



RISK MANAGEMENT INFORMATION
SIGN ORDINANCES AND THE FIRST AMENDMENT

This memorandum discusses some of the basics of designing a sign ordinance that meets the requirements of the First Amendment.

General First Amendment Principles

The First Amendment protects signs as speech, and courts will look very closely at any attempts to regulate signs.

There are a few rules for regulating signs:

1. Do not regulate based on content.
2. Do not favor commercial speech (advertising) over noncommercial speech.
3. Restrictions on signs must accomplish a substantial government interest and be no broader than necessary. The main substantial governmental interests recognized by courts are traffic safety and aesthetics.

With this background in mind, there are several steps cities can take when drafting ordinances.

Provisions All Sign Ordinances Should Have

Every sign ordinance should probably contain the following provisions:

Statement of Purpose

Tells why the ordinance was drafted and how it should be applied. Should state clearly that it is not intended to have content-based restrictions and should not be applied that way. Provides a quick clear statement of government purposes and how the ordinance fulfills those purposes rather than needing to review your legislative record if challenged.

Sample Ordinance

View a sample sign ordinance from the city of Hopkins in the Land Use area of the League website at www.lmc.org.

Substitution Clause

Provides that for every sign that is allowed, any non-commercial message could be legally substituted. Ensures that non-commercial speech is never discriminated against based on content because it will always allow a noncommercial message on any sign. Many ordinances inadvertently define signs in terms of advertising and may incidentally seem to allow only commercial messages. A substitution clause may correct these mistakes by providing a catch-all allowance of noncommercial messages notwithstanding other provisions.

This material is provided as general information and is not a substitute for legal advice.
Consult your attorney for advice concerning specific situations.

Severability Clause

Provides that if any provision of the ordinance is found to be invalid, the remainder of the ordinance stands on its own and is still valid. May prevent a flaw in part of the ordinance from invalidating all of it.

Acknowledgement of election season pre-emption

Minnesota Statute 211B.045 requires municipalities to allow noncommercial signs of any size during election season, from August 1 until ten days after the election.

Do not misinterpret this language. It gives extra protection to noncommercial speech during election season. It does not limit political signs to only that time.

Content Neutral regulations based on time, place, and manner

Regulations should be objectively based on time, place, and manner, not content. Examples include regulations based on size, brightness, zoning district, spacing, and movement.

Provisions All Sign Ordinances Should Avoid

Unfettered discretion

Avoid discretionary approval by the city. Having discretion creates the potential for favoring some messages or messengers over others, whether or not that discretion is actually abused. Permit requirements should be transparent and objective.

Exemptions or favoritism

Avoid exempting certain groups or messages, such as church signs or official flags, from permit requirements. This could be content-based discrimination.

Exemptions also may “water down” the substantial government interest. For example, if an ordinance prohibits temporary signs but allows a long list of exemptions, it suggests the city is not really concerned about temporary signs.

This is different from providing exemptions based on valid time, place, or manner restrictions, such as exempting all signs under a certain size from permitting requirements.

Inadvertently treating non-commercial speech differently by defining “sign” as “advertising”

Beware of over-defining terms. This occasional problem is the combination of a few steps:

1. Signs are defined as advertising devices.
2. The ordinance allows signs as defined.
3. All other signs are prohibited.

This arguably prohibits noncommercial speech, which is unconstitutional.

Common Questions and Issues

Off-premise advertising (Billboards)

Off-premise advertising consists of commercial signs that do not advertise for a business on the same premises as the sign. It is legal to forbid off-premise advertising, so long as the prohibition does not extend to noncommercial messages.

Flags

Be cautious of regulations that might favor some types of flags, particularly the United States Flag, over other flags. This is a good place for the substitution clause; if one type of noncommercial flag would be acceptable, any noncommercial flag should be allowed.

Yard Signs

Some courts have held that yard signs are constitutionally protected and cannot be prohibited. Be especially cautious about provisions that favor some messages over others, such as exemptions for real estate or construction project signs.

Electronic Signs

Electronic signs present new challenges, as the technology is capable of new levels of brightness, movement, flashing, and potential distraction. Most sign ordinances do not adequately address these issues. The League has commissioned a study on the traffic safety implications of the technology. Cities may wish to consider moratoriums while the study is conducted and then drafting ordinances that apply the information to each community. A moratorium may prevent electronic signs from becoming grandfathered.

More Information

Learn more about dynamic signage in:

- *Regulating Dynamic Signage*

It's available at www.lmc.org.

Summary

Keep in mind these basic rules of thumb:

1. Do not regulate content.
2. Do not favor commercial speech over noncommercial speech.
3. Provide and follow clear procedures.
4. Explain your rationale and purpose.
5. Avoid exceptions.

There are exceptions to these rules, but they should be approached cautiously and with legal advice.

For assistance or sample ordinances, contact one of the LMCIT land use attorneys: Paul Merwin at 651-281-1278; or Jed Burkett at 651-281-1247.