The Science of SIGNAGE

The History of Land Use Planning in a Nutshell

In the statutory sense, land use planning is a relative newcomer in human history. When people first started gathering in towns and villages, they seemed naturally to follow a plan that centralized retail and service activities along one or two "main" streets, with secondary streets reserved for family dwellings, although many merchants and professionals lived above or in the rear of their business premises (a land use planning model that is remarkably similar to the modern "mixed use development"). As towns grew and the population "urbanized," the impetus for planning neighborhoods and districts gained strength. One of the first major "land use plans" occurred in the mid-Nineteenth Century, when New York formalized the grid system, which clustered business districts in sections bounded by parallel and cross streets, surrounded by an outer girdle of mostly residential uses. However, it was not until the 1920s that division and segregation of land uses into discrete zones or districts received the legal stamp of approval.

The seminal case was *Village of Euclid v. Ambler Realty Co.*,[1] in which the U.S. Supreme Court upheld a zoning code as a legitimate exercise of municipal police powers to promote community health, safety, moral and general welfare. The code was upheld, despite the fact that neither side was required to produce factual evidence to support its position, and even though, the value of the subject property was significantly diminished as a result. As part of its opinion in this landmark decision, the Court found that apartment houses could be excluded from single-family residential districts because of the negative effects of such buildings on the availability of sunlight and open space. Thus was born a land use zoning theory based on unproven nuisance or quasi-nuisance theory. Segregational land use controls were allowed to replace natural mixed-use development patterns.

Emboldened by the *Ambler Realty* decision, land-use planners, who had heretofore exercised influence over the course of urban development in somewhat limited circumstances (the cities of Chicago and New York, as well as approximately ten states) began to enjoy greater powers on a national scale. These powers were further strengthened by the *Standard City Planning and Zoning Enabling Acts* ("Standard Acts") drafted by the U.S. Department of Commerce in the late 1920s. The Standard Acts provided the mechanisms for states to "enable" their local governments to enact zoning and land use regulations through exercise of delegated police powers. Following the federal lead, most states and local governments couched the language of enabling statutes in terms of "protecting the public health, safety, and welfare" (and sometimes, "morals").

The primary purposes of the Standard Acts were grounded in then-Secretary of Commerce Herbert Hoover's interest in assuring that the value of private investment, particularly in one's home, be protected from incursions of incompatible uses, and that cities be planned so there was an adequate public infrastructure to support a rapidly expanding urban population.

Interestingly, the Standard Acts and their immediate progeny did not envision a permanent zoning or planning commission.

1. 272 U.S. 365 (1926).

Instead, such commissions were to be temporary bodies that would be terminated once zoning regulations were adopted. However, a "Board of Adjustment" (BOA) was to serve as a permanent body, possessing quasi-judicial power to authorize hardship variances and special exemptions or conditional uses.

The necessity of variance or exception for circumstances that would result in harsh treatment or undue interference with time-honored property rights was confirmed in *Nectow v. City of Cambridge*.[2] Subsequently in 1935, as a counterbalance to perhaps overzealous granting of variances or exceptions by a BOA, the Harvard University Press published *Model Laws for Planning Cities, Counties and States, Including Zoning, Subdivision Regulation, and Protection of Official Map*. The authors recommended review standards that would not only guide BOA decision making, but also provide for appeal to the courts by a local government or state legislature in the event a BOA overstepped its authority and, through use of variances, effectively rezoned property unilaterally.

Signs have been part of the visual environment since ancient times.

In the decades following 1935, the pendulum has swung between a liberal grant of discretionary power to a BOA (or Board of Appeals) and one that is very restricted. Presently, a nation-wide consensus has not been reached, but as land use planning becomes increasingly intrusive and controlling, the courts are increasingly scrutinizing oppressive land use controls, and providing relief to beleaguered property owners, on appeal. One area of control under intensified review of zoning ordinances is that of signage regulation.

Signage Regulation

The English word "sign" is derived from the Old French word *signe*, in turn derived from the Latin, *signum*. According to Webster, the word has many meanings as a noun: a symbol representing an idea, as a word, letter, or mark; a motion or gesture conveying an idea, wish, etc; a publicly displayed notice on a permanent or temporary structure to advertise or otherwise inform of services, products or activities available or being conducted; something tangible or intangible indicating the existence or presence of a thing; an omen; a trace or vestige. A general description states that the word means a sensible indication of something that would not otherwise be apparent to the senses. In terms of the physical structure we think of as a "sign," it is understood as a device by which we determine the existence of a product, service, activity, or opinion of which, but for the sign, we would be unaware.

Until the 1920s, it was not uncommon for a shop owner to live upstairs. This is very similar to today's "mixed use development" model.

Retail uses have traditionally been clustered along one or two "main" streets.

Signs have been with us throughout our recorded history, and probably earlier. For millennia, signs were accepted as a part of the landscape and every day life. In the case of informational and directional signage, including business-related signage, the communication displayed was often considered indispensable to making knowledgeable choices or finding one's way, especially for area newcomers, short-term visitors, and non-local passersby. The best technology of the day was rapidly incorporated into signage in order to create displays that delighted the eye and allowed the business to stand out among its competitors.

However, with the exception of patently unsafe structures, right-of-way obstruction, or display of obscene or other "unlawful" message that might, for example, incite to riot, it was not until the latter half of the Twentieth Century that much attention was paid to signs in the sense of a formalized regulatory scheme controlling such things as size, height, placement, illumination, or content. Similarly, the courts did not much intrude, believing business advertising to be more an occupation or activity than a medium of speech.

Evolution of First Amendment Protection, as Applied to Commercial Signage

In 1942, the traditional "hands off" demeanor of the courts regarding commercial speech underwent a mutation when the U.S. Supreme Court decided *Valentine v. Chrestensen*.[3] The case arose as a Fourteenth Amendment "due process/equal treatment" challenge to a provision in New York City's sanitary code that prohibited the distribution of handbills containing advertising, while permitting circulation of handbills containing political messages. In finding for the City, the Court did not address commercial speech, per se, or the First Amendment, but only the issue of whether commercial advertising could be regulated by legislatures. However, the Court's holding that certain commercial communications (in the form of handbills that might "litter the streets") could be proscribed without offending the Constitution originated the distinction between commercial

2. 277 U.S. 183 (1928).
3. 316 U.S. 52.

and noncommercial speech, and, unfortunately, lent a certain air of "legitimacy" to differing treatment of the two.

The perception that commercial speech was a Constitutional orphan generally held sway for 34 years, until it was revisited, and corrected, in *Virginia State Board of Pharmacy v. Virginia Citizen Consumer Council, Inc.*[4] Here a state regulation prohibited pharmacists from advertising the prices of drugs. A consumer organization challenged the ordinance on the ground that it denied them beneficial (or useful) information and thereby violated the First Amendment. The core question was whether an advertisement, unaccompanied by any political expression, receives First Amendment protection. The Court responded that it does. Justice Harry Blackmun, writing for the majority, noted: "The

A purely economic intent does not disqualify speech from protection under the First Amendment.

fact that the advertiser's interest in a commercial communication is purely economic does not disqualify him from protection under the First and Fourteenth Amendments."[5]

In *Virginia State Board*, the test for determining whether the challenged ordinance is constitutional was first articulated, to wit:

Time, place and manner restrictions on commercial speech are permissible only if the restrictions:

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

In the context of the test, "time" refers to when a message may be displayed, "place" refers to where the message may be displayed, and "manner" refers to how the message may be displayed. The phrase "without reference to the content of the speech" means that the government cannot put time/place/manner limits on the message based upon what the message says or who is saying it (under the Fourteenth Amendment protections), unless the message concerns "unlawful activity" or is "misleading."

The next important commercial speech case was *Central Hudson Gas & Elec. Corp v. Public Service Comm.*,[6] in which a challenge was mounted against a New York state law that totally prohibited public-utility advertising. The state argued that the ban was necessary to prevent advertising that would increase consumer demand, in direct contravention

Chicago was one of the earliest American cities to impose land use planning.

4. 425 U.S. 748, 761-773 (1976).
5. *Id.* at 762.
6. 447 U.S. 557 (1980).
7. 517 U.S. 484 (1996).

of the state's "significant" interest in energy conservation. In analyzing the case, the Court strengthened the *Virginia State Board* test by requiring that the regulation directly advance the government interest, and be no more extensive that necessary to serve that interest. Finding that the state could advance its interest by requiring the utility to include in its advertising information regarding energy conservation, the Court overturned the ordinance as overbroad.

Since *Central Hudson*, the test for ordinances that for the most part do not regulate commercial speech based upon its content or copy, or the identity of the messenger, has been further strengthened, and today, if the ordinance is to withstand a constitutional challenge, the government must show all of the following:

(1) a substantial government interest that justifies the regulation;
(2) the regulation directly advances that interest;
(3) the regulation is narrowly tailored to achieve that interest; and
(4) the regulation leaves open ample alternative avenues of communication for those it affects.

The above test is administered by the courts under what is called "intermediate scrutiny." If the challenged regulation is based on the actual content (copy or graphics, or both) displayed on a sign, or seeks to limit or restrict signage expression to a limited class of speakers, the scrutiny intensifies. The first major case to establish a more intensive application of *Central Hudson* was *44 Liquormart v. Rhode Island*.[7]

In this case, a licensed Rhode Island liquor retailer sought a declaratory judgment that the state's laws banning the advertisement of retail liquor prices except at the place of sale violated the First Amendment. In an

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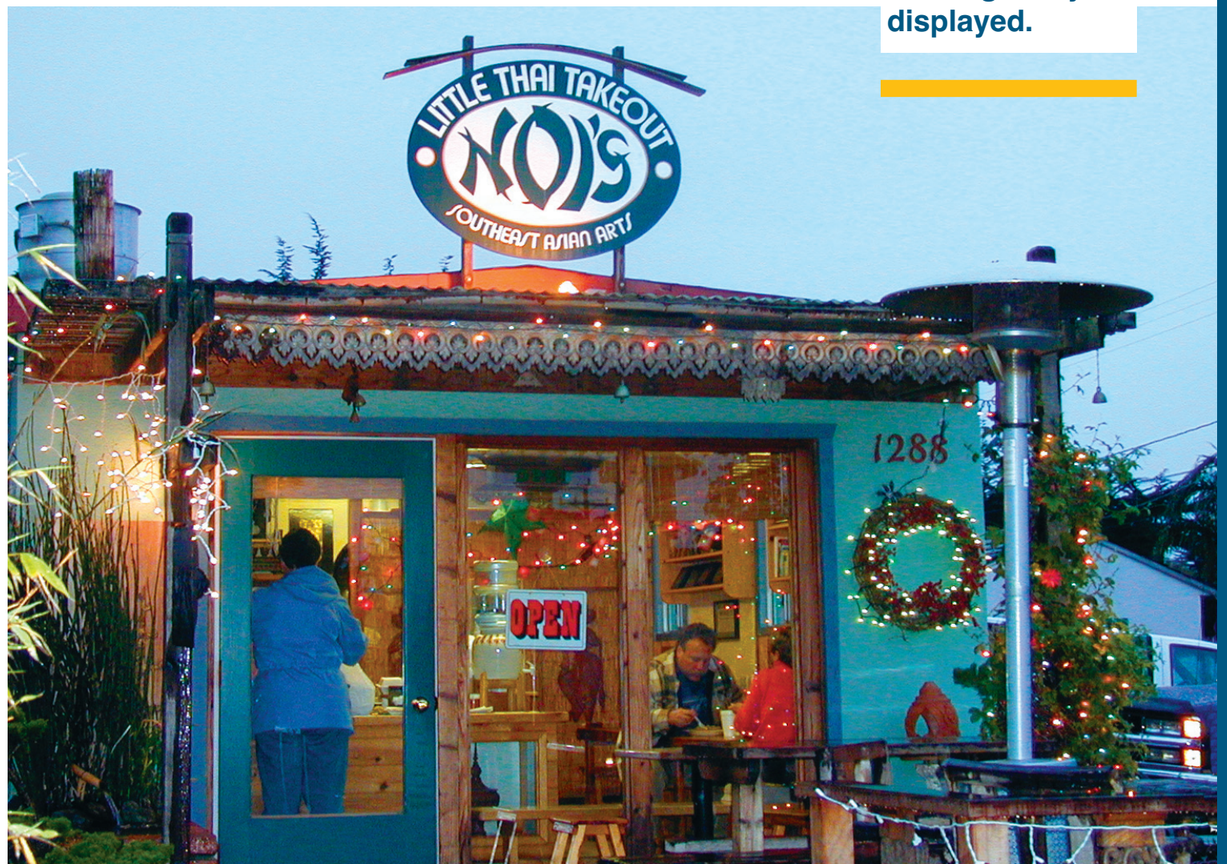
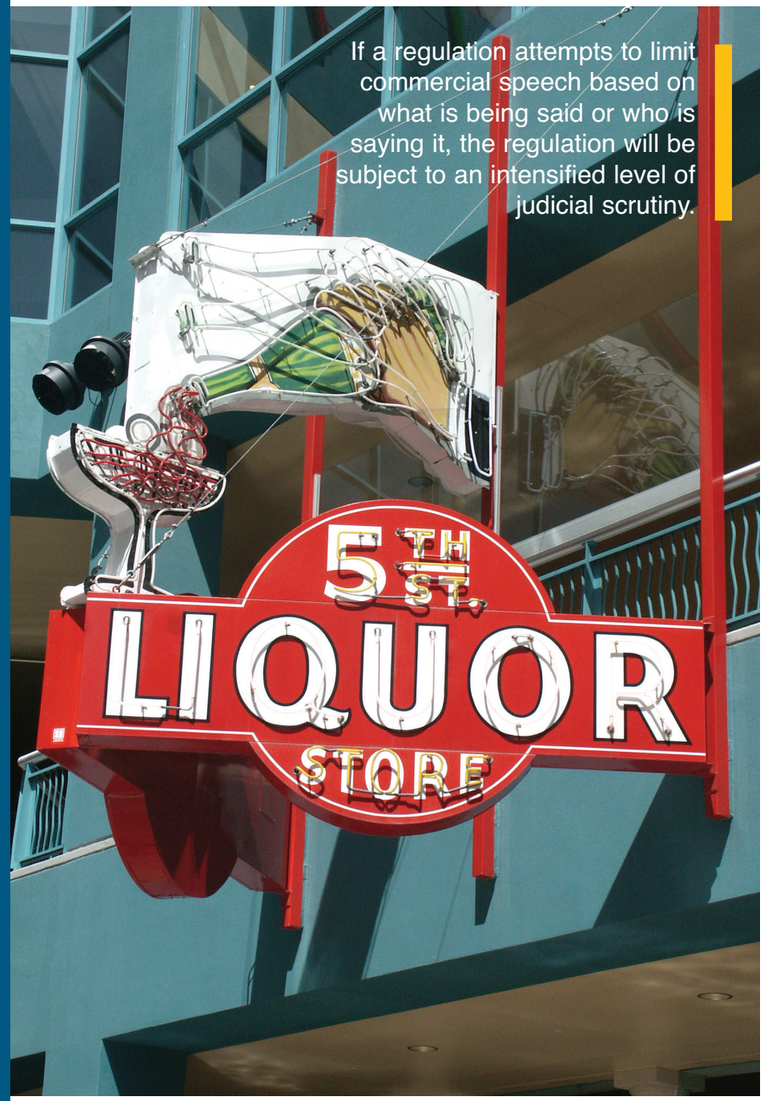


eight-part plurality opinion, the Court held, among other things:

1. Complete speech bans, unlike content-neutral restrictions on time, place, or manner of expression, foreclose alternative means of disseminating certain information and, thus, are particularly dangerous, warranting more careful constitutional review;
2. Complete bans against truthful, nonmisleading commercial messages rarely protect consumers from "commercial harms," but rather often serve only to obscure underlying governmental policy that could be implemented without regulating speech, and thus not only hinder consumer choice, but also impede debate over central issues of public policy;
3. Commercial speech regulation may not be sustained if it provides only ineffective or remote support for government's purpose, and the state bears the burden of showing not merely that regulation will advance the state's interest, but also that it will do so to a material degree;
4. The state does not have broad discretion to suppress truthful, nonmisleading commercial information for paternalistic purposes in lieu of less speech-restrictive alternatives;
5. The fact that the state's statutory ban on advertising of retail prices of alcoholic beverages pertained to "vice" activity does not except the ban from First Amendment protections for commercial speech;
6. The fact that the state chose to license its liquor retailers does not authorize the state to condition conferral of that benefit upon surrender of the constitutional right to freedom of speech; and
7. The First Amendment presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.



If a regulation attempts to limit commercial speech based on what is being said or who is saying it, the regulation will be subject to an intensified level of judicial scrutiny.

In this case and two others, the U.S. Supreme Court has strongly indicated its willingness to apply the *Central Hudson* test with "extra bite" when judging the validity of content-based bans on commercial speech.[8] What this means is that although the Court has yet to define its scrutiny of content-based sign regulations as "strict," requiring the government to show a compelling state interest that is advanced by the least restrictive means, it has come very close.[9]

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8. Greater New Orleans Broadcasting Assoc., Inc. v. United States, 527 U.S. 173 (1999); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
9. In fact, in 44 Liquormart, Justices Stevens, Ginsburg, and Breyer would have applied strict scrutiny to content-based restriction of truthful, nonmisleading commercial speech. Justice Thomas would have gone even further by applying "fatal" scrutiny, *i.e.*, finding such content-based distinctions illegitimate per se.