City of Durham*, 844 F.2d 172 (1988); *Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783 (1990).
16. 844 F.2d at 175.
17. 844 F.2d at 178.